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The Encyclopedic Digest of Virginia and West Vir- ginia Reports Cumulative Supplement

BEING A COMPLETE

Encyclopedia and Digest of all the Virginia and West Virginia Case Law from Volume 104 to Volume 129 Virginia Reports, both inclusive, and from Volume 56 to Volume 87 West Virginia Reports, both inclusive.

UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

ASSISTED BY

BEIRNE STEDMAN.

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PREFACE

The Cumulative Supplement has followed the plan of the original work both as to scope and subdivisions of titles, the same analysis lines, numbering and lettering being used. For example: Misnomer as ground for the abatement of an action was treated in the original digest in the title ABATEMENT, REVIVAL AND SURVIVAL, under the analysis line "Misnomer," II, B, and by referring to the same line in the Supplement similar matter will be found. New matter has been placed in the Supplement where it would have been placed in the original work if it had then been available, such new matter being distinguished by fractional numbered lines. For example: In the title above referred to, there was no authority in the original work on the point of withdrawal from the state as a ground of abatement, but there is such authority in the Supplement treated under "Withdrawal from State," II, K $\frac{1}{2}$.

Where "ante" and "post" have been used in cross references, the Cumulative Supplement is meant; "see the title" referring to the original digest. For example: Under the cross references to the title AGENCY, vol. 1, p. 117, there appears: "See the title AGENCY, vol. 1, p. 240, and references there given. In addition, see ante, AFFIDAVITS; post, AGRICULTURE; etc." The reference to the title AGENCY means that title in the original work; while the reference to AFFIDAVITS, AGRICULTURE, etc., means those titles in the Supplement.

The Virginia Code of 1919 and Barnes' West Virginia Code, 1918 edition, have been used as the basis for all references to the statute law.

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The word **abandon** means to give up, cease to use. *Southern Ry. Co. v. Com.*, 128 Va. 176, 105 S. E. 65.

"Intention to **abandon**, coupled with a surrender of possession, or what is equivalent thereto, constitutes legal **abandonment**. *Smith v. Root*, 66 W. Va. 633, 634, 66 S. E. 1005; *Garrett v. South Penn Oil Co.*, 66 W. Va. 587, 66 S. E. 741." *Kunst v. Mabie*, 72 W. Va. 202, 208, 77 S. E. 987.

"Legal **abandonment** is largely a matter of intention. But intention is generally proved by subsequent acts. The purpose is generally conceived before the act is performed, and is seldom declared in advance of it. Hence the intentions of men generally have to be determined by their acts." *Kunst v. Mabie*, 72 W. Va. 202, 208, 77 S. E. 987.

"The distinction between an **abandonment** and a forfeiture,' says Thornton on the Law of Oil and Gas, § 137, 'is often so thin as not to be distinguishable.' '**Abandonment**,' says he, 'rests upon the intention of the lessee to relinquish the premises, and is therefore a question of fact for the jury; while a forfeiture does not rest upon an intent to release the premises, but is an enforced release.' And in the same connection he says: 'Whether or not a lease has been **abandoned** is a matter of defense, and need not be negatived by the plaintiff in an action for the rent.' Again, 'If the lessee in fact **abandoned** the lease for the purpose for which it was granted, it is not necessary for him to yield up actual possession of the surface, to enable the lessor to declare an **abandonment** has been made.' " *Garrett v. South Penn Oil Co.*, 66 W. Va. 587, 596, 66 S. E. 741. See post, LANDLORD AND TENANT; MINES AND MINERALS; PENALTIES AND FORFEITURES. And see SURRENDER.

Abandonment of Person Sick with Small-pox upon Shore of State.—Va. Code 1919, § 4399.

ABATEMENT.—As to abatement of actions, see post, **ABATEMENT, REVIVAL AND SURVIVAL**. As to abatement of appeals, see post, **APPEAL AND ERROR**. As to abatement of attachment, see post, **ATTACHMENT AND GARNISHMENT**. As to abatement of nuisances, see post, **NUISANCES**. As to abatement of purchase money, see post, **VENDOR AND PURCHASER**. As to abatement of legacies, see post, **WILLS**.

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See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2, and references there given. In addition, see post, APPEAL AND ERROR; ATTACHMENT AND GARNISHMENT; DEATH BY WRONGFUL ACT; EXCEPTIONS, BILL OF; EXECUTORS AND ADMINISTRATORS; MANDAMUS. As to necessity of exception to ruling sustaining demurrer to plea in abatement, see post, APPEAL AND ERROR. As to abatement of attachment, see post, ATTACHMENT AND GARNISHMENT. As to abatement of suit in mandamus, see post, MANDAMUS. As to revival or continuation of writ of mandamus, see post, MANDAMUS.

I. NATURE OF MATTER IN ABATEMENT.

See post, "Grounds of Abatement," II.

II. GROUNDS OF ABATEMENT.

A. IN GENERAL.

Action of Detinue — Proceedings.—Va. Code 1919, § 5800.

Want of Form.—Va. Code 1919, § 6085; Barnes Code, ch. 125, §§ 9, 14.

Plea in Abatement Only.—Va. Code 1919, § 6105; Barnes Code, ch. 125, § 16.

Breach of Insurance Policy.—The defense allowed an insurance company by Code of 1906, c. 125, § 64, by filing a statement that the company will rely on breach of condition, warranty, or clause of the policy, is not to be made by plea in abatement. *Hinkle v. North River Ins. Co.*, 70 W. Va. 681, 688, 75 S. E. 54.

B. MISNOMER.

Plea Not Allowed For.—Va. Code 1919, § 6101; Barnes Code, ch. 125, § 14.

"Railroad" or "Railway."—Va. Code 1919, § 5, cl. 19.

Correction on Motion.—A judgment of justice against "B. & O. R. R. Co.," as described in the summons instead of Baltimore & Ohio Railroad Company, the corporation intended, is such a variance as formerly would have supported a plea in abatement, but since § 1979 chap. 50, Code 1906, relating to proceedings before justices, and § 3834, chap. 125, Code 1906, applicable by analogy to such proceedings, no plea for misnomer can be received, but the same may be corrected on mere motion of the parties, or of his own motion by the justice. *Stout v. Baltimore, etc., R. Co.*, 64 W. Va. 502, 63 S. E. 317.

C. CAPACITY IN WHICH PARTY SUES OR IS SUED.

Marriage Shall Not Cause Abatement.—Va. Code 1919, § 6166.

This section changes the rule laid down in the original Digest (vol. 1, p. 6.) on the authority of *Hunt v. Wilkinson*, 2 Call (6 Va.) 49, 57.

The marriage of a female plaintiff pending an action brought by her for damages for a personal injury, and failure to join husband, is not cause for abatement of action. *Stevens v. Friedman*, 58 W. Va. 78, 86, 51 S. E. 132.

D. NONJOINER AND MISJOINER OF PARTIES.

No Ground for Abatement. — Va. Code 1919, § 6102.

This section changes the rule laid down in the original Digest (vol. 1. p. 7), on the authority of *Brown v. Belches*, 1 Wash. (1 Va.) 9. Barnes Code, ch. 125, § 17.

Application of Statute. — Section 3258a of the Virginia Code, 1904 (§ 6102 Code 1919), which provides that, in a suit brought in a proper forum, whether in equity or at law, where it appears there has been a misjoinder of parties, plaintiff or defendant, the court may order the action or suit to abate as to any party improperly joined and proceed by or against the others as if such misjoinder had not been made, is inapplicable in a case where plaintiffs in error are suing in a court of law to avail themselves of the benefit of three instruments in writing containing covenants of indemnity and relief of the grantor in the first instrument, which were only available between the parties to the instruments and their privies. The plaintiffs' relief, if any, is in a court of equity. *McIlvane v. Big Stony Lumber Co.*, 105 Va. 613, 54 S. E. 473.

Carriers—Failure to Join Copartners or Coproprietors.—Va. Code 1919, § 3931; Barnes Code, ch. 104 § 9.

Nonjoinder—Husband and Wife.—In *Stevens v. Friedman*, 58 W. Va. 78, 82, 51 S. E. 132, it is said: "At common law the wife and husband must join in a suit for damages for an injury to the person of the wife, the husband being a necessary party. Failure to join him in the action seems to have been cause for abatement; but the rule is wholly changed in our practice and under our statute. The husband is no longer a necessary party; in fact, his existence or nonexistence is immaterial to the maintenance of the action. If he exists, failure to join him is no cause for abatement."

Same — In Equity. — "To obtain abatement or suspension of proceedings in equity in the nature of an abatement, on the ground of want of necessary parties, it must appear that the absent party has an interest in the subject matter of the suit that will be affected by the achievement of its object. It is not enough to show that he merely claims an interest. Facts must be disclosed from which the court can see that he has such an interest, if the statements of fact are true. Though want of necessary parties in equity may not constitute ground for abatement in the common-law sense of the term, it operates to suspend or delay the suit, until the defect is cured, and the plea or answer setting it up for this purpose ought to be tested as to its sufficiency by the rules of pleading." *Jackson v. Big Sandy, etc., R. Co.*, 63 W. Va. 18, 25, 59 S. E. 749.

Same — Detinue. — In an action of detinue, the defense that the party sued does not alone detain the property, but does so in conjunction with another party who it is claimed should have been made a party to the suit,

can not be made under the general issue, but must be made by plea in abatement. *National Fire Ins. Co. v. Catlin*, 8 Va. Law Reg. 127.

Same—Actions Ex Delicto.—Where the plaintiff in actions ex delicto improperly omits parties who ought to be joined as defendants there can be no question that the proper remedy is exactly the same as in actions ex contractu. The regular and well established method of objecting to any action "for too few defendants," where the ground for the objection does not appear on the face of the declaration, is by a plea in abatement. The decisive question is whether the objection is good, not whether the action is in contract or in tort. Ordinarily the objection is not good in actions of tort, but wherever it is good, regardless of the form of the action, the only remedy known to our law is a plea in abatement. *Matoaka Coal Corp. v. Clinch Valley Min. Corp.*, 121 Va. 522, 93 S. E. 799. See post, EJECTMENT.

Misjoinder.—If an improper plaintiff be joined in an action of ejectment, the court should order an abatement as to him and proceed in the names of the other plaintiffs as provided by § 3258a of the Code (1904, § 6102, Code 1919). *Coles v. Jamerson*, 112 Va. 311, 71 S. E. 618.

Same—Demurrer.—A misjoinder of parties can not be taken advantage of in this State by demurrer. The remedy provided by statute is to move the court to abate the suit or action as to the party improperly joined. *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174; *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

F. VARIANCE.

See ante, "In General," II, A.

Plea in Abatement Only—Amendment.—Va. Code 1919, § 6103; Barnes Code, ch. 125, § 15.

Variance between Writ and Declaration.—Sections 3259 and 3260 Code of 1904 (§§ 6103, 6105 Code 1919) do apply and were intended to control in just such cases as this. *Chesapeake, etc., R. Co. v. Chapman*, 115 Va. 32, 78 S. E. 631.

Variance between the writ and declaration may, under §§ 3834, 3835, W. Va. Code 1906 (Barnes Code, ch. 125, §§ 14, 15) be taken advantage of by plea in abatement. *Varney v. Hutchinson Lumber Co.*, 64 W. Va. 417, 63 S. E. 203.

Advantage of a variance between the summons and the declaration in an action at law can not be taken otherwise than by a plea in abatement. *Anderson v. Lewis*, 64 W. Va. 297, 61 S. E. 160; *Varney v. Hutchinson Lumber, etc., Co.*, 64 W. Va. 417, 63 S. E. 203; *Chesapeake, etc., R. Co. v. Chapman*, 115 Va. 32, 78 S. E. 631; *First Nat. Bank v. Sanders*, 77 W. Va. 716, 88 S. E. 187.

Misdescription of Plaintiff.—A plea to a bill in equity, filed by an administrator with the will annexed, asserting variance between the summons and the bill, on the ground that the plaintiff is described in the summons merely as administrator, is a plea in abatement. *Burlew v. Smith*, 68 W. Va. 458, 69 S. E. 908.

G. DEFECTS IN SUMMONS AND PROCESS.

See ante, "In General," II, A.

Plea in Abatement Only—Amendment.—Va. Code 1919, § 6103; Barnes Code, ch. 125, § 12.

Return of Sheriff.—In the absence of any allegation of fraud or collusion on the part of the plaintiff, the return of the sheriff on process, sufficient on its face, can not be attacked, even though made by plea in abatement filed in due time in the suit in which the process issued. For reasons of public policy contradiction of such re-

turns can not be made in any form, in the absence of any allegation of fraud or collusion. *Sutherland v. Peoples Bank*, 111 Va. 515, 69 S. E. 341.

Return of Summons—Not Found.—In order that a suit or action may abate under the provisions of § 8, ch. 125, Code, the return on the writ must show that the defendant is a nonresident; the fact alone that he is "Not found" is not sufficient to abate the suit or action. *Oil, etc., Supply Co. v. Gartlan*, 58 W. Va. 267, 52 S. E. 524.

Where the original summons has been regularly returned by the sheriff "Not found" and alias writs have thereafter issued and been likewise returned and continuances have been entered at rules by the clerk regularly each month until the declaration is filed, the suit or action does not abate. *Oil, etc., Supply Co. v. Gartlan*, 58 W. Va. 267, 52 S. E. 524.

Wrong County.—Where an action is brought in one county and the summons is directed to the sheriff of another, the summons will be quashed, and the action dismissed either on plea in abatement or motion to quash the summons and dismiss the action; no defendant residing in the county of the action. *Netter-Oppenhimer & Co. v. Elfant*, 63 W. Va. 99, 59 S. E. 892.

K. EXCEPTION FOR WANT OF JURISDICTION — PLEA TO JURISDICTION.

When Exception Must Be by Plea in Abatement.—Va. Code 1919, § 6105, amended by Acts 1920, p. 28; Barnes Code, ch. 125, § 16.

Where the declaration shows jurisdiction, no exception for want of jurisdiction can be taken except by plea in abatement. *Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 248; *Pennington v. Gillaspie*, 63 W. Va. 541, 542, 61 S. E. 416.

"By a plea in abatement, denying the jurisdiction of the court, the defendant asserts that no judgment can be rendered against him, no matter what amount is due, though ever so uncontestable. The affidavits bear upon the amount, presupposing the court to have jurisdiction to render judgment; but a plea in abatement going to the jurisdiction of the court denies the power of the court to render any judgment of recovery." *Netter-Oppenheimer & Co. v. Elfant*, 63 W. Va. 99, 100, 59 S. E. 892.

Dilatory Pleas Not Favored.—A plea to the jurisdiction on the ground that the defendant was a foreign corporation, did no business, and had no office or place of business, in the State, and had no agent in the State upon whom process could be legally served, is not within the reason for which the law discourages mere dilatory pleas. The defense is not merely dilatory, and does not go merely to a question of venue within the State, but is of much more serious and far-reaching character. *Bank v. Ashworth*, 122 Va. 170, 94 S. E. 469.

Objections to Venue.—Where the proper parties are before a circuit court, then by virtue of the statute (section 3058 of the Code of 1904, § 5890 Code 1919) and the common law rule on the subject, its territorial jurisdiction over persons and property is co-extensive with the bounds of the whole State, except as limited by the venue statutes, sections 3214 and 3215, Code of 1904 (§§ 6049, 6050 Code 1919); and but for such venue statutes, if a party defendant be once gotten before such court, in a litigation over a subject matter of which the court has general jurisdiction, and which subject matter is actually before the court by proper pleading and otherwise, such party would have no privilege of demanding that the trial should be had in any other court of

the State, it matters not where the cause of action may have arisen or where else in the State the defendant may reside. And since the defendant owes to statute law the venue privileges given by sections 3214 and 3215, Code of 1904, of limiting the said broad territorial jurisdiction of the court aforesaid, the statute law may attach a condition to the enjoyment of such privileges; and section 3260, Code of 1904 (§ 6105 Code 1919), has attached a condition thereto, namely, that such a privilege must be claimed by plea in abatement. *Moore v. Norfolk, etc., R. Co.*, 124 Va. 628, 98 S. E. 635.

Failure to Allege Domicile—Divorce.—Section 3260 of the Code of 1904 (§ 6105, Code 1919) provides that when the declaration or bill shows on its face proper matter for the jurisdiction of the court no exception for want of such jurisdiction shall be allowed unless taken by plea in abatement. But since no court in Virginia has any jurisdiction of a divorce cause unless one of the parties has been domiciled in the State for at least one year before the commencement of the suit, a bill which does not even allege that one of the parties has been so domiciled, does not show on its face proper matter for the jurisdiction of the court, and even if the bill had so alleged, that would not have given a court jurisdiction unless the allegation was sustained by proof of the fact. *Blankenship v. Blankenship*, 125 Va. 595, 100 S. E. 538.

The defense of the absence of the jurisdictional fact that one of the parties has been domiciled in the State for a year preceding the commencement of the suit is not a matter of abatement of the suit, but is in its nature a bar to the suit. Hence section 3260, Code of 1904 (§ 6105 Code 1919), is inapplicable, so that such defense

need not be pleaded in abatement, and may be pleaded in bar; and even if not pleaded in bar, the court may and should, for the reason of public policy, dismiss the suit at the hearing of the cause on the merits, unless the existence of such fact affirmatively appears from the proof in the record. Such is the power and duty of the court in such cases, because it does not therein exercise a general jurisdiction, but only a limited statutory jurisdiction. *Blankenship v. Blankenship*, 125 Va. 595, 100 S. E. 538.

Cannot Be Pleaded by Attorney.—

A plea to the jurisdiction by a natural person must be pleaded in proper person, and not by attorney, as appearance by attorney is regarded as pleading by leave of the court, and hence is an acknowledgment of its jurisdiction. *Davidson v. Watts*, 111 Va. 394, 69 S. E. 328.

K½. WITHDRAWAL FROM THE STATE.

"Withdrawal from the state before suit brought, a fact not appearing on the face of the summons, or in the acceptance of service thereof, if otherwise available, would certainly not be good ground for quashing the summons. That would be matter of abatement, pleadable, if good, by proper plea filed at rules. Sections 15, 16, chap. 125, Code 1906. Such a plea must not only be filed at rules, as required by said section sixteen, but by § 39 of said chapter, it must be verified by affidavit." *Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 132, 71 S. E. 194.

L. NONRESIDENCE OF DEFENDANT IN ATTACHMENT OR OTHER PROCEEDING.

Action or Suit.—Va. Code 1919, § 6080.

M. ANOTHER SUIT OR PROCEEDING PENDING.

A plea of another action pending is

in abatement. *Hinkle v. North River Ins. Co.*, 70 W. Va. 681, 682, 75 S. E. 54.

Mere Suggestion Not Sufficient.—A mere suggestion to the court by a defendant that his rights are involved in another pending cause will not alone suffice to prevent decree against him upon the bill taken for confessed. If he would rely upon the pendency of the other cause as a defense to the bill, he must plead it in such a way as to show that it is a bar, or that the other cause has priority of jurisdiction. *Katzenstein v. Prager*, 67 W. Va. 343, 67 S. E. 792.

Identity of Subject Matter and Relief.—"To sustain the plea of a former suit pending, it must appear that the subject matter and the relief sought in the second suit are the same as in the first suit." *Comstock v. Droney Lumber Co.*, 69 W. Va. 100, 107, 71 S. E. 255, citing *Stafford v. Board*, 56 W. Va. 670, 674, 49 S. E. 364; *Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 268, 1 Beach Mod. Eq. Pr., § 333.

The jurisdiction of the state corporation commission in regard to the obstruction of a highway by a railroad at a crossing and the establishment of an undergrade crossing is not affected by the pendency of an injunction suit of the board of supervisors of the county against the railroad company when the proceeding was instituted before the corporation commission, where the parties to the two proceedings were not the same, nor were the objects to be accomplished identical. Especially is this true where the injunction suit has been dismissed, as the supreme court of appeals will not turn the parties out of court and send them back to institute identical proceedings in the same court, between the same parties, to try the same issues, upon identical evidence, simply because the injunction suit was pending when this proceeding was insti-

tuted. *Southern R. Co. v. Commonwealth*, 124 Va. 36, 97 S. E. 343.

Suit for Rescission of Deed.—Where a suit in equity for the rescission of a deed, the consideration of which was partly money and an agreement of maintenance, was instituted when there was already pending a suit to require performance of said agreement, it was held that the pending suit was ample to have administered all the relief necessary, and as the proof in the suit in equity was insufficient to obtain a rescission of the deed, it was proper to dismiss it. *Blose v. Blose*, 118 Va. 16, 86 S. E. 911.

Cancellation of Deed and Ejectment.—One in actual possession of land under superior title may, in equity, maintain a suit to cancel a deed as an alleged cloud upon his title, despite the pendency of an action of ejectment instituted by the adversary party. *Moore v. Henderson*, 87 W. Va. 699, 105 S. E. 903.

In divorce proceedings a rule to show cause against a change of custody of children having been awarded, and a petition for revision or alteration of the decree filed, in the cause, the rules and principles governing a plea of another suit pending have no application. *Gates v. Gates*, 87 W. Va. 603, 105 S. E. 815.

Suit in Law and in Equity.—"Since the jurisdiction of equity is limited to cases in which the law does not afford a complete and adequate remedy, it has been held by cases both at law and in equity that two causes, one at law and one in equity, are ex necessitate so dissimilar that the pendency of one can not be pleaded in abatement of the other." *Risher v. Wheeling Roofing, etc., Co.*, 57 W. Va. 149, 156, 49 S. E. 1016. See post, "In Chancery Causes—Bill of Revivor," VIII, C, 2, c.

A creditor who holds a note se-

cured both by personal endorsement and by a vendor's lien on land conveyed to the principal debtor, may proceed at law on the note, and in equity for the enforcement of his lien, at the same time, until he obtains satisfaction in one forum or the other. *Post v. Bailey & Co.*, 68 W. Va. 434, 69 S. E. 910.

An action at law by one partner to recover the amount of a firm debt due him under an agreement with the other partner was not prevented from being maintained by the pendency of a suit in equity of long standing and which had never been determined. *Nester v. Bunns*, 85 W. Va. 568, 102 S. E. 227.

Same—Injunction Suit.—After the employer in a contract, for the cutting of timber on his land, has given notice of his desire to discontinue or terminate further performance or execution thereof on the part of the employee and enforced such right by an injunction, the employee has a right of action on his contract for breach thereof, provided he is not in fault himself, and the injunction constitutes no bar thereto. In such case, the pendency of the injunction suit can not be pleaded either in bar or abatement of the action. *Comstock v. Droney Lumber Co.*, 69 W. Va. 100, 71 S. E. 255.

Suits in Different States.—The pendency of a suit for partition in the courts of the state where land is situated, and a decree of partition therein, reversed on appeal by an appellate court, and remanded for further proceedings, will not estop or preclude the grantor in one of the deeds involved in said petition suit from maintaining a suit in the courts of another state where the deed was made and where the parties thereto reside, to obtain a decree requiring a reconveyance of the land to him upon the ground of fraud and deceit practiced by the grantee in obtaining such deed.

unless this question was fully presented by pleadings and proof, and actually adjudicated in such partition suit. *Woodcock v. Barrick*, 79 W. Va. 449, 91 S. E. 396.

While the pendency of a foreign attachment, attended by garnishment, will not abate an action in another court subsequently brought for the same debt, it will, when properly pleaded, effect a stay or postponement of the trial of the second proceeding to await the determination of the foreign attachment. *Whan v. Hope Natural Gas Co.*, 81 W. Va. 338, 94 S. E. 365.

P. TIME OF BRINGING ACTION.

Prematurity of Action.—The defense that a suit upon a promissory note is prematurely brought, for the reason that a condition, upon the performance of which the right to sue depends, has not been performed, may be made by a plea in abatement, even though advantage might be taken thereof in other ways. *Michael v. Donohue*, 86 W. Va., 34, 102 S. E. 803.

III. FORM, SUFFICIENCY AND CONSTRUCTION OF PLEA.

See post, "Pleas in Abatement in Criminal Cases," VII.

½A. IN GENERAL.

"To determine the real character of the pleading it is not necessary to enter upon a discussion of the features distinguishing a plea in bar from a plea in abatement, the decisive question to be determined being the effect upon the right of the plaintiffs to recover and whether such defensive matter is provable under the general issue." *Sutherland v. Guthrie*, 82 W. Va. 419, 420, 96 S. E. 61.

Facts Provable under General Issue—Striking Out Plea.—As the facts averred in a special plea, denominated

by the pleader a plea in abatement of the action, *assumpsit*, tend to show an assignment by the plaintiff of the claim sued on prior to the commencement of the action and are provable under the general issue in bar of the right to prosecute the action, the trial court did not err in sustaining the motion to strike the plea from the record. *Sutherland v. Guthrie*, 82 W. Va. 419, 96 S. E. 61.

Plea of Corporation Must Be by Attorney.—Where a defendant corporation filed a plea of abatement in its own name, to the jurisdiction of the court, the plea was overruled because it is requisite that a corporation must file such plea through its attorney. *Culpeper Nat. Bank v. Tidewater Improve. Co.*, 119 Va. 73, 89 S. E. 118.

It was objected to a plea to the jurisdiction that it was not good in form because the defendant corporation appeared in person instead of by attorney. The commencement of the plea was, "Defendant, Bank of Bristol, Inc., for special plea * * * comes and says," thus complying with the form expressly authorized by statute for the commencement of all pleas, Code 1904, § 3269 (§ 6113, Code 1919), and the signature of the plea was, "Bank of Bristol, Inc., By A. B. Whiteaker, attorney." Held: That, the objection was not well founded in point of fact. *Bank v. Ashworth*, 122 Va. 170, 94 S. E. 469.

Interest of Absent Party.—An answer to a bill, seeking abatement for want of necessary parties, which fails to aver facts, showing an interest, on the part of the absent party, in the subject matter of the bill, that will be affected by the achievement of the object of the suit, is insufficient for the purpose. *Jackson v. Big Sandy, etc., R. Co.*, 63 W. Va. 18, 59 S. E. 749.

A. MUST BE CERTAIN.

See post, "Pleas in Abatement in Criminal Cases," VII.

Ordinarily, a plea in abatement must set forth, with strictness and precision, such matter as will necessarily prevent further procedure in the case, if found to be true in point of fact. *State v. McIntosh*, 82 W. Va. 483, 96 S. E. 79.

"Pleas in abatement must be certain to every intent. They must set forth specifically the grounds of objection. They are not favored and are strictly construed. Hence, they must possess the highest degree of certainty in every particular." *State v. Taylor*, 57 W. Va. 228, 233, 50 S. E. 247; *State v. McClelland*, 85 W. Va. 289, 101 S. E. 472.

"In order to avail himself of a legal principle for an abatement or any purpose, a party must set forth sufficient facts to bring himself within that principle." *Jackson v. Big Sandy, etc., R. Co.*, 63 W. Va. 18, 25, 59 S. E. 749.

A plea in abatement which avers facts which, if true, may or may not constitute a legal defense, depending entirely upon an ulterior fact not averred, is bad for uncertainty. *Risher v. Wheeling Roofing, etc., Co.*, 57 W. Va. 149, 156, 49 S. E. 1016.

Another Suit Pending.—In an action at law a plea in abatement, of a former suit pending, which does not aver whether such former suit is pending at law or in equity, is bad for uncertainty. *Risher v. Wheeling Roofing, etc., Co.*, 57 W. Va. 149, 49 S. E. 1016.

B. MUST BE VERIFIED.

Va. Code 1919, § 6124; Barnes Code, ch. 125, §§ 16, 39; *Burlew v. Smith*, 68 W. Va. 458, 460, 69 S. E. 908; *Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 132, 71 S. E. 194.

Counter Affidavit.—Barnes Code, ch. 125, § 46.

Though a plaintiff in an action of assumpsit has filed with his declaration an affidavit of the amount due him, the defendant may file a plea in abatement to the jurisdiction of the court without filing the

counter affidavit required of a defendant by West Virginia Code, 1899, c. 125, § 46 (Barnes Code, p. 1116). *Netter-Oppheimer & Co. v. Elfant*, 63 W. Va. 99, 59 S. E. 892.

D. DUPLICITY.

Where a plea in abatement presents two distinct and sufficient defenses, either of which, if true, would necessitate a finding on the issue in favor of the pleader, the plea is bad for duplicity. *Fitzgerald v. Southern Farm Agency*, 122 Va. 264, 94 S. E. 761; *Deatrick v. State Life Ins. Co.*, 107 Va. 602, 610, 59 S. E. 489.

A plea in abatement set up as a defense that neither the cause of action, nor any part of it, arose within the jurisdiction of the trial court, and also that at the time of the service of the writ upon the defendant, defendant was within the jurisdiction solely for the purpose of defending another suit brought against him by the plaintiff. Held: That the plea was bad for duplicity. *Fitzgerald v. Southern Farm Agency*, 122 Va. 264, 94 S. E. 761.

Every Ground of Jurisdiction Must Be Negatived.—To constitute a sufficient plea to the jurisdiction of the court, every ground of jurisdiction enumerated in the statute must be negatived in the plea; and a plea which does this is not bad for duplicity. *Deatrick v. State Life Ins. Co.*, 107 Va. 602, 615, 59 S. E. 489.

E. MUST GIVE PLAINTIFF A BETTER WRIT.

A plea in abatement must give plaintiff a better writ, must show a more proper or sufficient jurisdiction in some other court of the state wherein the action is brought. *Deatrick v. State Life Ins. Co.*, 107 Va. 602, 611, 59 S. E. 489.

It is true, as a general rule, that a plea in abatement must show a more proper or sufficient jurisdiction in some other court of the state wherein the

action is brought. But this requirement can not avail where the plea shows a condition of facts under which no court in the State has jurisdiction. *Bank v. Ashworth*, 122 Va. 170, 94 S. E. 469; *Deatrick v. State Life Ins. Co.*, 107 Va. 602, 615, 59 S. E. 489.

Better Writ Given.—In an action of tort against a railroad company, a plea to the jurisdiction is good which avers that the cause of action did not nor did any part thereof arise in the county in which the action is brought, and that, at the time of the issuing of the writ in the cause, the defendant did not have its principal office in said county, and that it had no president or other chief officer residing in said county, and which further states in what county the cause of action, if any, did arise, and in what city its principal office was at the time of issuing the writ and still is. The venue of all actions in Virginia, whether local or transitory, is fixed by statute, and the statute declares where actions against corporations as well as individuals may be brought. *Virginia, etc., R. Co. v. Hollingsworth*, 107 Va. 359, 367, 58 S. E. 572.

I. CONSTRUCTION OF PLEA.

Pleas in abatement are strictly construed. *State v. Taylor*, 57 W. Va. 228, 233, 50 S. E. 247; *State v. McClelland*, 85 W. Va. 289, 101 S. E. 472.

Relaxation of Technical Rules.—To construe an objection to a plea to the jurisdiction as a motion to strike out, would be to relax one rule of practice, highly technical it is true, merely to give the other party the benefit of another rule none the less technical, and that too to defeat a substantial right. *Bank v. Ashworth*, 122 Va. 170, 94 S. E. 469.

IV. TIME AND EFFECT OF FILING PLEAS IN ABATEMENT.

See post, "Pleas in Abatement in Criminal Cases," VII.

Not Received after Demurrer, Plea in Bar or Answer.—Va. Code 1919, § 6105, amended by Acts 1920, p. 28.

No plea in abatement, shall be received after the defendant has demurred, pleaded in bar or answered to the declaration or bill, nor after a decree nisi or conditional judgment at rules. *Chesapeake, etc., R. Co. v. Chapman*, 115 Va. 32, 38, 78 S. E. 631.

No Plea in Abatement Shall Be Received after Rules Next Succeeding the Rules at Which Declaration or Bill Is Filed.—Va. Code 1919, § 6105, as amended by Acts 1920, p. 28.

Filed with Pleas in Bar.—Va. Code 1919, § 6107.

For Non-Joinder.—A plea in abatement for non-joinder of parties, under § 3260 of the Va. Code of 1904 (§ 6105, Code 1919), can not be received after the defendant has pleaded in bar. *Matoka Coal Corp. v. Clinch Valley Min. Corp.*, 121 Va. 522, 93 S. E. 799.

After Demurrer.—A plea in abatement tendered after demurrer, is barred by time. *Burlew v. Smith*, 68 W. Va. 458, 460, 69 S. E. 908, citing *Flesher v. Hasler*, 29 W. Va. 404, 1 S. E. 580; *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. 827; *Rutter & Co. v. Sullivan*, 25 W. Va. 427.

After General Appearance.—A plea to a bill in equity, filed by an administrator with the will annexed, asserting variance between the summons and the bill, on the ground that the plaintiff is described in the summons merely as administrator, is a plea in abatement, and if tendered after a general appearance, may properly be rejected or disregarded in the decree. *Burlew v. Smith*, 68 W. Va. 458, 69 S. E. 908.

After Entry of Conditional Judgment.—In an action for personal injuries defendant railroad was properly served with process under §§ 3225 and 3227, Va. Code of 1904. The company failed to appear on the return day, and plaintiff having filed his declaration, a

conditional judgment was entered as to defendant in accordance with the statute (§ 3284, Code of 1904, § 6131, Code 1919), and, at the subsequent rules, the company continuing in default, judgment was entered against it. Thereafter, at term, the company appeared specially, and moved to dismiss the action on the ground that the court had no jurisdiction over the cause, because it appeared upon the face of the declaration filed that the entire cause of action arose without the territorial jurisdiction of the court. Held: That the motion of the company to dismiss the case was, in truth, an objection directed merely against the venue of the action, and came in the wrong form and too late under § 3260 of the Code of 1904, which provides that such an objection can not be allowed (§ 6105, Code 1919), unless taken by plea in abatement, which could not be filed at the stage of the proceeding at which the motion was made. *Moore v. Norfolk, etc., R. Co.*, 124 Va. 628, 98 S. E. 635.

"Under our statute, § 3260 of the Code (§ 6105, Code 1919), all pleas of abatement must be filed before there is a conditional judgment at rules." *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 30, 63 S. E. 17.

After Office Judgment.—A variance between writ and declaration may, under §§ 3834, 3835, Code 1906, be taken advantage of by plea in abatement filed at the proper time; but such plea, though tendered at the same term of court at which the judgment becomes final, whether before or after an order for an inquiry of damages has been executed, not being a plea to issue, can not be received to set aside an office judgment. *Varney v. Hutchinson Lumber, etc., Co.*, 64 W. Va. 417, 63 S. E. 203; *Greenbrier Valley Bank v. Bair*, 71 W. Va. 684, 690, 77 S. E. 274.

Prevention of Entry of Office Judgment.—A plea in abatement, or any plea filed at the first rule day, or which

may now be filed at the second rule day, after default at the first, or appearance and rule to plead, will prevent the entry of an office judgment. *Greenbrier Valley Bank v. Bair*, 71 W. Va. 684, 690, 77 S. E. 274.

Statutory Provision—To What Pleas Applicable.—Section 16, ch. 125, Barnes Code, limiting the time for filing pleas in abatement, applies only to pleas to the jurisdiction of the court, where the declaration or bill shows on its face proper matters for the court's jurisdiction. It does not apply to a plea of *ne unques administrator*, which may be filed within the same time as a plea to the general issue. *Taylor v. Virginia-Pocahontas Coal Co.*, 78 W. Va. 455, 88 S. E. 1070.

When Plea Becomes Part of Record.—Where defendant in due time filed its plea to the jurisdiction, and it was accepted and filed by the clerk at rules in the exercise of a ministerial and mandatory duty, it became thereby as much a part of the record as the declaration itself. *Bank v. Ashworth*, 122 Va. 170, 94 S. E. 469.

V. DEMURRER TO PLEA IN ABATEMENT.

Va. Code, § 6118.

Criminal Prosecution.—To a plea in abatement filed by a defendant in a criminal prosecution, the attorney for the commonwealth may demur or reply, but he has no right to do both. If, after his demurrer is overruled, he replies to the plea, the demurrer will be treated as waived or withdrawn, although the prisoner objected to the filing of the replication and excepted to the ruling of the court overruling his objection. *Mullins v. Commonwealth*, 115 Va. 945, 79 S. E. 324.

VI. PLEAS IN ABATEMENT IN EJECTMENT.

See post, EJECTMENT.

VII. PLEAS IN ABATEMENT IN CRIMINAL CASES.

See ante, generally, "Form, Sufficiency and Construction of Plea," III; "Demurrer to Plea in Abatement," V.

A. NECESSITY AND : GROUNDS FOR PLEA.

1. Legality of Evidence.

The question of the legality of the evidence upon which an indictment is found can only be presented by plea in abatement, upon which an issue of fact as to the competency and sufficiency thereof may be tried. *State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

2. Illegal Constitution of Grand Jury.

See post, GRAND JURY.

B. FORM AND SUFFICIENCY OF PLEA.

1. Must Be Certain.

A plea in abatement in a criminal case must be certain to every intent. *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247; *State v. McClelland*, 85 W. Va. 289, 101 S. E. 472.

Improper Constitution of Grand Jury.—If the irregularity, relied upon as matter of abatement, relates to the constitution or organization of the grand jury, the plea must show in what the irregularity consists, otherwise it will be lacking in the element of certainty. *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

A plea in abatement, charging generally that no writ of venire facias was issued and served within the time, and in the manner prescribed by the statute (referring to them), and that the body of men who had professed to be the grand jury which had found the indictment did not constitute a legal grand jury, is insufficient. *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

Same—Plea Based on Discrimination in Selecting Grand Jury.—A plea in abatement to an indictment

founded upon discrimination against the prisoner, in the selection of the grand jury by whom the indictment was found, on account of his race and color, he being a person of color and of African descent, which does not positively and unequivocally aver the existence in the county in which the indictment was found, of persons of his race and color fully qualified for grand jury service, is insufficient and may properly be rejected. *State v. McClelland*, 85 W. Va. 289, 101 S. E. 472.

The clause "Who are competent and qualified to serve upon a grand jury," found in such a plea and preceded by averments that the persons of whom it is predicated are colored and African by descent and are citizens and taxpayers of the county and constitute a large percentage of the citizens and tax-payers thereof, is uncertain and equivocal as to whether such persons are qualified for grand jury service, because it may be regarded as the averment of a mere conclusion founded upon the insufficient facts antecedently stated; and the plea, containing it and no other averment of qualification for such service, does not comply with the requirement of the rule of pleading, as to certainty and definiteness. *State v. McClelland*, 85 W. Va. 289, 101 S. E. 472.

A plea by a person charged with the same offense in two successive indictments, setting up, as matter abatement, continuances of the first indictment after the finding of the second, which, under the provisions of § 25 of ch. 159 of the Code, would entitle him to a discharge from prosecution for the offense, if the latter had not been returned, and making no disclosure of the proceedings on the second indictment, is insufficient for lack of certainty and definiteness. *State v. McIntosh*, 82 W. Va. 483, 96 S. E. 79.

An essential averment of such plea is the concurrence of enough unexcused continuances of both indictments, after

the finding of the second, to make, when added to any of the first, that may have occurred before the finding of the second, the requisite number. *State v. McIntosh*, 82 W. Va. 483, 96 S. E. 79.

In the case of two such indictments, the accused is not entitled to count under said statute, any term at which he procured a continuance of either indictment on his own motion, or otherwise prevented a trial thereof. *State v. McIntosh*, 82 W. Va. 483, 96 S. E. 79.

2. Sufficiency in General.

A paper filed in a criminal case in time for a plea in abatement, containing the allegations necessary to raise the question of the validity of an indictment because of the improper constitution of the grand jury, and properly verified, will be treated as a plea in abatement, notwithstanding the pleader designates it a motion to quash. *State v. Young*, 82 W. Va. 714, 97 S. E. 134; *State v. Cook*, 81 W. Va. 686, 95 S. E. 792.

A plea in abatement in a criminal case charging that the defendant belongs to the negro race, that there are a large number of men of his race within the county qualified for grand jury service, that none such were upon the grand jury which found the indictment against him, that the list from which the grand jury which indicted him was drawn contained the name of no person of the negro race, and that the county commissioners in making such list excluded all persons of the negro race therefrom solely because of their race or color, sufficiently charges that he has been denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States (p. 717). *State v. Young*, 82 W. Va. 714, 97 S. E. 134.

C. TIME FOR FILING PLEAS IN ABATEMENT.

Va. Code 1919, § 4907; Barnes Code, ch. 125, § 16.

D. WAIVER OF RIGHT TO PLEAD.

In a criminal case, the defendant waives his right to plead any matter in abatement by pleading in bar, but the court has discretion to allow the plea in bar to be withdrawn and the dilatory plea entered. *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

If, in a criminal case, the plea of not guilty is withdrawn by leave of the court, the plea in abatement must be received if sufficient. *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

E. TRIAL OF PLEAS IN ABATEMENT.

Tried First.—Va. Code 1919, § 4907; Barnes Code, ch. 125, § 21.

VIII. DEATH OR OTHER DISABILITY.

A. SURVIVAL OF ACTIONS.

1. In General.

Va. Code 1919, § 5790; Barnes' Code, ch. 127, § 2.

"The question whether an action survives depends upon the nature of the action and not upon the form of it. It has been held that the line of demarcation at common law, separating those actions which survive from those which do not, is that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and right of property affected are merely incidental. At common law the rule was a general one that actions *ex contractu* survived the death of a party to an action, but where the damage resulting was to the person the rule was otherwise." *Winston v. Gordon*, 115 Va. 899, 918, 80 S. E. 756, quoting 1 Cyc. 49.

Tort Actions in General.—Tort actions for wrong to property, real or

personal, or which grow out of breach of contract, but not for wrongs done to the person or reputation, or any purely personal wrong, apart from property or contract survive to or against the personal representative. An action for breach of promise of marriage does not survive at common law, nor under the Virginia statute. *Winston v. Gordon*, 115 Va. 899, 916, 80 S. E. 756.

"Generally, tort actions for wrong to property rights survive, while actions for wrongs done to the person abate, except, among others, that the right to maintain actions for statutory penalties dies with the person." *Kinney v. West Union*, 79 W. Va. 463, 466, 91 S. E. 260.

Causes of action *ex delicto*, that survive, and may be prosecuted by or against the personal representative of a decedent, primarily and generally are such as affect property or property rights, the wrong to the person being merely incidental. *Kinney v. West Union*, 79 W. Va. 463, 466, 91 S. E. 260.

An action for obstruction to the free use and enjoyment of a public street in its original condition survives to the personal representative. *Kinney v. West Union*, 79 W. Va. 463, 466, 91 S. E. 260.

Assignability and survivability are convertible terms. If, therefore, the party in whom a cause of action exists can not by contract, as by assignment, place it beyond his control, it will not survive. *Woodford v. McDaniels*, 73 W. Va. 736, 739, 81 S. E. 544.

Statutory Provisions.—A cause of action *ex delicto* which abated by death and did not survive, at common law, to or against the personal representative, does not survive by virtue of § 2, ch. 127, Code 1913 (Barnes Code, p. 1122). Such section prescribes only the mode of procedure for the revival of actions which, at common law or by virtue of other statutory provisions, survive to or against the personal rep-

resentative. It does not create a new cause, or give a new right, of action which did not exist before. *Woodford v. McDaniels*, 73 W. Va. 736, 742, 81 S. E. 544.

5. Trespass.

Application of Statute.—Section 20, ch. 85, Code, which provides that "an action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away of any goods, or for the waste or destruction of or damage to any estate of or by his decedent," does not authorize recovery of indirect or consequential damages resulting from the wrongful use of judicial proceedings, whereby the person injured was deprived merely of the use and benefit of property pending a suit subsequently dismissed on appeal for want of jurisdiction. *Woodford v. McDaniels*, 73 W. Va. 736, 742, 81 S. E. 544.

6. Real Actions.

½a. In General.

Suits to Sell Realty of Incompetent.—Va. Code 1919, § 5336.

Action to Establish a Trust in Land.

—A suit by the life tenant and remaindermen to establish a trust in land, does not abate on the death of the life tenant. *Taylor v. Taylor*, 76 W. Va. 469, 85 S. E. 652.

b. Ejectment.

Where Right of Plaintiff in Ejectment Expires before Trial—What Judgment Entered.—Va. Code 1919, § 5479; Barnes Code, ch. 90, § 28.

Action in Ejectment by Husband and Wife.—"It does not appear when the husband died, but upon his death the cause of action survived to his wife Code 1887, § 3306 (Code 1919, § 6165); 1 Min. Inst. (4th ed.). *McMurray v. Dixon*, 105 Va. 605, 608, 54 S. E. 481.

16. Action for Personal Injuries.

See ante, "In General," VIII, A, 1.

Death of Plaintiff.—Va. Code 1919, § 5790, amended by Acts 1920, p. 27; Barnes Code, ch. 127, §§ 1, 2.

Employers' Liability Act—Right of Action.—At common law the right of action for an injury to the person is extinguished by the death of the injured party. The purpose of the act of Congress approved April 22, as amended by the act of Congress approved April 5, 1910, commonly known as the "Employers' Liability Law," is to give a right of action for the benefit of certain relatives, dependent upon the employee wrongfully killed, for the pecuniary loss to them resulting from his death, and also to give an employee, wrongfully injured, a right of action therefor, which shall survive, in case of his death, to the same beneficiaries. *Chafin v. Norfolk, etc., R. Co.*, 80 W. Va. 703, 93 S. E. 822.

17. Malicious Prosecution.

A cause of action for malicious prosecution does not, under the common law or by statute, survive against the personal representative, unless as a result thereof property is acquired by the wrongdoer which enures to his benefit or enhances the value of the estate in the hands of his personal representative. *Woodford v. McDaniels*, 73 W. Va. 736, 739, 81 S. E. 544.

18. Action for Wrongful Death.

See post, DEATH BY WRONGFUL ACT.

B. DEATH OR DISABILITY OF PARTIES PLAINTIFF OR DEFENDANT.

1. In General.

See ante, "Action for Personal Injuries," VIII, A, 16; post, "Revivor of Suits and Actions," VIII, C.

Dower and Damages against Heirs and Alienees.—Va. Code 1919, § 5127. **State.**—Va. Code 1919, § 2512.

Parties Exceeding Thirty.—Va. Code 1919, § 6173; Barnes Code, ch. 127, § 9.

At common law a suit, whether founded on contract or tort, abated by the death of a sole plaintiff or of a sole defendant before trial or verdict, and could proceed no further. *Woodford v.*

McDaniels, 73 W. Va. 736, 737, 81 S. E. 544.

2. Parties Plaintiff—In Whose Name Revived.

a. Specific Instances.

By virtue of the statute (Code 1887, §§ 2902-3; Code 1919, §§ 5786, 5789), an action brought by deceased in his lifetime could be revived, upon the suggestion of his death, in the name of his personal representative. *Brammer v. Norfolk, etc., R. Co.*, 107 Va. 206, 209, 57 S. E. 593.

3. Parties Defendant—Against Whom Revived, etc.

a. Specific Instances.

Mandamus Proceedings—Erection or Repair of Jail or Courthouse.—Va. Code 1919, § 2866.

Application for New Charter—Proceedings by Creditors.—Va. Code 1919, § 3811.

Dissolution of Corporation.—Va. Code 1919, § 3815; Barnes Code, ch. 754, § 739.

Death by Wrongful Act.—See post, DEATH BY WRONGFUL ACT.

If a former owner of land, in whose name it is sold for taxes, has parted with title before the sale, and is made a party to a suit to avoid the tax-deed, and dies pending the suit, it is proper to revive the suit against his administrators but it is not necessary to revive the suit against his heirs. *James v. Piggott*, 70 W. Va. 435, 440, 74 S. E. 667.

b. Death of One or More of Several Defendants.

At common law, a total abatement of the action was occasioned by the death of one of two or more joint defendants. This result is avoided by the West Virginia statute, Code, ch. 127, § 2, saying the action may proceed against the others if the cause of suit survives against them. *Means v. Barnes*, 72 W. Va. 512, 514, 78 S. E. 665.

Where pending a suit one of three trustees, made defendants, dies, the

suit does not abate, and a decree without the presence of the substituted trustee, when the death of the one dying has not been noted or brought to the attention of the lower court, will not be reversed for error in omission to revive the case against the substituted trustee. *McLanahan v. Mills*, 73 W. Va. 246, 252, 80 S. E. 351.

d. Where Party Whose Powers Cease Is Defendant.

Va. Code 1919, § 6170; Barnes Code, ch. 127, §§ 1, 2.

5. Death Pending Appeal.

See post, APPEAL AND ERROR.

7. Suggestion of Death.

Va. Code 1919, § 5790, amended by Acts 1920, p. 27; Barnes Code, ch. 127, §§ 4, 6, 7; *Brammer v. Norfolk*, etc., R. Co., 107 Va. 206, 57 S. E. 593.

When in a pending creditors' suit the death of a non-resident defendant and creditor has been suggested, and the suit has been revived against his administrator c. t. a., regularly appointed by the county court, and the cause has been thereafter regularly proceeded with to final decree in favor of the creditors, including the estate of such decedent, the decree is binding upon such estate, and the petition of the residuary legatee, and executor of the will of such non resident creditor, appointed and qualified in the state of his domicile, but who has not qualified as such fiduciary in this state, to set aside or modify such decree, without showing good ground therefor, is properly rejected. *Kelly v. Wellsburg*, etc., R. Co., 80 W. Va. 306, 92 S. E. 433.

C. REVIVOR OF SUITS AND ACTIONS.

1/2. In General.

See ante, "Parties Defendant—Against Whom Revived," etc., VIII, B, 3.

Where Death or Other Equivalent Event Occurs as to Any of Several

Plaintiffs or Defendants in a Suit, the Cause of Which Survives, How Suit to Proceed; How on Death of a Joint Defendant.—Va. Code 1919, § 6165; Barnes W. Va. Code, p. 1122, ch. 127, § 2.

1 1/2. Time for Revival, etc.

Va. Code 1919, § 6171; Barnes Code, ch. 127, §§ 2, 4.

Not Affecting the Right to Recover.—Va. Code 1919, § 5826; Barnes Code, ch. 104, § 19.

Though three terms of court have passed without notice being taken on the record of a writ of scire facias to revive a cause, revival not being limited or confined to the particular term to which the writ is returnable, it may be entered at a subsequent term, and the court does not lose jurisdiction to proceed according to the writ. *Davidson v. Kunst*, 72 W. Va. 116, 118, 77 S. E. 548.

If after waiting for more than a year after service of a writ of scire facias, plaintiff, in the absence of defendant, has the case revived, a jury immediately called, and judgment entered, the court on motion of the new party at the same term should set aside the verdict and judgment and continue the case. The right to such continuance given by § 4, chapter 127, Code 1906, is absolute. *Davidson v. Kunst*, 72 W. Va. 116, 119, 77 S. E. 548.

1 3/4. Who May Revive.

See ante, "Parties Plaintiff — In Whose Name Revived," VIII, D, 2.

Upon the death of an individual, all rights of action which survive pass to his personal representative, and are to be asserted by him. *Saunders v. Bank*, 113 Va. 656, 664, 75 S. E. 94. See post, EXECUTORS AND ADMINISTRATORS.

2. Modes of Revival, Etc.

1/2a. In General.

Marriage of Female Plaintiff or Defendant.—Va. Code 1919, § 6166. See

ante, "Capacity in Which Party Sues or Is Sued," II, C.

Section 2, ch. 127, W. Va. Code, prescribes only the mode of procedure for the revival of actions which, at common law or by virtue of other statutory provisions, survive to or against the personal representative. *Woodford v. McDaniels*, 73 W. Va. 736, 742, 81 S. E. 544.

By Consent.—Revival of a cause against heirs of a deceased defendant by consent of such heirs dispenses with process to revive and make them parties. *Teter v. Irwin*, 69 W. Va. 200, 71 S. E. 115.

a. By Scire Facias.

See ante, "Time for Revival," etc., VIII, C, 1½; "In Chancery Causes—Bill of Revivor," VIII, C, 2, c.

Administrator De Bonis Non.—Va. Code 1919, § 5387; Barnes Code, ch. 85, § 22.

Incompetent Persons.—Va. Code 1919, § 6168; Va. Code 1919, § 6169; Barnes Code, ch. 127, §§ 4, 5.

Where Party Whose Powers Cease Is Defendant.—Va. Code 1919, § 6170; Barnes Code, ch. 127, § 6.

When Issued.—Va. Code 1919, § 6171; Barnes Code, ch. 127, § 7.

Misdescription of Actions in Writ.—Where the parties are the same and it does not appear that there was any other suit pending between them, and there is nothing in the record showing surprise or prejudice, the misdescription of the action in a writ of scire facias to revive the suit against an administrator, as one in debt instead of assumpsit, is immaterial. *Davidson v. Kunst*, 72 W. Va. 116, 118, 77 S. E. 548.

b. By Motion.

See ante, "Suggestion of Death," VIII, B, 7. And see Va. Code 1919, § 6168; Barnes Code, ch. 127, § 4.

Sale of Property of Incompetent or Property Held in Trust.—Va. Code 1919, § 5336.

c. In Chancery Causes—Bill of Revivor.

See ante, "Another Suit or Proceeding Pending," II, M.

"The proceeding to revive this cause by writ of scire facias instead of by bill of revivor is authorized by § 4, ch. 127 of the Code. Under that section it is not necessary that a bill of revivor be filed and process had thereon in order that a suit in chancery be revived on the death of one of the parties thereto. Such revivor may be effected by a writ of scire facias as well as by bill of revivor. *Reid v. Stuart*, 20 W. Va. 382; *Bock v. Bock*, 24 W. Va. 586; *Gainer v. Gainer*, 30 W. Va. 390, 4 S. E. 424." *Moore v. Moore*, 81 W. Va. 17, 20, 93 S. E. 937.

A suit in equity may be revived in the name of the proper representative of a dead plaintiff, without notice of scire facias, on motion. *Straight v. Ice*, 56 W. Va. 60, 48 S. E. 837.

4. Sufficiency and Time of Order of Revival.

Entered at Rules.—Va. Code 1919, § 6169; Barnes Code, ch. 127, § 5.

XV. WAIVER OF PLEA.

If issues are joined on pleas in abatement, and on pleas in bar, at the same time, and defendant goes to trial upon the merits, without asking that a trial on the pleas in abatement be first had, he thereby waives them. *Houseman v. Globe, etc., Ins. Co.*, 78 W. Va. 586, 588, 69 S. E. 269.

XVI. IMPLIEDLY OVERRULING PLEA.

By a decision on the merits of the case, the court impliedly overrules such pleas in abatement as present matters proper to be determined by the court. *Houseman v. Globe, etc., Ins. Co.*, 78 W. Va. 586, 89 S. E. 269.

XVII. BURDEN OF PROOF.

Upon a plea to the jurisdiction, or in

abatement, just as is the case with other affirmative pleas, the burden of proof is, as a general rule, on the defendant. *Builders Supply Co. v. Piedmont Lumber Co.*, 122 Va. 225, 94 S. E. 938.

XVIII. TRIAL.

See ante, "Pleas in Abatement in Criminal Cases," VII.

Issues on Pleas in Abatement Shall Be Tried First.—Va. Code 1919, § 6107; Barnes Code, ch. 125, § 21.

ABBREVIATION.—See post, INDICTMENTS, INFORMATIONS AND PRESENTMENTS; NAMES.

ABIDING THE EVENT.—See post, STIPULATIONS. As to another suit pending, see ante, ABATEMENT, REVIVAL AND SURVIVAL. As to supersedeas or stay of proceedings, see post, APPEAL AND ERROR; SUPERSEDEAS AND STAY OF PROCEEDINGS.

ABDUCTION AND KIDNAPPING.

I. Abduction, 20.

II. Kidnapping, 20.

CROSS REFERENCES.

See the title ABDUCTION AND KIDNAPPING, vol. 1, p. 56, and references there given. In addition, see post, CRIMINAL LAW; SEDUCTION.

I. ABDUCTION.

Female for Purpose of Defilement, etc.—Va. Code, 1919, §§ 4411, 4413; Barnes Code, ch. 144, § 16.

Inmate of State Institution. — Va. Code, 1919, § 4412; Barnes Code, ch. 147, § 12 a (1).

Code, 1919, § 4407; Barnes Code, ch. 144, § 14.

With Intent to Use or Sell as a Slave.—Va. Code, 1919, § 4408.

Illegal Seizure, etc., of a Child.—Va. Code, 1919, § 4409; Barnes W. Va. Code, p. 1192, ch. 144, § 14.

II. KIDNAPPING.

With Intent to Extort Money.—Va.

ABOUT.—See post, MORE OR LESS; SALES; VENDOR AND PURCHASER.

Effect of word about as qualifying quantity of goods sold, see *Paxton Lumber Co. v. Panther Coal Co.*, 83 W. Va. 341, 98 S. E. 563.

'About a minute is absolutely devoid of any certainty for it is a phrase very commonly used to denote a mere point of time and not the lapse of any certain period.' *State v. Clifford*, 59 W. Va. 1, 25, 52 S. E. 981.

ABOUT HIS PERSON.—See post, WEAPONS.

ABOVE PROPERTY.—See *Spurrier v. Hobbs*, 68 W. Va. 729, 730, 70 S. E. 760.

ABSENCE.—See post, ATTACHMENT AND GARNISHMENT; JUDGMENTS AND DECREES; SERVICE OF PROCESS. As ground for continuance, see post, CONTINUANCES. As to presumption of death from absence, see post, PRESUMPTIONS AND BURDEN OF PROOF.

ABSOLUTE.—As to absolute privilege, see post, NOTICE; WITNESSES. “ ‘Absolute safety,’ as was said by the court in *Norfolk, etc., Tract. Co. v. Ellington*, 108 Va. 245, 61 S. E. 779, ‘is unattainable, and employers are not insurers.’ ” *Potomac, etc., R. Co. v. Chichester*, 111 Va. 152, 158, 68 S. E. 404. See post, MASTER AND SERVANT.

Absolute control at all times as used in the statute relating to automobiles means such control as makes the operation of the car safe, in view of, and as determined by, its apparent situation and surroundings. A car is in **absolute control**, while running at a reasonable high rate of speed on a smooth, straight, unobstructed road. To be under **absolute control**, it need not be susceptible of instant stoppage. *Goff v. Clarksburg Dairy Co.*, 86 W. Va. 237, 242, 103 S. E. 58.

ABSTRACT.—As to abstract instructions, see post, INSTRUCTIONS.

“ ‘In the United States an abstract is not an implied feature of every sale of land. Since every title is of record, the doctrine of caveat emptor, in the absence of special agreement, requires the purchaser to satisfy himself as to title, and for that purpose to make the necessary investigation and abstracts.’ 1 Am. & Eng. Ency. L. 213.” *Thompson v. Robinson*, 65 W. Va. 506, 509, 64 S. E. 718. See post, VENDOR AND PURCHASER.

Under a contract to furnish an **abstract of title** with a warranty deed, an **abstract of title** completely evidenced by muniments of record need not be verified by an affidavit of the abstractor. *Womack v. Agee*, 79 W. Va. 22, 90 S. E. 793.

ABUSE OF PROCESS.—See post, MALICIOUS PROSECUTION; SUMMONS AND PROCESS.

ABUSIVE LANGUAGE.—See post, LIBEL AND SLANDER. **Punishment for Using Abusive Language.**—Va. Code 1919, § 4536.

ABORTION.

CROSS REFERENCES.

See the title ABORTION, vol. 1, p. 57, and references there given. In addition, see post, CRIMINAL LAW; EVIDENCE; PHYSICIANS AND SURGEONS.

Attempts to Produce Abortion or Prompt Its Procuring. — Va. Code 1919, § 4401; Barnes Code, ch. 144, § 8.	Limitation of Prosecution — Two Years. —Va. Code 1919, § 4768; Barnes Code, ch. 152, § 10.
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ABUTTING OWNERS.

I. Changing Grade of Streets, 22.

III. Location of Steam Railroads on Streets and Highways, 22.

IX. Excavations in Street by Abutting Owners, 22.

CROSS REFERENCES.

See the title ABUTTING OWNERS, vol. 1, p. 60, and references there given. In addition, see post, ADJOINING LANDOWNERS; ADVERSE POSSESSION; CANALS; DEDICATION; DRAINS AND SEWERS; EMINENT DOMAIN; MUNICIPAL CORPORATIONS; NUISANCES; SPECIAL ASSESSMENTS; STREET RAILROADS; STREETS AND HIGHWAYS; TELEGRAPHS AND TELEPHONES; TURNPIKES AND TOLLROADS. As to right of abutter to enjoin occupation of street for private use, see post, INJUNCTIONS. As to authority of town council to require occupants of adjacent realty to pave sidewalks, see post, SPECIAL ASSESSMENTS. As to ascertainment of damages to abutting owners from change of grade, see post, STREETS AND HIGHWAYS. As to the elements of damages to abutting property from change of street grade, see post, STREETS AND HIGHWAYS. As to injury to person on street, see post, STREETS AND HIGHWAYS. As to liability for flooding abutting lots, see post, STREETS AND HIGHWAYS. As to ownership of fee in street or sidewalk, see post, STREETS AND HIGHWAYS. As to the right of abutter to access, light, air and view, see post, STREETS AND HIGHWAYS.

I. CHANGING GRADE OF STREETS.

See post, SPECIAL ASSESSMENTS; STREETS AND HIGHWAYS.

III. LOCATION OF STEAM RAILROADS ON STREETS AND HIGHWAYS.

See post, STREETS AND HIGHWAYS.

IX. EXCAVATIONS IN STREET BY ABUTTING OWNERS.

See post, STREETS AND HIGHWAYS.

"Excavations, properly and safely constructed under the public streets in cities, for the convenience of the owners or premises adjoining, are not unlawful; and they are not liable to be treated as nuisances if kept in repair, and the use of the street is not inter-

rupted for an unreasonable length of time." *Lynch v. North View*, 73 W. Va. 609, 616, 81 S. E. 833.

The abutting owner of the fee has a right to use the subsurface of a public street, subject to the superior right of easement therein in favor of the municipality for water, gas and sewer mains, etc., provided he does not materially interfere with travel on the surface. *Lynch v. North View*, 73 W. Va. 609, 616, 81 S. E. 833.

Connecting Dwelling with Water Main—Personal Injuries.—The opening of a ditch in a public street, for the purpose of laying a pipe to connect a dwelling house with the water main, is not, per se, a nuisance, and does not make the owner of the house liable to a person injured by falling into the ditch, unless such owner has been guilty of negligence. *Jenkins v. Montgomery*, 69 W. Va. 796, 72 S. E. 1087.

A CASE AGREED.—See post, AGREED CASE.

ACCELERATION.—See post, REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

ACCEPTANCE.—See post, BILLS, NOTES AND CHECKS; CONTRACTS; DEDICATION; SALES.

ACCESS.—See ante, ABUTTING OWNERS, post, EASEMENTS.

ACCESSORIES.—See post, ACCOMPLICES AND ACCESSORIES.

ACCIDENT.—See post, EVIDENCE; MASTER AND SERVANT; NEGLIGENCE. As to homicide as constituting accidental killing by violence, see post, ACCIDENT, CASUALTY, HEALTH AND INDUSTRIAL INSURANCE. As to accident in equity see post, MISTAKE AND ACCIDENT. As to whether proof of an accident may be circumstantial and sufficiency of evidence to show accident, see *General Acci., etc., Corp. v. Murray*, 120 Va. 115, 90 S. E. 620. See also post, ACCIDENT, CASUALTY, HEALTH AND INDUSTRIAL INSURANCE.

ACCIDENT, CASUALTY, HEALTH AND INDUSTRIAL INSURANCE.

I. Statutory Regulation of Companies, 24.

II. The Application, 24.

A. In General, 24.

B. Representations by Insured, 24.

III. The Contract, 24.

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B. Liability of Insurer, 25.

1. In General, 25.

2. Limitation of Liability, 25.

a. Voluntary or Negligent Exposure to Unnecessary Danger, 25.

b. Injury While on Roadbed or Bridge of Railway, 26.

c. Visible Marks on Exterior of Body Lacking, 26.

C. Cancellation of Policy, 27.

IV. Pleading and Practice, 27.

V. Evidence, 27.

CROSS REFERENCES.

See the title ACCIDENT INSURANCE, vol. 1, p. 71, and references there given. In addition, see post, DAMAGES; EVIDENCE; FIRE INSURANCE; INSURANCE; LIFE INSURANCE; MASTER AND SERVANT.

I. STATUTORY REGULATION OF COMPANIES.

See also post, "The Contract," III. **Accident Insurance Companies.**—Va. Code, 1919, §§ 4240; 4305; 4322-4326. Barnes Code, chap. 34, §§ 61, 62, 63.

Casualty Companies.—Va. Code, 1919, §§ 4259-4272.

Industrial Sick Benefit Companies and Associations.—Va. Code 1919, §§ 4351-4359; Pollard's Code 1920, pp. 204, 733. Barnes Code, chap. 34, §§ 61, 62, 63.

II. THE APPLICATION.

See also post, "Evidence," V.

A. IN GENERAL.

Application as Part of Contract.—To make the application for a policy of insurance in an accident and health insurance company, organized under the laws of a state other than this and doing business here, containing warranties, part of the contract of insurance, it must be attached to the policy. Mere reference to it in the policy and adoption thereof in terms do not suffice. *Bowyer v. Continental Casualty Co.*, 72 W. Va. 333, 78 S. E. 1000.

In the absence of statutory prescription of the forms of contracts of insurance, such reference and adoption would make the application part of the policy, but section 62 of chapter 74 of the Code as revised, amended and reenacted by chapter 77 of the Acts of 1907 (serial section 1107a Ann. Code Supp. 1909), and sections 15 and 16 of said chapter, requiring policies of insurance fully and plainly to set forth the contracts between the parties thereto, exclude therefrom all conditions, agreements and warranties not expressed in the policies themselves, or papers attached thereto. *Bowyer v. Continental Casualty Co.*, 72 W. Va. 33, 78 S. E. 1000. See post, INSURANCE.

Classification of Applicant by Agent—Estoppel of Company.—An accident insurance company is estopped to deny that a party insured by it was placed in the wrong classification, when such classification was made by its agent upon full and truthful information given such agent as to the employment and occupation of the assured. *Parker v. American Acci. Ins. Co.*, 79 W. Va. 576, 92 S. E. 88.

B. REPRESENTATIONS BY INSURED.

Under Virginia Code of 1904, § 3344a, as modified by Code of 1919, § 4220, omissions of the applicant, concerning other accident or health insurance, without any wilful purpose to deceive or defraud the company, held not to avoid the policy so far as death from accident was concerned. *Standard Acci. Ins. Co. v. Walker*, 127 Va. 140, 102 S. E. 585. See post, INSURANCE.

Where the occupation of the insured in an accident policy was that of contractor, whose chief duty was to supervise the work of his servants in brick construction, although he sometimes actually laid bricks, for the purpose of showing inexpert brick layers how the work was to be done, his representation that the duties of his occupation were fully described as "Proprietor—supervising only," was not a false representation which induced the company to give him a preferred classification. He was, in fact, a preferred risk, and received the classification to which he was entitled. *Standard Acci. Ins. Co. v. Walker*, 127 Va. 104, 102 S. E. 585.

III. THE CONTRACT.

A. IN GENERAL.

Character and Content of Accident Policies.—Va. Code 1919, §§ 4315-4321. **Accident or Sick Benefits Not Subject to Attachment, Garnishment, Etc.**—Va. Code 1919, § 4219.

B. LIABILITY OF INSURER.**1. In General.**

Death by Homicide.—In the absence of any provision in an accident policy relieving the company from liability in case of death by homicide, such a killing is an accidental killing by violence, for which the company is liable. *Standard Acci. Ins. Co. v. Walker*, 127 Va. 140, 102 S. E. 585.

Intoxication of Insured as a Defense.—Where an accident policy is conditioned against liability for injury happening while insured is intoxicated, and where plea in that behalf is to be successfully relied upon, the evidence must show that insured was actually intoxicated at the time the accident befell him. *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119.

Contributory Negligence.—Accident insurance is not designed to furnish indemnity only in cases where the policy holder orders his conduct with grave circumspection and provident foresight of consequences. Mere contributory negligence is no answer to an action to a contract of insurance. Therefore, an insurer against accident must not be relieved from liability because of mere contributory negligence unless the contract is plain and unequivocal that it should be. *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 293, 64 S. E. 119.

Duty of Company as to Its Records.—It is the duty of an accident insurance company to see that its records correctly set forth the facts that are communicated to it, and it will be held to the same measure of responsibility as if it had done so. *Wolontz v. United States Casualty Co.*, 126 Va. 156, 101 S. E. 58.

2. Limitation of Liability.**a. Voluntary or Negligent Exposure to Unnecessary Danger.**

Meaning of Phrase.—The phrase "voluntary or negligent exposure to unnecessary danger," in a policy of accident insurance exempting the insurer

from liability for injury from cause so expressed, is a cumulative or redundant expression, and is properly interpretable as "voluntary exposure to unnecessary danger." *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119.

Danger Unknown.—Exposure to an unknown danger, though a voluntary act, is not a voluntary exposure. *Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 174, 63 S. E. 962; *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 294, 64 S. E. 119.

Sitting or lying on a bench at the side of a building, near the top of an unguarded wall, on a dark night, it not appearing that insured in so doing was conscious of the pitfall, or had knowledge of his surroundings, is not "voluntary exposure to unnecessary danger." *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119.

One who lies down to sleep on the top of the boilers of a steamboat, and is there injured by steam escaping from a safety valve, is not guilty of voluntary exposure to unnecessary danger, though warned not to sleep there, unless he was conscious of the danger from escaping steam from the safety valve. *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 295, 64 S. E. 119.

Involuntary Exposure.—A merely inadvertent and unintentional exposure to a known danger, under peculiar circumstances, not affording opportunity for deliberate action, is an involuntary, not voluntary, exposure. *Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 174, 63 S. E. 962.

Obvious Risk of Injury or Obvious Danger.—A person who attempts to cross a railroad track immediately in front of a rapidly approaching train; and is run over and killed, exposes himself to an "obvious risk of injury or obvious danger," within the meaning of a condition in an accident insurance policy, limiting the liability of the insurer. *Combs v. Colonial Casualty Co.*, 73 W. Va. 473, 80 S. E. 779.

It is believed that, in all those cases in which the danger was obvious and there was opportunity for deliberation, not instances of sudden peril, precluding volition or producing momentary confusion of thought, the courts have uniformly held the insured bound to know it and treated him as if his knowledge thereof had been admitted or uncontroverted. *Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 176, 63 S. E. 962.

Either reckless or deliberate encountering of known danger so obvious that a reasonably prudent man would have observed and avoided it, if the circumstances were not such as necessitated the encountering thereof, is a "voluntary exposure." *Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 63 S. E. 962; *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 290, 64 S. E. 119.

An obvious danger is one that is plain and apparent to a reasonably observant person, and the fact that insured may not have observed it and been conscious of it at the time of the fatal accident, is not material. He owed to the insurer, as well as to himself, the duty to be reasonably careful when in the presence of an obvious danger, and his failure to use reasonable care does not excuse him. *Combs v. Colonial Casualty Co.*, 73 W. Va. 473, 475, 80 S. E. 779.

Voluntary Exposure.—In an accident policy which exempts liability as to an injury caused by the insured's "voluntary exposure to unnecessary danger," those words are properly interpreted to refer only to danger of a real, substantial character, which the insured recognized, but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all the risks of the situation. *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119.

Necessary Danger.—A voluntary exposure to necessary danger is not forbidden by a clause in an accident insurance policy, limiting the liability of the

insurer in case of an injury resulting from "voluntary exposure to unnecessary danger or obvious risk of injury." *Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 63 S. E. 962.

Rights of Parties Fixed by Contract.—In an issue raised under a clause in an accident insurance policy, limiting the liability of the insurer in case of an injury resulting from "voluntary exposure to unnecessary danger or obvious risk of injury," the rights of the parties are fixed and determined by the contract, not the law of negligence, but certain general principles, operative alike in controversies arising *ex contractu* and *ex delicto*, have application and, of these, some are recognized in the law of negligence. *Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 63 S. E. 962.

b. Injury While on Roadbed or Bridge of Railway.

In an accident policy, excepting liability for injury to insured while on the roadbed or bridge of a railway, the manifest intention is to exempt the insurer from responsibility for injury caused by collision with moving trains thereon. *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119.

c. Visible Marks on Exterior of Body Lacking.

Ordinarily in case of an immediately fatal accident, the difference in the appearance of insured just before the accident and of his dead body immediately thereafter is a sufficient visible mark upon the body of the insured to prevent the reduction of the indemnity provided in the policy under a provision therein contained in case of injuries, fatal or otherwise, of which there shall be no visible marks on the exterior of the body, the limit of the company's liability shall be one-fifth of the amount that would otherwise be payable under the policy. *Parker v. North American Acci. Ins. Co.*, 79 W. Va. 576, 92 S. E. 88.

C. CANCELLATION OF POLICY.

Provision Valid.—A contract of accident insurance providing that the company might cancel the policy by written notice mailed to the latest address of assured appearing on the company's record with the company's check for the unearned part of the premium, is a valid contract, and the company has the right to cancel in the manner provided. *Wolontier v. United States Casualty Co.*, 126 Va. 156, 101 S. E. 58.

Notice of Cancellation.—Under the facts of the case the notice of cancellation held to be invalid since it was not sent according to the stipulation in the contract of insurance. *Wolontier v. United States Casualty Co.*, 126 Va. 156, 101 S. E. 58.

IV. PLEADING AND PRACTICE.

Fraud in the procurement of the issuance of a policy of accident insurance not under seal need not be specially pleaded. Fraud if established would be a full and complete, not merely a partial, defense. Evidence thereof is admissible under the general issue. *Bowyer v. Continental Casualty Co.*, 72 W. Va. 333, 337, 78 S. E. 1000.

V. EVIDENCE.

Presumptions and Burden of Proof.—In an action to recover damages for a negligent injury, the burden of showing negligence by a preponderance of the evidence is upon the plaintiff, and if the injury might have resulted from one of two causes for only one of which the defendant was responsible there can be no recovery, neither can the plaintiff recover if it is just as probable that the damage was caused by the one as by the other. *General Acci., etc., Corp. v. Murray*, 120 Va. 115, 90 S. E. 620.

In order to recover on an accident policy, the burden is on the plaintiff to bring himself within the provisions of the contract of insurance by proving an accidental injury to the assured. There is no presumption to aid in this

proof, as death is presumed to be the result of natural dissolution rather than accidental injury. *General Acci., etc., Corp. v. Murray*, 120 Va. 115, 90 S. E. 620.

Unless the injury is shown to have been intentionally self-inflicted or inflicted by some other person, the legal presumption is that it was accidental. *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119.

Evidence of Injury.—In an action on a policy of accident insurance, evidence that insured was found lying at the bottom of a wall, badly injured, near the unrailed top of which he was reclining on a bench only shortly before, alone, and in the darkness of night, makes a prima facie case of injury by violent, external and accidental means. *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119.

While the proof of the accident may be circumstantial, the circumstances proved must point directly to the main fact in issue and not be such as to lead merely into a labyrinth of surmises and conjectures. Even upon a demurrer to evidence the finding can not be based upon conjecture, guess or random judgment, but must be founded upon facts shown in evidence. *General Acci., etc., Corp. v. Murray*, 120 Va. 115, 90 S. E. 620.

Injury as Proximate Cause of Death.—Under the evidence it was held that there was no necessary or natural connection between the injury and the disease of which decedent died, and there could be no recovery on the policy insuring against bodily injuries effected through external, violent and purely accidental causes which should solely and independently of all other causes necessarily result in his death. *Continental Casualty Co. v. Peltier*, 104 Va. 222, 51 S. E. 209; *General Acci., etc., Corp. v. Murray*, 120 Va. 115, 90 S. E. 620.

Evidence of Intoxication.—Evidence as to appearances of intoxication, or their absence, by witnesses who saw insured immediately before or after the

injury, is proper and admissible in that behalf. *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119.

Application as Evidence.—Though inadmissible, by reason of the West Virginia statute, to prove statements of the insured therein as a warranty or part of the policy, because not attached to it, the application for a policy is admissible, together with other evidence, to prove fraud in the procurement of the policy. *Bowyer v. Continental Casualty Co.*, 72 W. Va. 333, 337, 78 S. E. 1000.

Fraud.—"It requires more than a

mere false statement to prove fraud. It must have been made with intent to mislead and deceive, and the injured party must have relied upon it." *Bowyer v. Continental Casualty Co.*, 72 W. Va. 333, 338, 78 S. E. 1000.

Evidence of Participation by Beneficiary in Homicide of Deceased.—In an action on an accident policy, evidence was held insufficient to show guilty knowledge or participation by beneficiary in alleged homicide of deceased. *Standard Acci. Ins. Co. v. Walker*, 127 Va. 140, 102 S. E. 585.

ACCOMMODATION PAPER.—See post, **BILLS, NOTES AND CHECKS.**

ACCOMPLICES AND ACCESSORIES.

I. Definition and General Consideration, 28.

II. Who Are Accomplices and Accessories, 30.

A. Accessory before the Fact, 30.

B. Accessory after the Fact, 30.

IV. Prosecutions, 30.

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C. Jurisdiction and Venue, 30.

D. Evidence, 31.

E½. Instructions, 31.

F. Questions for Jury, 32.

H. Punishment, 32.

CROSS REFERENCES.

See the title **ACCOMPLICES AND ACCESSORIES**, vol. 1, p. 74, and references there given. In addition, see post, **ASSAULT AND BATTERY; CONSPIRACY; CRIMINAL LAW; DUELLING; HOMICIDE; PRIZE FIGHTING.**

I. DEFINITION AND GENERAL CONSIDERATION.

"Aider and Abettor."—Any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks or signs, or who in any way or by any means countenances and approves the same, is in law deemed to be an aider and abettor, and liable as principal, and proof that a person is present at the commission of a trespass without disapproving or opposing it, is evidence

from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it. and was thereby aiding and abetting the same. *Hunt v. DiBacco*, 69 W. Va. 449, 71 S. E. 584.

Russell (1 vol. 456) lays it down, that "in order to make an abettor to a manslaughter a principal in the felony, he must be present, aiding and abetting the act committed." This learned author is sustained by Hale. *State v.*

Yoho, 64 W. Va. 250, 252, 61 S. E. 367.

Aid.—"Though the word 'aid' does not necessarily embrace or imply guilty knowledge or wrongful purpose, yet when supplemented by 'abet' as both are used in the statute and indictments, they jointly indicate such knowledge and purpose and the intention to encourage the commission of the offense. Such are the useful definitions of these terms in felony indictments where there are accessories either before or after the fact." *State v. Ankrom*, 86 W. 570, 574, 103 S. E. 925.

"Aiding and Abetting" Distinguished from Accessories before the Fact.—In *State v. Putman*, 18 S. C. 175, 44 Am. Rep. 569, the court said that one being present, aiding and abetting was not identical with an accessory before the fact. Why? Because he was present acting. *State v. Yoho*, 64 W. Va. 250, 252, 61 S. E. 367.

Distinction between Principal and Accessory Abolished.—Secs. 6 and 8, Ch. 152, of the West Va. Code (Barnes Code, p. 1256), in effect, abolish the common law distinction between an accessory before the fact and a principal felon, by making such accessory, in every felony, punishable as if he were the principal in the first degree, and punishable in the county in which the principal felon might be indicted. *Weil v. Black*, 76 W. Va. 685, 86 S. E. 666. See post, "Jurisdiction and Venue," IV, C; "Punishment," IV, H.

"The relation of principal and agent, or of employer and employee, is not recognized in the criminal law. By that law, every man must stand for himself. No man can authorize another to do what he may not lawfully do himself. If the attempt to confer such authority be made, and the unlawful act be done, both are guilty." *State v. Henaghan*, 73 W. Va. 706, 713, 81 S. E. 539.

If a person with felonious intent through the instrumentality of an innocent agent, cause a crime to be committed, he, and not the agent, is the principal, and is punishable accord-

ingly, although he was not present at the time and place of the offense either actually or constructively, within the meaning of the law of aider and abettor, operative between principal and accessory before the fact. As between him and the innocent agent, there is no such relation. He alone is the guilty party. *State v. Bailey*, 63 W. Va. 668, 60 S. E. 785.

Principals in First or Second Degree.—If the actor, the person who performs the manual act incident to the crime, had felonious intent in the performance thereof, or knew the act was criminal, he is a principal in the first degree; and the person at whose instigation he acted is either a coprincipal in the first degree or a principal in the second degree, if he was actually or constructively present, but if not present in either sense, he is an accessory before the fact. *State v. Bailey*, 63 W. Va. 668, 60 S. E. 785.

"A principal in the second degree is one who is present aiding and abetting the principal actor in the commission of the crime and actual physical presence is not necessary; a constructive presence is sufficient, as in the instance of a person keeping watch or guard at a convenient distance while the murder is being committed by the principal actor." *State v. Cremeans*, 62 W. Va. 134, 137, 57 S. E. 405.

If persons combine together for the purpose of rescuing a person in the custody of officers of the law, and in the execution of such design a murder is committed, all are equally principals in the murder. *State v. Cook*, 81 W. Va. 686, 95 S. E. 792. See post, HOMICIDE.

If a party who actually did an unlawful act was innocent of intentional wrong, and the act on his part was by procurement of another, it imputes the criminal intent to that other and makes him the guilty party, although he was not in any sense an accomplice, co-conspirator, or aider or abettor of the actor. The relation of the parties to

one another and to the act is such as to create an exception to the general rules of law respecting principals and accessories. *State v. Bailey*, 63 W. Va. 668, 672, 60 S. E. 785.

II. WHO ARE ACCOMPLICES AND ACCESSORIES.

A. ACCESSORY BEFORE THE FACT.

There can be no accessory without a principal. *State v. Bailey*, 63 W. Va. 668, 60 S. E. 785.

An accessory before the fact is one who is absent at the time of the actual perpetration of the crime, but procures, counsels, commands, incites or abets another to commit the crime. The crime of an accessory before the fact is a particular one. The absence of the accessory before the fact at the time and place of the principal offense is an essential element of the crime, and absence at the time the crime was committed is necessary to make him an accessory before the fact. *State v. Cremeans*, 62 W. Va. 134, 137, 57 S. E. 405. See *State v. Bailey*, 63 W. Va. 668, 60 S. E. 785.

B. ACCESSORY AFTER THE FACT.

What Constitutes Accessory after the Fact.—The true test whether one is accessory after the fact is to consider whether what he did was done by way of personal help to his principal with a view to enabling his principal to elude punishment; the kind of help being material. In the case at bar, the evidence fails utterly to prove any act on the part of the plaintiff in error in the way of help to his alleged principal with a view to enabling him to elude punishment. *Buck v. Commonwealth*, 116 Va. 1031, 83 S. E. 390.

Who Not Deemed Accessories after the Fact.—But no person in the relation of husband and wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, or servant to the offender, who, after the commission of a felony, shall

aid or assist a principal felon or accessory before the fact, to avoid or escape from prosecution or punishment, shall be deemed an accessory after the fact. Va. Code 1919, § 4765; *Barnes W. Va. Code*, p. 1256, ch. 152, § 7.

IV. PROSECUTIONS.

B. INDICTMENT.

Any accessory before the fact may be indicted either with such principal or separately. Va. Code 1919, § 4766; *Barnes W. Va. Code*, p. 1256, ch. 152, § 8.

C. JURISDICTION AND VENUE.

An accessory, either before or after the fact, may, whether the principal felon be convicted or not, or be amenable to justice or not, be indicted, convicted, and punished in the county or corporation in which he became accessory, or in which the principal felon might be indicted. Va. Code 1919, § 4766; *Barnes W. Va. Code*, p. 1256, ch. 152, § 8.

"*State v. Ellison*, 49 W. Va. 70, 38 S. E. 574, holds § 8 (Chap. 152, W. Va. Code) not to be unconstitutional because it provides that the accessory can be tried in the county where the principal might be indicted, although he did not therein counsel and advise the commission of the principal's act. The locus in quo of the accessory's crime is made the county in which the principal commits the felonious act; and that part of the statute which attempts to make the crime punishable in the place where the accessorial acts are committed of course, can have no extra-territorial effect. But that does not prevent the accessory's act, wherever committed, from being tried where the felonious act is consummated; provided jurisdiction of his person be obtained. That an accessory is without the state when he counsels and procures the commission of a felony within the state, makes it none the less an offense against the laws of this state, if the principal's act be committed therein." *Weil v. Black*, 76 W. Va. 685, 693, 86 S. E. 668.

D. EVIDENCE.

See post, **CONSPIRACY.**

Acts and Declarations.—The motives and purpose of a principal in the First Degree are directly in issue on the trial of the principal in the Second Degree and to show such motives and purpose the acts and declarations of the former, although not made in the presence of the latter, may be introduced. *Commonwealth v. Allen*, 18 Va. Law Reg. 410.

When two or more accomplices are tried together for felony, the declaration or confession of one made after the criminal act in the absence of the others, too long after it to be a part of the *res gestæ*, is admissible in evidence; but the court must instruct the jury that it is not to be considered as evidence against any one but the one making the confession. *State v. McCoy*, 61 W. Va. 258, 57 S. E. 294.

Uncorroborated Testimony of Accomplice.—While the jury may, if they see proper to do so, convict upon the uncorroborated testimony of an accomplice alone, it is the duty of the court to warn them not to do so. As to the extent of the corroboration, the general rule, and the one which is correct and safe is that if two or more accomplices are produced as witnesses, they are not deemed to corroborate each other, but the same rule is applied, and the same confirmation is required, as if there were but one. Moreover, the corroboration or confirmation must relate to some fact (or facts) which goes to establish the guilt of the accused. *Jones v. Commonwealth*, 111 Va. 862, 69 S. E. 953. See post, "Instructions," IV, E½.

Impeaching Testimony of Accomplice.—Any evidence tending to shed light upon the evidence of accomplices, or to affect their credibility, or the weight to which their testimony is entitled, by showing what influences, if any, have been brought to bear upon them is plainly admissible. If an accomplice has been promised immunity

from prosecution, the jury are entitled to know it. *Jones v. Commonwealth*, 111 Va. 862, 69 S. E. 953.

E½. INSTRUCTIONS.

Conviction upon Uncorroborated Testimony of Accomplice.—Where the court instructed the jury that they might, if they thought it proper to do so, convict the accused upon the uncorroborated testimony of an accomplice, but nevertheless the evidence of an accomplice must be received with great caution, and that if two or more accomplices are produced as witnesses they are not deemed to corroborate each other, it was held not error to refuse to further instruct the jury that, "the source of such evidence is tainted, and the danger of collusion between the accomplices and the temptation to exculpate themselves by fixing the responsibility upon others is so strong that it is the duty of the court to warn the jury against the danger of convicting the accused upon their uncorroborated testimony." *Hunt v. Commonwealth*, 126 Va. 815, 101 S. E. 896.

The instruction as given in the preceding syllabus was as favorable to the accused in its statement upon the subject dealt with as he could ask. The quoted language was objectionable because it needlessly elaborated the rule fully stated by the instruction as given, by entering upon a statement of the reasons for such rule, which statement was likely to mislead the jury into concluding that the court thereby expressed an opinion that the testimony referred to was in fact "tainted" and was in fact "uncorroborated" in any particular; whereas it was for the jury to decide whether the testimony in question was "tainted," and there was evidence in the case corroborating the testimony in question in some particulars. *Hunt v. Commonwealth*, 126 Va. 815, 101 S. E. 896.

In *Commonwealth v. King*, 9 Va. Law Reg. 653, 657, the following instruction was given: "The court in-

structs the jury that although the testimony of an accomplice if unsupported is always received with great caution, yet an accomplice is unquestionably a competent witness, unless he has been previously sentenced for an infamous offense, and he is competent alone; that is, a prisoner may be convicted on the testimony of an accomplice uncorroborated by that of any other witness, it being the duty of the jury in all cases to consider the evidence and judge of the credit of the witnesses."

F. QUESTIONS FOR JURY.

On the trial of one charged with

having committed a crime through the instrumentality of an innocent agent, the guilt or innocence of the latter is a question for the jury, if there is evidence tending to prove criminal intent on his part. *State v. Bailey*, 63 W. Va. 668, 60 S. E. 785.

H. PUNISHMENT.

How Principal in Second Degree and Accessories Punished.—Va. Code 1919, § 4765; Barnes W. Va. Code, p. 1256, ch. 152, § 6.

ACCORD AND SATISFACTION.

I. Definition and General Consideration, 32.

II. What Constitutes, 33.

½A. In General, 33.

III. Effect of Accord and Satisfaction, 33.

IV. Pleading and Practice, 34.

CROSS REFERENCES.

See the title ACCORD AND SATISFACTION, vol. 1, p. 81, and references there given. In addition, see post, BILLS, NOTES AND CHECKS; COM-PROMISE AND SETTLEMENT; CONTRACTS; EVIDENCE; LIMITA-TION OF ACTIONS; NOVATION; PAYMENT; RELEASE.

I. DEFINITION AND GENERAL CONSIDERATION.

Pre-Existing Debt or Dispute.—Allegations of bill held not to make a case of accord and satisfaction, because the written and verbal contracts were contemporaneous, whereas an accord implies a pre-existing debt or dispute. *Rector v. Hancock*, 127 Va. 101, 102 S. E. 663.

An accord without satisfaction is insufficient and so where the defense of accord and satisfaction is set up the evidence must show both an accord and a satisfaction. *Eichelberger v. Mann*, 115 Va. 774, 778, 80 S. E. 595.

Actual Acceptance Necessary.—In order to constitute a valid accord and satisfaction, whether the substituted contract be executory or executed,

there must be an actual acceptance, and not a mere agreement to accept. *Rector v. Hancock*, 127 Va. 101, 102 S. E. 663.

The plea of accord and satisfaction is not established where the bill affirmatively shows that there never has been any substitution of the one contract for the other, and that the holder of the notes, though repeatedly requested, has failed and refused to comply with his agreement to accept the possession of the land and the services of complainants in discharge thereof. *Rector v. Hancock*, 127 Va. 101, 115, 102 S. E. 663.

Effect of Fraud.—A written release or acquittance of a claim for personal injury will not sustain a plea of accord and satisfaction in the premises, if its

execution was obtained by deception and fraud. *Norvell v. Kanawha, etc.*, R. Co., 67 W. Va. 467, 68 S. E. 288.

II. WHAT CONSTITUTES.

½A. IN GENERAL.

A receipt by the grantor of an easement "to lay, maintain, operate and remove" an oil and gas pipe line acknowledging payment "in full for all damages on any and every account caused by or arising from laying, maintaining and operating" such pipe line, while owner of the servient land, the terms thereof, when properly construed, not necessarily comprehending subsequent injuries, does not operate as a release, or accord and satisfaction, barring him or his vendee from recovery for such injuries. *Moore v. Hope Natural Gas Co.*, 76 W. Va. 649, 86 S. E. 564.

An executed contemporaneous verbal agreement for the discharge of a note, as distinguished from an executory contract for the same purpose, when fully performed by the maker of a money obligation and accepted as such by the payee amounts to an accord and satisfaction. *Rector v. Hancock*, 127 Va. 101, 113, 102 S. E. 663.

III. EFFECT OF ACCORD AND SATISFACTION.

An executory contract, oral or written, may be accepted in satisfaction of a pre-existing demand or controversy, and when so accepted the original demand or controversy is then wiped out; it is satisfied; and the right of action for it is gone, albeit it may be that out of the transaction designed as a satisfaction of the original wrong a new cause of action may arise. *Rector v. Hancock*, 127 Va. 101, 102 S. E. 663.

Matters Contemplated by Agreement—Intention of Parties—Extrinsic Evidence.—An accord and satisfaction operates as a bar only in regard to matters contemplated by the agreement. Whether it does operate must be determined from the intention of the parties as gathered from the agreement, and not from matters dehors the writing. But extrinsic evidence is admis-

sible to show the circumstances surrounding the parties at the date of the agreement, the nature of the transaction to which it was designed to apply, keeping in view the particular purposes to be effected, and giving to the terms employed their ordinary and usual meaning. *Moore v. Hope Natural Gas Co.*, 76 W. Va. 649, 653, 86 S. E. 564.

Matters Unknown at Time of Execution.—"An accord and satisfaction does not operate as a bar to matters unknown to the parties at the time of its execution. To give it that effect might work manifest injustice, and impose upon the releasor an instrument to which he did not assent." *Moore v. Hope Natural Gas Co.*, 76 W. Va. 649, 654, 86 S. E. 564.

Careless and Negligent Acts.—"Whether the receipt was intended to and in fact does absolve defendant from liability for the natural and unavoidable consequences of an act carefully and prudently done by virtue of the grant, it would not have that effect or so operate if such acts were carelessly and negligently performed. From such acts, though occasioned while he is engaged in the exercise of a lawful granted right, a defendant can not by contract exonerate himself. *Maslin v. B. & O. R. R. Co.* 14 W. Va. 180; *Brown v. Adams Exp. Co.*, 15 W. Va. 812; *Berry v. West Virginia, etc.*, R. Co., 44 W. Va. 538, 30 S. E. 143; *Johnson v. Richmond, etc.*, R. Co., 86 Va. 975, 11 S. E. 829; *Shannon v. Chesapeake, etc.*, R. Co., 104 Va. 645, 52 S. E. 376." *Moore v. Hope Natural Gas Co.*, 76 W. Va. 649, 653, 86 S. E. 564.

Accord and Satisfaction with Joint Trespasser.—*Barnes W. Va. Code*, p. 1157, ch. 136, § 7.

Person Committed for Misdemeanor May Be Discharged on Acknowledgment of Satisfaction by Party Injured.—*Va. Code* 1919, § 849.

Part Performance of an Obligation, Accepted in Satisfaction Extinguishes

it.—Va. Code 1919, § 5765. See *Robinet v. Taylor*, 121 Va. 583, 592, 93 S. E. 616.

IV. PLEADING AND PRACTICE,

Limitation of Actions.—Where a contract constitutes an accord and satisfaction, limitations independent of the principal transaction will not run. *Rector v. Hancock*, 127 Va. 101, 102 S. E. 663.

Proof of Admissible under General Issue.—In an action on simple contract, proof of accord and satisfaction of a disputed claim, is admissible under the general issue without specification. *Shore v. Powell*, 71 W. Va. 61, 76 S. E. 126.

"Full or general payment before suit brought, or a discharge by an accord and satisfaction, is admissible, under the general issue, without description thereof in a bill of particulars, when it is matter of defense." *Schwartz v. Clark*, 86 W. Va. 244, 246, 103 S. E. 47.

In an action of detinue to recover a certificate of stock pledged to secure payment of a debt, in which the pledge and non-payment of the debt are relied upon by way of defense, in a special plea, proof of a release of the pledge, or a discharge thereof by an accord and satisfaction, is admissible under the issue made by a general replication to the special plea. *Schwartz v. Clark*, 86 W. Va. 244, 103 S. E. 47.

The plea of accord and satisfaction must show some consideration moving toward plaintiff, or, in other words, that plaintiff obtained something of value by the new agreement. *Frank & Sons v. Gump*, 104 Va. 306, 308, 51 S. E. 358.

Parol Evidence.—An executed or fully performed contemporaneous verbal agreement for the discharge of a note, as distinguished from an execu-

tory contract for the same purpose, can not be shown by parol, and will not constitute a good defense in an action upon the note, except in so far as such contract, when fully performed by the maker of the note, and accepted as such by the payee, amounts to an accord and satisfaction. The collateral contract must have been executed in the sense that something else than money has been actually given and received in satisfaction of the debt. When this has been done, the debt has been discharged. *Rector v. Hancock*, 127 Va. 101, 102 S. E. 663.

Until there has been an acceptance and consequent discharge of the written obligation to pay money, it matters not whether the parol contract remains executory or has been fully executed so far as the rule as to parol evidence is concerned, because in either case the purpose is to prove a contract different from that which is evidenced by the writing. Of course, an executed contract will generally be of much more value to the defendant as a counterclaim or offset against an action on the written obligation than a contract which still remains executory; but neither one can be engrafted by parol upon such obligation so as to vary its terms in regard to matters completely covered by it. *Rector v. Hancock*, 127 Va. 101, 102 S. E. 663.

In the instant case, if the bill had alleged that subsequent to the execution of the notes, the defendant accepted the possession of the property and the services of the complainants in satisfaction of the notes and afterwards refused to release the deed of trust, parol evidence would have been admissible to prove such acceptance, as this would simply be proving by parol an accord and satisfaction equivalent to payment, which is always permissible. *Rector v. Hancock*, 127 Va. 101, 114, 102 S. E. 663.

ACCORDING TO LAW.—"When the court directs that a bond be executed conditioned 'according to law,' it has in its mind in the vast majority of instances just such a bond as was executed in this case; a bond to answer all costs and damages that may be incurred by reason of suing out the injunction in case the same shall be dissolved." *Columbia Amusement Co. v. Pine Beach Invest. Corp.*, 109 Va. 325, 63 S. E. 1002. See post, **BONDS; INJUNCTIONS.**

ACCOUNTS AND ACCOUNTING.

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CROSS REFERENCES.

See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82, and references there given. In addition, see post, AGENCY; ASSIGNMENTS; ASSUMPSIT; DOCUMENTARY EVIDENCE; EQUITY; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; JOINT TENANTS AND TENANTS, IN COMMON; LARCENY; LIMITATION OF ACTIONS; MINES AND MINERALS; PARTNERSHIP; RECEIVERS; SHERIFFS AND CONSTABLES; TRUSTS AND TRUSTEES. And see ACCOUNT. As to open account as being a chose in action, see post, ASSIGNMENTS. As to account as evidence, see post, DOCUMENTARY EVIDENCE. As to settlement of accounts of committees of insane persons, see post, INSANITY. As to interest on accounts, see post, INTEREST. As to account stated between master and servant, see post, MASTER AND SERVANT. As to account and statement of claim in mechanic's lien proceeding, see post, MECHANICS' LIEN. As to notice of motion for judgment upon account, see post, MOTIONS. As to bill for accounting, see post, PARTNERSHIP. As to settlement of accounts between partners, see post, PARTNERSHIP. As to motion to surcharge accounts of receivers, see post, RECEIVERS. In addition, see post, AGENCY; ASSIGNMENTS; ASSUMPSIT. As to reference of accounts, see post, REFERENCE AND COMMISSIONERS.

§1. ACCOUNT DEFINED.

"The word 'account' has more than one meaning. It is a reckoning or computation or written or printed statement of facts and occurrences, a recital of transactions, which would give it a broader meaning." *Diebold & Sons' Stone Co. v. Tatterson*, 115 Va. 766, 772, 80 S. E. 585.

I. VARIOUS KINDS OF ACCOUNTS.

A. ACCOUNTS STATED.

1. In General.

Generally, where persons who have had previous transactions of a monetary character agree that the account representing the transactions and the balance shown are correct, and the debtor expressly or impliedly prom-

ises to pay such balance, the account thereby becomes an account stated. *Hoover-Dimeling Lumber Co. v. Neill*, 77 W. Va. 470, 87 S. E. 855.

"To constitute an account stated, there must have been a settlement satisfactory to the parties interested, and concurrence by them in the result thereof, and a promise by the debtor express or implied to pay the balance so ascertained to be due. The meeting of minds is as essential to the existence of an account stated as such concurrence is in any other agreement. Both must assent to the correctness of the account and the balance due. Such we find to be the essential prerequisite of an account stated. *Robertson v. Wright*, 17 Gratt. (58 Va.) 534; *McNeel v. Baker*, 6 W.

Va. 153; *McCarty v. Chalfant*, 14 W. Va. 531; *McGraw v. Trader's Nat. Bank*, 64 W. Va. 509, 63 S. E. 398; *Camp v. Wilson*, 97 Va. 265, 274. 33 S. E. 591." *Hoover-Dimeling Lumber Co. v. Neill*, 77 W. Va. 470, 473, 87 S. E. 855.

An account rendered becomes an account stated only when it has been examined by the parties, and the balance admitted, without having been paid. *McGaw v. Trader's Nat. Bank*, 64 W. Va. 509, 63 S. E. 398.

Conclusiveness.—See post, "Impeaching Settled or Stated Accounts," II.

Sufficiency of Evidence.—In *First Nat. Bank v. Bank*, 72 W. Va. 700, 79 S. E. 649, the judgment of the lower court that the defendant was not indebted to plaintiff on an account stated was affirmed as being supported by the facts proven.

2. Retention of Account Rendered without Objection.

a. In General.

The failure to dispute an account rendered, after the lapse of a reasonable time, amounts to an admission of its correctness. *Buchanan v. Higginbotham*, 123 Va. 662, 97 S. E. 340; *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726; *McGraw v. Trader's Nat. Bank*, 64 W. Va. 509, 63 S. E. 398.

Objections to accounts rendered, which will prevent them from being deemed stated accounts must be made within a reasonable time. *Buchanan v. Higginbotham*, 123 Va. 662, 97 S. E. 340.

Uncontroverted proof of such an admission is sufficient basis for the recovery on the account without resorting to the original entries or other proof. *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 126, 83 S. E. 726.

Rebuttable Presumption.—Failure to object within a reasonable time to an account rendered, amounts only to a

rebuttable admission, not to an estoppel. *Laraway v. Croft Lumber Co.*, 75 W. Va. 510, 512, 84 S. E. 333.

When Rule Inapplicable.—The rule that an account rendered and retained an unreasonable time, without objection, becomes an account stated, applicable as between merchant and merchant, and principal and agent, is inapplicable to monthly accounts rendered by one of the parties for money and goods advanced to the other pending the execution by the other of a logging contract. And at the completion of such contract the party to whom such accounts are so rendered is not estopped to dispute the correctness of items therein not previously objected to. *Dodge v. Brown*, 74 W. Va. 466, 468, 82 S. E. 262.

Necessity for Pre-Existing Debt or Liability.—Where there is no pre-existing debt or liability, the rendering of an account, to one who keeps it without objection, does not make an account stated. *Cooper v. Upton*, 60 W. Va. 648, 64 S. E. 523; S. C., 65 W. Va. 401, 64 S. E. 527.

There can be no account stated where there is no pre-existing debt or liability. *Cooper v. Upton*, 60 W. Va. 648, 64 S. E. 523.

What Account Determines.—An account stated, in the absence of fraud, mistake, error or omission, determines only the amount of the debt when a liability exists. Alone, it can not create a liability where none previously existed. *Cooper v. Upton*, 60 W. Va. 648, 64 S. E. 523; S. C., 65 W. Va. 401, 64 S. E. 527.

b. Whether Doctrine Restricted to Merchants.

While the doctrine as to accounts stated may originally have had its origin in transactions between merchants, it has quite generally been extended to all cases where the relation of debtor and creditor exists. *Buchanan v. Higginbotham*, 123 Va. 662, 97 S. E. 340.

"Some courts have limited the rule, that an account may become stated by silence from which acquiescence may be inferred, to accounts between merchants only; but even though an account rendered between others than merchants may not become technically an account stated, we think that it is nowhere doubted that the evidence of such retention of objection, between parties other than merchants, may be taken to show an implied admission or acquiescence in its correctness, the weight of the testimony being for the consideration of the jury, under the circumstances of the particular case." *Buchanan v. Higginbotham*, 123 Va. 662, 666, 97 S. E. 340.

"In Virginia, it has been settled since the case of *Townes v. Birchett*, 12 Leigh (39 Va.) 173, that the doctrine is not restricted to merchants, and it is there held that the rule is not confined to accounts rendered by merchant to merchant of mutual dealings between them as merchants, much less between merchants abroad and merchants at home." *Buchanan v. Higginbotham*, 123 Va. 662, 667, 97 S. E. 340.

Accounts between Banker and Customer.—The rule that an account rendered and retained for a long time without objection becomes an account stated is, as a general proposition, inapplicable in Virginia and West Virginia, except as between merchant and merchant, and principal and agent, with mutual accounts. Between banker and customer some superior equity must intervene in order to preclude the customer from objecting to an illegal and unauthorized charge against him. *McGraw v. Trader's Nat. Bank*, 64 W. Va. 509, 63 S. E. 398.

B. SETTLED ACCOUNTS.

When an account is paid it becomes a settled account. *McGraw v. Trader's Nat. Bank*, 64 W. Va. 509, 63 S. E. 398.

C. BANKING ACCOUNTS.

See post, **BANKS AND BANKING.**

D. BOOK ACCOUNTS.

See post, **DOCUMENTARY EVIDENCE.**

F. ACCOUNTS OF FIDUCIARIES.

1. In General.

Va. Code 1919, §§ 5401-5440; *Barnes W. Va. Code*, pp. 994-996, ch. 87, §§ 3, 67, 9.

1. Administrators' and Executors' Accounts.

See post, **EXECUTORS AND ADMINISTRATORS**

2. Agents' Accounts.

See post, **AGENCY.**

3. Guardians' Accounts.

See post, **GUARDIAN AND WARD.**

4. Partnership Accounts.

See post, **PARTNERSHIP.**

5. Trustees' Accounts.

See post, **TRUSTS AND TRUSTEES.**

G. ACCOUNTS OF PUBLIC OFFICERS.

Barnes W. Va. Code, p. 122, 123, ch. 10, B, §§ 2-6.

H. ACCOUNTS OF PUBLIC SERVICE CORPORATIONS.

Barnes W. Va. Code, p. 228, ch. 15, O, § 26.

II. IMPEACHING SETTLED OR STATED ACCOUNTS.

A. IN GENERAL.

An account stated by the parties is not generally conclusive. *Hoover-Dimeling Lumber Co. v. Neill*, 77 W. Va. 470, 87 S. E. 855.

An account stated by a commissioner under an order of reference entered in an action at law, while not conclusive against the parties, will be treated as prima facie correct; and on him who

challenges its accuracy or justness devolves the duty of showing it to be unjust or inaccurate. *Hoover-Dimeling Lumber Co. v. Neill*, 77 W. Va. 470, 87 S. E. 855.

Presumption of Correctness.—An account stated affords presumptive evidence of the accuracy and correctness of the charges therein stated, and the burden of proof rests on him who challenges the verity of such account. *Hoover-Dimeling Lumber Co. v. Neill*, 77 W. Va. 470, 87 S. E. 855.

“When fiduciaries have settled their accounts in a chancery suit pending for that purpose, and such settlements have been duly confirmed, from time to time, by decree of court, they are presumed to be correct and can not be opened except upon a proper proceeding filed in due time, in which the errors complained of must be specifically pointed out, and the parties affected thereby given an opportunity to be heard. *Turnbull v. Buford*, 119 Va. 304, 307, 89 S. E. 233.

B. WHEN SUBJECT TO IMPEACHMENT.

Fraud, Mistake or Error.—An account stated by the parties may be impeached and corrected, for fraud, mistake or error in the terms composing it or the balance ascertained. While the agreement of the parties operates as an admission that the account is correct, it does not create an estoppel and so preclude the right to inquire further into its merits, unless the position of the other party has thereby been altered to his prejudice. *Hoover-Dimeling Lumber Co. v. Neill*, 77 W. Va. 470, 475, 87 S. E. 855.

Settled or stated accounts can not be opened or corrected except on the ground of fraud, accident, mistake or omission; and the burden is on the party seeking to impeach the account to prove the existence of such fraud, accident, mistake or omission, by clear and convincing evidence. *Chapman v. Liverpool Salt, etc., Co.*, 57 W. Va. 395, 50 S. E. 601.

C. SURCHARGING AND FALSIFYING

A bill filed by a board of supervisors of a county against a county treasurer charging that he had made certain settlements with the board which were erroneous, and pointing out the errors complained of by reason of which he had failed to account for funds due the county from delinquent taxes, and had charged a greater commission on certain funds than the law allows, and praying for a reference to a commissioner to settle the accounts of the treasurer, and that he be required to produce before such commissioner his books and papers to enable him properly to state the accounts, and that he be required to pay the amount found by him, and for general relief, is in no sense a bill of discovery, but a bill to surcharge and falsify the accounts of the treasurer, and is subject to the rule governing such bills which requires the specific grounds of surcharge and falsification to be stated in the bill. *Board v. Powell*, 106 Va. 751, 58 S. E. 812.

If, upon a general bill for an account, the defendant relies upon and proves a prior settlement in pais of the matters in dispute, the complainant should be allowed to amend his bill, if desired, and to surcharge and falsify the stated or settled account by pointing out or indicating specifically any items of error, mistake or omission existing therein. *Branner v. Branner*, 108 Va. 660, 62 S. E. 952.

Procedure.—“Our procedure with respect to surcharge and falsification of settled accounts is liberal and simple. As far back as *Shugart v. Thompson*, 10 Leigh (37 Va.) 434, 452, it was held that where on order of account proofs are adduced, which, though they do not sustain the specific objections taken to the bill, ascertain that the settlement may be justly surcharged in other respects, although according to the strictest and most formal practice the plaintiff may be required to amend his bill and urge therein the objections

made to the settlement shown by the evidence, yet it is competent for the court to dispense with this proceeding, and permit the plaintiff to proceed in respect to the objections shown by the evidence in like manner as if they had been noticed by the bill. But if the defendant objects that he was surprised by the new objections to the account, the court may and ought to give him time to combat them; and if he urge the privilege he would have by answer to an amended bill, to explain and defend the account in these respects, such privilege should be secured to him, by allowing him to file his affidavit containing such explanation and defense, and by giving to such affidavit the like credit and effect, as his answer containing the like matter would be entitled to." *Miller v. Smith*, 109 Va. 651, 653, 64 S. E. 956.

Finality of Decree.—When the ex parte settlements of a trustee have been surcharged and falsified by a bill filed for that purpose, and the decree of the trial court has been affirmed by the supreme court with respect to all items of surcharge and falsification, it is a finality not only with respect to the particular items to which the attention of the court was called, but with respect to all the accounts which the trustee had settled before the institution of the suit. New items existing when the former decree was made can not, as a rule, be added by the trial court when the case is remanded. The former adjudication applies not only to matters actually then adjudicated, but to every point which properly belonged to the subject of litigation, or which the parties, exercising reasonable diligence, might have brought forward at the time. *Miller v. Smith*, 109 Va. 651, 64 S. E. 956.

III. EQUITY JURISDICTION.

A. IN GENERAL.

The general rule is that courts of equity will take jurisdiction of suits for the settlement of accounts where the

accounts are mutual, extending over a long period of time, intricate, and complicated. *Croft Land Co. v. Royal Block Coal Co.*, 87 W. Va. 570, 105 S. E. 799.

It seems to be well settled that, in matters of account growing out of privity of contract between parties, not only where the accounts are mutual and intricate, but also where the accounts are all on one side, and a discovery is sought which is material to plaintiff's relief, equity has jurisdiction. *Belcher v. Big Four Coal, etc., Co.*, 68 W. Va. 716, 719, 70 S. E. 712.

An indebtedness arising because of a mistake made in the settlement of accounts which does not involve the restatement of such accounts, or which arises from the failure to include in such settlement a proper item, may be recovered in an action at law without resort to a suit in equity to surcharge and falsify the settlement. *State v. Carfer*, 83 W. Va. 331, 97 S. E. 825.

Whether or not a court of equity has jurisdiction in a mere matter of account between two parties must be determined by the facts of the particular case. *Oglesby Co. v. Ould Co.*, 117 Va. 546, 85 S. E. 475.

Where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account to the plaintiff, equity will entertain jurisdiction of a suit for an accounting, although the account is neither mutual nor complicated. *Wilson v. Kennedy*, 63 W. Va. 1, 59 S. E. 736. See post, TRUSTS AND TRUSTEES.

"If there is a relation of principal and agent, and the matter as to which an accounting is sought are peculiarly within the knowledge of the latter, there is jurisdiction in equity as well as in courts of law." *Sperry v. Premier Pocahontas Collieries Co.*, 87 W. Va. 223, 225, 104 S. E. 486.

A bill for an accounting filed by a principal against an agent whose duty it is to keep and render accounts to the plaintiff, alleging failure to keep

and render accounts of money coming into his hands, or becoming due from him, and wrongful conduct on his part rendering it difficult or impossible for the plaintiff to ascertain the true state of the account, sets up a good cause of action cognizable in equity. *Sperry v. Premier Pocahontas Collieries Co.*, 87 W. Va. 223, 104 S. E. 486.

Accounting Incident to Main Purpose of Suit.—"It is settled law that if the main purpose of the suit is to settle title or boundary to land and no other grounds of equity exist, accounting and discovery of profits are merely incidents to the right of title, and equity has no jurisdiction of the controversy." *Lockwood v. Carter Oil Co.*, 73 W. Va. 175, 180, 80 S. E. 814.

Mere conflict in claim to oil royalty does not assure equity jurisdiction to order an accounting. *Peterson v. Smith*, 75 W. Va. 553, 84 S. E. 250, wherein the bill did not make a case for an accounting.

Necessity of computation of the quantity and value of coal mined and timber cut from land by a trespasser confers no right to an accounting in equity. The right to such an accounting can neither precede nor assume the establishment of the trespass itself. It is a sequence, dependent upon the existence of the trespass, and an issue of that kind belongs exclusively to courts of law in the absence of an independent equity such as only an equitable title rendering the legal remedies inapplicable, inadequate and inappropriate. *Hudson v. Iguano Land, etc., Co.*, 71 W. Va. 402, 76 S. E. 797.

B. PERSONS SUBJECT TO ACCOUNTS.

10. Agents.

Where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an account is sought are peculiarly in the knowledge of the latter, equity will assume jurisdiction. *Wilson v. Kennedy*, 63 W. Va. 1, 2, 59 S. E. 736.

A court of equity, under its general

jurisdiction for the enforcement of trusts, has jurisdiction to settle and adjust accounts between principal and agent at the suit of the principal against his agent where confidence is reposed in him by his principal, but, as a general rule, a bill for an account by the agent against his principal does not lie, as it is the duty of the agent and not of the principal to keep the account, and usually there is no trust or confidence reposed in the principal. *Davis v. Marshall*, 114 Va. 193, 76 S. E. 316.

Loss of Account Book.—While there are some exceptions to the rule that an agent can not maintain a bill for an accounting against his principal, an agent seeking to maintain such a bill must allege in his bill the facts which bring him within some exception to the rule. A general allegation that there are mutual, current and, in some instances, confused items of account between them as principal and agent, unaccompanied by any account of the agent against principal, is not sufficient. An allegation that some of the accounts have been destroyed by an accidental fire does not relieve the situation of the agent, as the loss or destruction of account books or of items of account is not of itself a ground of equity jurisdiction. *Davis v. Marshall*, 114 Va. 193, 76 S. E. 316.

IV. PROCEEDINGS TO OBTAIN AN ACCOUNTING.

B. OFFICERS TAKING ACCOUNT —COMMISSIONER IN CHANCERY.

See post, "In General," IV, C, 1. And see also post, "Commissioner of Accounts," VII.

Appointment, Removal, Power and Oath.—*Barnes W. Va. Code*, p. 1124, ch. 129, §§ 1, 2.

Reference of Accounts.—*Va. Code*, 1919, § 6179; *Barnes W. Va. Code*, p. 1124, ch. 129, § 3.

Same—In Vacation.—*Barnes W. Va. Code*, p. 1125, ch. 129, § 5.

Accounts in Actions at Law.—Barnes W. Va. Code, p. 1126, ch. 129, § 10.

C. WHEN AN ACCOUNT WILL BE ORDERED.

1. In General.

When Deemed Necessary.—Under § 3921, Code 1906 (Barnes Code, p. 1126, ch. 129, § 10), in any case at law in which it may be deemed necessary the court may direct a commissioner in chancery or other competent person, either before or at the time of trial, to take and state an account between the parties, which account when thus stated shall be deemed prima facie correct and may be given in evidence to the court or jury trying the case. *Connell v. Yost*, 62 W. Va. 66, 57 S. E. 299.

To Enable Party to Make.—An order for an account will not be awarded merely to enable a party to make out his case, or to reopen the investigation of the account of an indebtedness which has been previously settled by the parties with the aid of their counsel, and the integrity and correctness of which has not been impugned. *Hamilton v. Stephenson*, 106 Va. 77, 55 S. E. 577.

Laches.—After the funds in a cause have passed beyond the control of the court, and the cause is practically ready for a final decree, a court of equity will not, at the instance of the counsel for some of the parties (who has paid no attention to the case for years, and whose clients have been, in the meantime, represented by other counsel) order an account to ascertain what is due to him from his clients for services rendered in the cause. *Miller v. Penniman & Bro.*, 110 Va. 780, 67 S. E. 516.

C¼. PARTIES.

In a suit by an assignee for an accounting of certain coal royalties, a part of the personal estate devised to the assignor and widow for life, subject to debts, with remainder in equal

proportion to plaintiff, a son, and another son, named also as executors of the will, with power given them to manage and control said personal estate, the remaindermen in their individual rights and as executors of said will are necessary parties to such suit, and because of their absence the bill is fatally defective on demurrer. *Poteet v. Imboden*, 73 W. Va. 567, 80 S. E. 958.

Where a mother controls and manages a farm, and takes all the rents and profits arising therefrom, her sons who simply assist her in running the farm are not proper parties to a suit against the mother to have an account of such rents and profits. *Watts v. Watts*, 104 Va. 269, 51 S. E. 359.

C¼. PLEADING.

Where an amended bill relates only to certain items of debit and credit in an accounting to be had between the parties, and the case on its merits has been fully matured for hearing, it is unnecessary to await the answer of the defendant to the amended bill before adjudicating the principles of the cause and directing such accounting. *Gay v. Gibson*, 85 W. Va. 226, 101 S. E. 365.

In a bill for a general accounting specific pleading is not required; it is sufficient to show the relation of the parties which entitles complainant to the relief, and a general statement of the matters pertaining to which the accounting is sought will be sufficient. *McGraw v. Trader's Nat. Bank*, 64 W. Va. 509, 516, 63 S. E. 398.

In a suit for an accounting against lessor and lessee in an oil and gas lease, by one claiming a portion of the oil and gas under an alleged deed or contract from the lessor, and which contract besides a covenant to convey contains also a provision for the payment to the vendor of \$300.00, for each and every well drilled and completed as stipulated, within ninety days from the date of such completion, and which by the terms of the contract is

to be of the essence thereof, default in such payment to render the contract null and void; excusing performance thereof, if the bill seeking such accounting of the oil or gas produced fails to allege payment of the sum stipulated and performed by him of all other conditions precedent, it is fatally defective, and bad on demurrer, and if further amendment is declined the bill is properly dismissed. *Freeman v. Carnegie Natural Gas Co.*, 74 W. Va. 83, 87, 81 S. E. 572.

Averment that Equitable Relief Requisite without Facts Demurrable.

—Where the bill shows that the specific accounts can be fairly determined in a court of law, and discovery is unnecessary, mere general averments in the bill that adequate relief can be obtained only in a court of equity, without allegation of facts sufficient for discovery, or facts showing discovery is necessary, or complexity or intricacy of mutual accounts, which a court of law could not properly adjudicate, will not be sufficient to confer equity jurisdiction, and a demurrer to the bill should be sustained. *Croft Land Co. v. Royal Block Coal Co.*, 87 W. Va. 570, 105 S. E. 799.

Bill Not Showing Right to Relief in Equity.—Where a bill seeks to assert a purely legal claim, and alleges a necessity for an accounting between two codefendants in order to ascertain if the plaintiff in the bill is liable to one of the codefendants as guarantor of the other defendant's obligation, and it appears from an exhibit filed with the bill that the liability, when so ascertained, could not be set off against the plaintiff's demand at law, and there are no other grounds of equity jurisdiction to sustain the bill, a demurrer should be sustained. *Croft Land Co. v. Royal Block Coal Co.*, 87 W. Va. 570, 105 S. E. 799.

Multifariousness.—Bill for an accounting and to set aside deeds joining as defendants all beneficiaries of

fraud held not multifarious. *Koen v. Koen*, 86 W. Va. 503, 103 S. E. 322.

D. PROCEDURE BEFORE THE COMMISSIONER.

1. In General.

Barnes W. Va. Code, p. 1125, ch. 129, §§ 7, 8.

Where an account is taken by a commissioner, the judge is well within his rights in going over the commissioner's report with him, and assisting him in testing its accuracy in the light of exceptions and papers filed therewith, and his action in this respect is to be commended. *Herrell v. Board*, 113 Va. 594, 75 S. E. 87.

Instruction by Judge.—*Barnes W. Va. Code*, p. 1125, ch. 129, § 6.

2. Notice of Taking Account.

Va. Code, 1919, § 6180; *Barnes W. Va. Code*, p. 1125, ch. 129, § 4.

Where a defendant and his counsel were present throughout the taking of an account by a master, and participated in all the proceedings before him, and the report of the master was re-committed to him at the instance of the defendant, to consider his former report in connection with exceptions filed by the defendant, and to amend the same or make a new report based on his former report and the depositions theretofore taken, and the papers and records filed, and in the light of said exceptions and calculations, and evidence, to make such report as, in his judgment, was proper, the report made in pursuance thereof can not be said to have been made without notice to the defendant. *Herrell v. Board*, 113 Va. 594, 75 S. E. 87.

3. Evidence.

Proof of Debt by Affidavit.—*Barnes W. Va. Code*, p. 1126, ch. 129, § 11.

F. REPORT OF COMMISSIONER OR MASTER.

See post, REFERENCE.

Hearing on Report.—*Barnes W. Va. Code*, p. 1126, ch. 129, § 9.

G. OBJECTIONS AND EXCEPTIONS.

It is not equitable for a defendant to a bill of injunction (in whose favor a judgment at law was rendered, for a sum of money, which he had paid as security for the complainant), to except to a commissioner's statement of the debits and credits between them, "to the time of the judgment; on the ground that, from the circumstances of the case, and conduct of the parties, they considered their accounts as closed, and nothing due on either side;" and, yet, to select and rely upon the judgment, as an item in his favor, in exclusion of the other items in the account. *Foster v. Clarke*, 5 Munf. (19 Va.) 430.

I. RESUBMISSION.

Barnes W. Va. Code, p. 1124, ch. 129, § 3.

V. ACTIONS ON ACCOUNT.

A. IN GENERAL.

By Assignee.—*W. Va. Code*, ch. 99, §§ 14-15.

Severance of Causes of Action.

While an account is assignable, a single cause of action can not be subdivided by various assignments, without the consent of the debtor, so as to enable each assignee to institute an action at law in his name for the part so assigned to him. Such subdivision is not in accord with the debtor's contract, and might subject him to many embarrassments and responsibilities not contemplated in his original contract. *Phillips v. Portsmouth*, 112 Va. 164, 70 S. E. 502.

Pleading.—An account filed with a declaration is no part of the declaration, and defects in the account can not be taken advantage of by demurrer. *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820.

Time of Amendment.—In an account upon which a notice of motion for judgment was based the words "Long Branch" were used to designate one of the places where the services were

rendered. There was no such place, the proper designation being "Laurel Branch." Pending the examination of the plaintiff as a witness, attention was called to the error, and on motion of the plaintiff he was permitted to make the needed change over the objection of the defendant. Held: This was a mere immaterial misnomer, which did not in any way take the defendant by surprise, and that there was no error in the ruling of the trial court. *Mankin v. Aldridge*, 127 Va. 761, 105 S. E. 459.

Burden of Proof.—The burden of proving that objection was made within a reasonable time rests upon the party contesting the account so rendered. *Buchanan v. Higginbotham*, 123 Va. 662, 97 S. E. 340.

In a proceeding by motion for judgment for the balance due on account, it was error to refuse an instruction that the burden was upon the plaintiff to prove his case by a preponderance of evidence, "and if he has not so proven his claim, you will find for the defendant as to any item therein which has not been so proven by the plaintiff." *Mankin v. Aldridge*, 127 Va. 761, 105 S. E. 459.

Inquiry of Damages Unnecessary.—*Va. Code*, 1919, § 6132.

B. FILING COPY OF ACCOUNT.

When Account to Be Filed with Declaration.—*Va. Code* 1919, § 6090.

VI. ACTION OF ACCOUNT.

In the ancient and practically obsolete common-law action of account, the only issue was liability, not for money but to account. The defendant could plead his willingness to account and confess his liability, or deny that he was ever under any duty to account, or plead that he had rendered a full account or set up a release, a bond given in satisfaction or the statute of limitations, when available. If he failed on an issue so made, judgment in the first instance was not rendered for any sum of money. It was, not

that the plaintiff recover, but that the defendant render an account. The judgment was technically known as that of *quod computet*. After the entry thereof the case went to auditors for a settlement of the account, and on the return of their finding judgment was rendered for the amount ascertained by them. 1 Bac. Abr. 43, 54, inc.; 1 Chitty Pl. (11 Am. Ed.) 488; Andrew's Stephen's Pl. 78n. The action lay against guardians in socage, bailiffs, receivers, one merchant in favor of another, partner against partner, and perhaps others. It was not in any sense like *assumpsit*, because it did not sound in damages. *Mitchell v. Penny*, 66 W. Va. 660, 662, 66 S. E. 1003.

When Action of Account May Be Maintained.—Acts 1920, p. 28; Pollard's Code 1920, p. 713.

VII. COMMISSIONER OF ACCOUNTS.

Va. Code 1919, §§ 5401-5440; Barnes

Code, ch. 137, § 6. See post, REFERENCE.

VIII. STATE ACCOUNTANT AND STATE BOARD OF ACCOUNTANCY.

Va. Code 1919, §§ 550-572; W. Va. Acts 1917, Reg. Sess. c. 59; W. Va. Code Suppl. 1918, § 306a, 306d, ch. 11, A, §§ 1-4.

IX. CERTIFIED PUBLIC ACCOUNTANTS.

Barnes Code, ch. 15 G, §§ 1-6.

X. MONEY OF ACCOUNT.

Va. Code 1919, §§ 5548-5550; Barnes W. Va. Code, p. 1014, ch. 96, §§ 1-3.

XI. FRAUDULENT ENTRIES IN ACCOUNTS.

Va. Code, 1919, § 4457; Barnes W. Va. Code, p. 1200, ch. 145, § 21.

ACCOUNTS, CLAIMS AND DEBTS.—See ante, ACCOUNTS AND ACCOUNTING, p. 9, and see post, CLAIM; INDEBTED—INDEBTEDNESS. As to commissioner of accounts, see post, REFERENCE AND COMMISSIONERS.

In *Wyatt v. Norris*, 66 W. Va. 667, 669, 66 S. E. 1016, it is said: "These observations lead us to inquire: What is the ordinary understanding of the words **accounts, claims and debts** as used in this will? To be more specific, and to reach more nearly the case: Do these words ordinarily signify money on deposit in bank? Our answer is that they do not. In common acceptance, money in bank is considered as ready money, not as an account, claim or debt due to the depositor. *Dabney v. Cottrell*, 9 Gratt. (50 Va.) 572."

ACCOUNTS STATED.—See ante, ACCOUNTS AND ACCOUNTING.

Accretion.

See the title ACCRETION, vol. 1, p. 103, and references there given. In addition, see post, BOUNDARIES; NAVIGABLE WATERS; WATERS AND WATERCOURSES.

ACCRUE.—**Accrue** is defined to mean to come into existence, to become vested. *Dunn v. Bank*, 74 W. Va. 594, 599, 82 S. E. 758. See post, BANKS AND BANKING.

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See the title ACKNOWLEDGMENTS, vol. 1, p. 104, and references there given. As to enforcement of defectively acknowledged conveyance by wife, see post, HUSBAND AND WIFE. As to taking acknowledgment as judicial act, see post, NOTARY PUBLIC. As to liability of notary for taking void or defective acknowledgment, see post, NOTARY PUBLIC. As to authority of officer to take and sufficiency of acknowledgment, see 3 Va. Law Reg., N. S., 492.

III. NECESSITY.

See post, "In General," VII, A.

½A. IN GENERAL.

See Va. Code 1919, § 5204; Barnes Code, ch. 73, § 2.

A. BETWEEN THE PARTIES.

A deed or deed of trust, etc., may be good between the parties without a certificate of acknowledgment. *Clarksburg Casket Co. v. Valleu Undertaking Co.*, 81 W. Va. 212, 215, 94 S. E. 549; *State v. Smoot*, 82 W. Va.

63, 67, 95 S. E. 526, citing *State v. Proudfoot*, 38 W. Va. 736, 18 S. E. 949; *Board v. Dunn*, 27 Gratt. (68 Va.) 608, 623.

B. FOR RECORDATION.

Va. Code 1919, § 5204; Barnes Code, ch. 73, § 2.

Deed or Deed of Trust.—"A sufficient certificate of acknowledgment is essential to the recordation of a deed or deed of trust, and, without it, the copying of the instrument on the record book does not constitute con-

structive notice. As to creditors and purchasers without notice, it is void. *Abney v. Ohio Lumber, etc., Co.*, 45 W. Va. 446, 32 S. E. 256; *Cox v. Wayt*, 26 W. Va. 807; *Ihrig v. Ihrig*, 78 W. Va. 360, 88 S. E. 1010." *Clarksburg Casket Co. v. Valleu Undertaking Co.*, 81 W. Va. 212, 215, 94 S. E. 549.

C. FOR ADMISSION IN EVIDENCE.

Not Admissible in Evidence unless Properly Acknowledged.—A deed, the execution of which is not proved otherwise than by a certificate of acknowledgment, reciting that it was acknowledged by the grantor before his deputy, as such deputy, and signed by the grantor himself, as clerk of a county court, is inadmissible as evidence. *Webb v. Ritter*, 60 W. Va. 193, 196, 54 S. E. 484.

An attested copy of a deed not properly acknowledged and, therefore, not recordable, is not evidence in lieu of the original. *Goad v. Walker*, 73 W. Va. 431, 436, 80 S. E. 873.

Sufficient Compliance Renders Admissible as Evidence.—A deed purporting to convey land situated in West Virginia, acknowledged in the year 1872, in the city of New York, before a commissioner for the commonwealth of Virginia, in the state of New York, recorded in West Virginia in the county in which the land lies, and reacknowledged before an officer competent to take acknowledgments of deeds conveying land situated in West Virginia, after the commencement of the action in which its use is desired as evidence, is admissible, between the parties thereto and against all other persons except subsequent purchasers claiming the land and creditors seeking to charge it, under the same title. *Webb v. Ritter*, 60 W. Va. 193, 195, 54 S. E. 484.

D. INSTRUMENTS REQUIRING ACKNOWLEDGMENT.

See ante, "Between the Parties," III, A; "For Admission in Evidence," III, C; post, "In General," VII, A.

Candidate.—Va. Code 1919, § 154.

Primary Candidate.—Va. Code 1919, § 229.

Trade-Mark or Brand for Timber.—Va. Code 1919, § 1449.

Delinquent Land Proceedings.—Va. Code 1919, §§ 2476, 2495.

Decreeing Capital Stock.—Va. Code 1919, § 3781.

Certificate of Incorporation.—Va. Code 1919, § 3851.

Same—New Charter after Dissolution.—Va. Code 1919, § 3811.

Same—Purchases of Property and Franchises.—Va. Code 1919, § 3817.

Same—Non-Stock Corporation and Amendment Thereof.—Va. Code 1919, §§ 3874, 3875.

Consolidation of Corporations.—Va. Code 1919, § 3822.

Amendment of Charter.—Va. Code 1919, §§ 3779, 3780.

Same—Railroad.—Va. Code 1919, § 3859.

Same—Public Service Corporation.—Va. Code 1919, § 3868.

Articles of Association — Railroad.—Va. Code 1919, § 3857.

Same—Public Service Corporation.—Va. Code 1919, § 3866.

Marriage of Minor.—Va. Code 1919, § 5078.

Waiving Jointure.—Va. Code 1919, § 5121.

Conditional Sales.—Va. Code 1919, § 5189, amended by Va. Acts 1920, p. 398.

Representatives.—Va. Code 1919, §§ 5204; 5207.

Power of Attorney — Married Women.—Va. Code 1919, § 5215; Barnes Code, ch. 73, §§ 2, 10.

Same — Execution of bonds for Surety Company.—Va. Code 1919, § 4349.

Plats to Lots.—Va. Code 1919, § 5218; Barnes Code, ch. 73, A. §.12; Va. Code 1919, § 5221.

Agent to Conduct Mercantile Business.—Va. Code 1919, § 5223.

Widow Renouncing Will. — Va. Code 1919, § 5276.

Designation of Guardian. — Code 1919, § 5317.

Altered Deed.—Although material alteration in a deed may have been with the consent of the grantors, the deed can not operate to invest in the grantee land not covered by the original grant, without a redelivery of the deed by them, and, if it has been acknowledged before the alteration, the deed should be again acknowledged. 1 Devlin on Deeds, § 462a. Waldron v. Waller, 65 W. Va. 605, 64 S. E. 964, 967.

IV. WHO MAY MAKE.

Certificate of Incorporation — New Charter after Dissolution.—Va. Code 1919, § 3811.

Same—Purchaser.—Va. Code 1919, § 3817.

Same — Non-Stock Corporation Thereof.—Va. Code 1919, §§ 3874, 3875.

Articles of Association — Railroad.—Va. Code 1919, § 3857, amended by Va. Acts 1920, p. 305, but not as to this provision.

Same—Public Service Corporation.—Va. Code 1919, § 3866.

Amendment of Charter—Railroad.—Va. Code 1919, § 3859.

Same—Public Service Corporation.—Va. Code 1919, § 3868.

Agent for Married Woman.—Va. Code 1919, § 5215; Barnes Code, ch. 663, § 3, ch. 73, § 6a.

V. WHO MAY TAKE.

A. IN GENERAL.

Of Candidate.—Va. Code 1919, § 154.

Of Primary Candidate.—Va. Code 1919, § 229.

Trade-Mark or Brand.—Va. Code 1919, § 1449.

Delinquent Land.—Va. Code 1919, § 2476.

Commissioners.—Va. Code 1919, § 2853; Barnes W. Va. Code, ch. 52, § 13, ch. 73, § 3.

Certificate Decreasing Capital Stock.—Va. Code 1919, § 3781.

Certificate of Consolidation of Corporations.—Va. Code 1919, § 3822.

Articles of Association — Railroad.—Va. Code 1919, § 3857, amended by Va. Acts 1920, p. 305, not as to this provision.

Same—Public Service Corporation.—Va. Code 1919, § 3866.

Power of Attorney to Execute and Revoke Bonds.—Va. Code 1919, § 4349.

Certificate of Incorporation. — Va. Code 1919, § 3851.

Same—Of Purchaser. — Va. Code 1919, § 3817.

Same — Non-Stock Corporation and of Amendment Thereof.—Va. Code 1919, §§ 3874, 3875.

Amendment of Charter — Railroad.—Va. Code 1919, § 3859.

Same — Public Service Corporation.—Va. Code 1919, § 3868.

Certificate for Amendment of Charter.—Va. Code 1919, §§ 3779, 3780.

Conditional Sales.—Va. Code 1919, § 5189, amended by Va. Acts 1920, p. 398.

Court or Clerk.—Va. Code 1919, § 5204; Barnes Code, ch. 73, § 3.

President of County Court.—Barnes Code 1918, ch. 39, § 3a.

Notary Public Connected with Bank.—W. Va. Acts 1919, ch. 60, p. 249.

By Justices of the Peace.—Barnes Code, ch. 50, §§ 5-7.

Within United States.—Va. Code 1919, §§ 5205, 5206; Barnes Code, ch. 51, § 11, ch. 73, § 3.

Of Representatives. — Va. Code 1919, §§ 5204, 5207; Barnes W. Va. Code, ch. 73, § 3.

Of Corporations.—Va. Code 1919, §§ 5207, 5208 (Amended by Va. Acts 1920, p. 586) Pollard's Code 1920, p. 235, § 5209.

Land Plats.—Va. Code 1919, § 5218; Barnes Code, ch. 73 A. § 12.

Designation of Guardian.—Va. Code 1919, § 5317; Barnes Code, ch. 82 § 4.

A deputy clerk, being empowered by a statute of Virginia to "discharge any of the duties of the clerk," could, in his own name as such deputy, certify acknowledgments to writings, whether intended for recordation in the office of his principal, or in any other county court clerk's office of Virginia. *Goad v. Walker*, 73 W. Va. 431, 439, 80 S. E. 873.

Deputy Clerk and Notary Public.—The offices of deputy clerk of a county court and notary public are not incompatible, and the clerk's acknowledgment to a tax deed, taken and certified by a notary public who is also the clerk's deputy, is valid. *Friedman v. Craig*, 77 W. Va. 223, 87 S. E. 361.

Deputy of Grantor.—A deed acknowledged by the grantor before his deputy, as such deputy, and signed by the grantor himself, as clerk of a county court, is not properly acknowledged. *Webb v. Ritter*, 60 W. Va. 193, 196, 54 S. E. 484. But see next succeeding paragraph.

"The rule forbidding a deputy clerk, as such, to certify the acknowledgment of his principal rests upon a mere technicality, the theory being that the deputy's act is the act of his principal and the same, in effect, as if the principal had taken his own acknowledgment. But we can see no valid reason why a person, holding the office of deputy clerk, may not take the chief clerk's acknowledgment in the capacity of notary public. We would certainly not be forbidden to do so because of any supposed improper influence arising out of his subordinate

position." *Friedman v. Craig*, 77 W. Va. 223, 225, 87 S. E. 361.

"A man can neither take his own acknowledgment nor the acknowledgment of another person to a deed, conveying property to him. For the latter proposition, *Tavener v. Barrett*, 21 W. Va. 656, is pointed authority and it seems much clearer that a person, acting as an officer, can not take and certify his own acknowledgment as a private individual. *Davis v. Beazley*, 75 Va. 491; *Beamon v. Whitney*, 40 Me. 413. A deputy acts for, on behalf and in the name of, his principal. His act is, in law, the act of the principal." *Webb v. Ritter*, 60 W. Va. 193, 229, 54 S. E. 484.

The mayor of a municipality within this state possesses no legal authority to take and certify acknowledgments to deeds or other writings; such authority being limited, by § 3, ch. 73, Code 1913, to the persons therein named. *Zolsman v. Toltz*, 74 W. Va. 604, 82 S. E. 511.

B. BENEFICIARY MAY NOT TAKE.

See ante, "In General," V, A.

Clerk Who Is Beneficiary or Grantee.—A deed, the execution of which is not proved otherwise than by a certificate of acknowledgment, signed by the grantee, as clerk of a county court, is properly rejected when offered as evidence. *Webb v. Ritter*, 60 W. Va. 193, 196, 54 S. E. 484.

One who acts as agent of the borrower in procuring a loan, and is paid for his services out of the money procured, is not disqualified to take the acknowledgment of the borrower to a deed of trust given to secure such loan. *Pence v. Jamison*, 80 Va. 761, 94 S. E. 383.

Notary Who Is Employee or Agent of the Trustee.—The fact that the notary who takes the acknowledgment of the grantors in a deed is the clerk,

agent, and employee of the trustee in the deed, and receives a salary for his services as such, does not affect his competency to take such acknowledgment and receive compensation therefor. *Scott v. Thomas*, 104 Va. 330, 51 S. E. 829.

C. TRUSTEE MAY NOT TAKE.

See ante, "In General," V, A; "Beneficiary May Not Take," V, B.

Notary Trustee in Deed of Trust.

A certificate of acknowledgment to a deed of trust is void, where the acknowledgment was taken and certified by a notary, who was designated in the deed as a trustee. *Yates v. Ley*, 121 Va. 265, 92 S. E. 837. This case is distinguishable from *Heeke v. Allan*, 127 Va. 65, 102 S. E. 655, as will appear from the two succeeding paragraphs.

A deed of bargain and sale was made, and the grantee therein, as a part of the same transaction, conveyed the property to a trustee to secure the deferred payments of the purchase money. The notary who took the grantor's acknowledgment to the deed of a bargain and sale was named as trustee in the deed of trust, but had no other connection with or interest in the transaction. Held: That the acknowledgment was a valid acknowledgment. *Heeke v. Allan*, 127 Va. 65, 102 S. E. 655.

E. VALIDATION OF.

By Ex-Service Men.—Va. Acts 1920, p. 69, Pollard's Code 1920, p. 719.

By Officials Who, Since Jan. 13, 1920, Have Held Other Offices.—Va. Acts 1920, p. 340.

By Justices of the Peace, etc., Designated as "Police Justices."—Va. Acts 1920, p. 405, Pollard's Code 1920, p. 753.

In Foreign Countries.—Va. Acts 1918, p. 506, Pollard's Code 1920, p. 485.

By Foreign Officials.—Va. Acts 1918, p. 108, Pollard's Code 1920, p. 358.

Validation of Defective. — Barnes Code, ch. 73, § 11.

VI. ACT OF TAKING ACKNOWLEDGMENT IS JUDICIAL—COLLATERAL OR DIRECT ATTACK.

Taking and certifying the acknowledgment of a deed is regarded as a judicial act in this state, and can not be impeached even directly, save in a court of equity, and not then except for fraud. *McCauley v. Grim*, 115 Va. 610, 79 S. E. 1041.

Impeachment—Testimony of Officer.

An officer taking an acknowledgment to a deed is incompetent as a witness in a collateral proceeding to impeach his official act. But in a direct proceeding to set aside the instrument for fraud, he is competent to prove that he was imposed upon and honestly led to believe that the person who acknowledged the instrument was in fact the person named in the instrument. *Mankin v. Davis*, 82 W. Va. 757, 97 S. E. 296.

VII. MARRIED WOMEN.

A. IN GENERAL.

See ante, "Between the Parties," III, A.

Power of Attorney—Necessity.—Va. Code 1919, § 5215.

Necessity.—A married woman can not divest herself of legal or equitable title to land, otherwise than by a deed or contract acknowledged in the manner prescribed by the statute. *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354; *Slaven v. Riley*, 73 W. Va. 76, 79 S. E. 1024; *Weekly v. Wagner*, 76 W. Va. 236, 85 S. E. 248. See also, *Shumate v. Shumate*, 78 W. Va. 576, 90 S. E. 824; *Simpson v. Belcher*, 61 W. Va. 157, 56 S. E. 211; *Titchenell v. Titchenell*, 74 W. Va. 237, 71 S. E. 978.

A contract in writing, by husband and wife, for the sale of two lots owned in fee by them separately, for a gross consideration, though not enforceable against her for want of ac-

knowledge, is enforceable against him, upon payment of such proportionate part of the consideration as his lot bears to the combined area, if thus equitably ascertainable, but, if not, then by such other method as may seem just and equitable. *Milam v. Williams*, 73 W. Va. 467, 80 S. E. 770.

Where the husband joins his wife in a deed conveying, in fee, her undivided interest in a tract of land, the deed is void as to the wife if defectively acknowledged. *Custer v. Hall*, 71 W. Va. 119, 76 S. E. 183.

Effect of Subsequent Acknowledgment.—Where a married woman by a written option executed only by her signature and seal, agrees to convey her land to another in case he elects to take the same within a stipulated time, her acknowledgment of the same made before a notary after the time fixed for such election has expired, will not, without more, revive and legalize the agreement and an election made under it within the time. *Weekly v. Wagner*, 76 W. Va. 236, 85 S. E. 248.

Proof of execution of a deed to her separate real estate, by a married woman, made by two witnesses before the clerk of a county court, as provided in § 2 of ch. 73 of the Code is not the equivalent of such acknowledgment and can not be substituted therefor. *Simpson v. Belcher*, 61 W. Va. 157, 56 S. E. 211.

A substantial compliance with the statute as to taking and certifying a married woman's acknowledgment to a deed, under the former statute on the subject, was all that was required. A literal compliance was not necessary. *Saffell v. Orr*, 109 Va. 768, 64 S. E. 1057; *Geil v. Geil*, 101 Va. 773, 45 S. E. 325.

B. PRIVY EXAMINATION.

See post, "Certificate," VII, C.

Abolition of Privy Examination. — The privy examination of a married

woman was abolished in 1891. *Shumate v. Shumate*, 78 W. Va. 576, 581, 90 S. E. 824.

A certificate, made in 1888, of acknowledgment by a married woman of a deed failing to state that on privy examination she acknowledged the deed renders the deed void as to her. *Nuttall v. McVey*, 63 W. Va. 380, 60 S. E. 251.

C. CERTIFICATE.

See post, "The Certificate," VIII.

Certificate of Privy Examination. — Abbreviation of the word "wife" thus, "wi" in a certificate of the privy examination of a married woman, respecting her execution of a deed, and her acknowledgment thereof, did not invalidate the certificate. A substantial compliance with the statute was all that was required. *Hill v. Horse Creek Coal Land Co.*, 70 W. Va. 221, 224, 73 S. E. 718.

A certificate made in 1868, of acknowledgment by a married woman of a deed, failing to state that on privy examination she acknowledged the deed, rendered the deed void as to her. *Nuttall v. McVey*, 63 W. Va. 380, 60 S. E. 251.

VIII. THE CERTIFICATE.

See ante, "Certificate," VII, C.

½A. NECESSITY.

Marriage of Minor.—Va. Code 1919, § 5078; Barnes Code, ch. § 2.

Power of Attorney for Married Woman.—Va. Code 1919, § 5215; Barnes Code, ch. 66, § 3.

To be recordable, a deed of trust or other similar writing must have an endorsement or certificate of acknowledgment thereof, before an officer authorized to take the same, written upon it or annexed to it. *Ihrig v. Ihrig*, 78 W. Va. 360, 88 S. E. 1010.

A. SUFFICIENCY IN GENERAL.

See post, BAIL AND RECOGNIZANCE.

Form of.—Va. Code 1919, §§ 5205,

5207, 5210; Barnes Code, ch. 73, § 66.
Same — Corporations. — Va. Code 1919, §§ 5207, 5208; Barnes Code, ch. 73, § 5.

Same—Representatives. — Va. Code 1919, § 5207.

Married Women.—Barnes Code, ch. 73, § 4, 6, amended by W. Va. Acts 1919, p. 261.

Same — Commissioners Appointed without the State.—Va. Code 1919, § 2853.

Recitals by Notary — Change of Name by Female Notary.—Va. Code 1919, § 5210.

Assignment of Judgment or Vendor's Liens, etc.—W. Va. Acts 1921, p. 174, adding § 11 to Barnes Code, ch. 74.

"Substantial compliance with the statute form is all that is required; indeed the Code says that the certificate shall be 'to the following effect,' then giving the form. Now, the certificate, whatever its form or words, must have the same legal effect as the form gives." *Duffy v. Currence*, 66 W. Va. 252, 258, 66 S. E. 755; *Clarksburg Casket Co. v. Valleu Undertaking Co.*, 81 W. Va. 212, 214, 94 S. E. 549. See ante, "In General," VII, A.

Policy of Law to Uphold.—It is the admitted policy of the law to uphold certificates of acknowledgment when substance is found, and not to suffer the proofs of instruments to be defeated by technical and unsubstantial objections. A literal compliance with the statutory forms of acknowledgment to conveyances is not exacted. A fair compliance is sufficient. *Blake v. Hollandsworth*, 71 W. Va. 387, 390, 76 S. E. 814.

Must Show Title and Character of Officer.—"A certificate of acknowledgment, of itself, or aided by the instrument acknowledged, must show the title and character of the officer taking the acknowledgment, but this may be shown by the initials of the officer as well as if his title were fully written

out." *Worley v. Adams*, 111 Va. 796, 802, 69 S. E. 929.

Signature and Suffix Controls.—"Although a certificate to an instrument states the title of an officer not authorized to take an acknowledgment, if the signature thereto, together with its suffix, alone shows an officer having such authority, the signature and its suffix will control." *Worley v. Adams*, 111 Va. 796, 803, 69 S. E. 929.

Designation of Authority of Officer.—An acknowledgment headed, "Braxton County Court Clerk's Office, December 4th 1848," and signed "John P. Byrne, C. B. C.," sufficiently designates the official character of the officer certifying it and stands for the words Clerk of Braxton County. *Goad v. Walker*, 73 W. Va. 431, 80 S. E. 873.

A deed has two certificates of acknowledgment, immediately following one another, both dated the same day, one as to the husband the other as to the wife, the one as to the wife in full compliance with the statute and showing the official character of the officers making it, the one as to the husband though purporting to be made by persons of the exact names of those making the other certificate yet deficient in not describing them as officers authorized in the premises; held: The two certificates may be read together as one, or the certificate of the wife's acknowledgment may be resorted to for aid in supplying the omission of official character in the other. *Blake v. Hollandsworth*, 71 W. Va. 387, 76 S. E. 814.

Certified by Unauthorized Officer.—An acknowledgment to a trust deed, certified by an officer having no legal authority therefor, is void and ineffectual for any purpose. *Zolsman v. Totz*, 74 W. Va. 604, 82 S. E. 511.

Necessity of Signature by Officer.—"To be valid, a certificate of acknowledgment must be signed by the officer making it. The statute requires

it to be under his hand. To comply with this requirement, it must be signed. 1 Cyc. 577." *Ihrig v. Ihrig*, 78 W. Va. 360, 362, 88 S. E. 1010.

A deed containing a certificate of acknowledgment unsigned by the notary, by whom the acknowledgment purports to have been taken, and not otherwise proven, is not a recordable paper. *South Penn. Oil Co. v. Blue Creek Develop. Co.*, 77 W. Va. 682, 88 S. E. 1029.

Acknowledgment before Justice Who Also Signs as Alderman.—The fact that a justice taking an acknowledgment signs the certificate as justice and alderman will not vitiate such certificate, but his official designation as alderman will be regarded as surplusage. *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409.

Knowledge of Officer as to Identity of Acknowledger.—An acknowledgment, certified in 1855, as well as at the present time, should in some manner identify the person acknowledging as the person who signed the writing. *Goad v. Walker*, 73 W. Va. 431, 80 S. E. 873.

"The statute intends that the officer shall certify that the woman acknowledging is the same who signed the deed. It intends that the officer from his own knowledge of the person, or by prudent inquiry, shall ascertain and find and certify that identity of person. Otherwise false certificates may be obtained." *Duffy v. Currence*, 66 W. Va. 252, 257, 66 S. E. 755.

The omission from a certificate of acknowledgment of a deed of the words, after the name of a grantor, "whose name is signed to the writing above," makes the acknowledgment bad, there being no other words in the certificate to the same effect. *Duffy v. Currence*, 66 W. Va. 252, 66 S. E. 755; *Goad v. Walker*, 73 W. Va. 431, 436, 80 S. E. 873, wherein the court said: "The certificate should show that the officer making it knew the person ac-

knowledging the writing to be the same person who signed it. The words quoted from the statute were intended to perform that office. Code 1849, ch. 121, § 3; Code (W. Va.) 1906, ch. 73, § 3."

For examples of certificates sufficient in this respect. See *Sullivan v. Gum*, 106 Va. 245, 55 S. E. 535; *Goad v. Walker*, 73 W. Va. 431, 439, 80 S. E. 873.

Marital Relation.—So much of the form of the certificate of acknowledgment, set out in Sec. 4, ch. 73 (Barnes Code, ch. 73, § 4), Code, to be made by a husband and wife to their joint deed, as provides for certification of the marital relation, is merely directory; and a deed for the wife's land, made and acknowledged by both husband and wife, is not void because marital relation does not appear on the face of the deed or in the certificate of acknowledgment. The relationship may be proven by evidence *dehors* the writing. *Wehrle v. Price*, 80 W. Va. 666, 94 S. E. 477.

Designation of Authority to Make Acknowledgment.—A certificate of acknowledgment of a deed of trust by a corporation, which omits from the affidavit constituting a part of it, the clause, "And that said writing was signed and sealed by him in behalf of said corporation," is fatally defective, and the instrument to which it is appended is not legally recordable. *Clarksburg Casket Co. v. Vallen Undertaking Co.*, 81 W. Va. 212, 94 S. E. 549.

"The clause omitted is obviously a substantial one and lack thereof is not supplied by any equivalent words. The executing officer is required to swear, 'That said writing was signed and sealed by him in behalf of said corporation.' It is not enough that he has authority generally to execute deeds and other instruments for and on behalf of the corporation. He must swear that he had authority to execute the par-

ticular instrument he acknowledges." *Clarksburg Casket Co. v. Valleu Undertaking Co.*, 81 W. Va. 212, 215, 94 S. E. 649.

B. PRESUMPTION OF REGULARITY.

It is not necessary that the certificate should state in express terms that the acknowledgment was taken before the officer in his city. It will not be presumed that the officer did an illegal act. *Sullivan v. Gum*, 106 Va. 245, 55 S. E. 535; *Worley v. Adams*, 111 Va. 796, 803, 69 S. E. 929, citing *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078.

C. EQUIVALENT EXPRESSIONS.

See ante, "Sufficiency in General," VIII, A.

A certificate of acknowledgment of a deed taken by a notary public which is full, accurate and complete in every respect except that the official character of the officer taking it is not specifically stated in the body of the acknowledgment, but which is signed by him with the letters N. P. after his name, is a sufficient certificate. The letters N. P. read in connection with what is certified stand for and are the equivalent of notary public. *Worley v. Adams*, 111 Va. 796, 69 S. E. 929.

E. CERTIFICATE AS EVIDENCE.

Evidence to Impeach.—The certificate of the acknowledgment of a deed imports verity, and can not be overcome, except by the clear and satisfactory proof. *Swiger v. Swiger*, 58 W. Va. 119, 52 S. E. 23.

The evidence of the grantor denying the execution of the deed and the opinion of experts that the signature thereto is not that of the grantor, are not sufficient to overcome the certificate of acknowledgment. *Swiger v. Swiger*, 58 W. Va. 119, 52 S. E. 23.

Denial of the execution of a deed and acknowledgment thereof, unaided otherwise than by the facts that the signature is by mark and the party could write and denies having ever signed any papers by mark, is not sufficient to overcome a certificate of acknowledgment, nearly thirty years old and pronounced genuine by the officer who certified the acknowledgment. *Hill v. Horse Creek Coal Land Co.*, 70 W. Va. 221, 224, 73 S. E. 718.

Same—Officer Can Not Contradict His Own Certificate.—The evidence of a justice of the peace, who takes and certifies an acknowledgment to a deed, is incompetent so far as it tends to impeach his official act. *Wooldridge v. Wooldridge*, 69 W. Va. 554, 72 S. E. 654.

Wife's Deed—Recitals of Acknowledgments—Burden of Proof.—Upon a bill by a husband, after the death of his wife, to set aside a deed executed and acknowledged by her in due form, but not joined in by him and alleged not to have been lawfully executed by her, while living separate and apart from him, but a copy of which is exhibited with the bill, the certificate of acknowledgment thereto, by section 6, chapter 73, Code 1913, constitutes prima facie evidence of the facts recited therein, and a general replication of plaintiff to defendants' answer denying all the material allegations of such bill, and denying the invalidity of said deed, does not put defendants upon proof of the facts recited in such certificate. *Spangler v. Vermillion*, 80 W. Va. 75, 92 S. E. 449.

XII. FEES.

Notaries.—Va. Code 1919, § 3480 (3); *Barne's Code*, ch. 137, § 4.

Justice of the Peace.—Va. Code 1919, § 3481, amended by Va. Acts 1920, p. 804, but not as to this provision.

ACQUIESCENCE.—See post, ESTOPPEL; LACHES.

ACQUITTED.—See ante, AUTREFOIS, ACQUIT AND CONVICT.

In an action for malicious prosecution "Saying that the plaintiff was discharged is not sufficient; it is not equal to the word **acquitted**, which has a definite meaning. Where the word **acquitted** is used it must be understood in the legal sense, namely, by a jury on the trial. But there are various ways by which a man may be discharged from his imprisonment, without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution." *Graves v. Scott*, 104 Va. 372, 375, 376, 51 S. E. 821, quoting Justice Buller in *Morgan v. Hughes*, Durnf. & East's Rep., vol. 2, p. 225.

ACTIONABLE NEGLIGENCE.—See post, NEGLIGENCE.

ACTIONABLE WORDS.—See post, LIBEL AND SLANDER.

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ACTIONS.

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CROSS REFERENCES.

See the title ACTIONS, vol. 1, p. 122, and references there given. In addition see ante, ABATEMENT, REVIVAL AND SURVIVAL; ACCOUNTS AND ACCOUNTING; post, AMENDMENTS; ARBITRATION AND AWARD; ASSAULT AND BATTERY; ASSUMPSIT; ATTACHMENT AND GARNISHMENT; BONDS; BOUNDARIES; CARRIERS; COMMON LAW; CONSOLIDATION OF ACTIONS; CORPORATIONS; COSTS; COUNTIES; COURTS; CREDITORS' SUITS; DAMAGES; DEAD BODIES; DEBT, ACTION OF; DEMURRERS; DETINUE; DISMISSAL, DISCONTINUANCE AND NONSUIT; EJECTMENT; ELECTION OF REMEDIES; EMINENT DOMAIN; EXECUTORS AND ADMINISTRATORS; FALSE IMPRISONMENT; FORCIBLE ENTRY AND DETAINER; HUSBAND AND WIFE; INJUNCTIONS; INSANITY; INTERPLEADER; JURISDICTION; LIMITATIONS OF ACTIONS; LISPENSERS; MALICIOUS PROSECUTION; MASTER AND SERVANT; MERGER; MORTGAGES AND DEEDS OF TRUST; MULTIPLICITY OF SUITS; NUISANCES; PARTIES; PARTITION; SET-OFF, RECOUPMENT AND COUNTERCLAIM; STATE; STIPULATIONS; STOCK AND STOCKHOLDERS; SUPERSEDEAS AND STAY OF PROCEEDINGS; TRESPASS; TROVER AND CONVERSION; VENUE. As to moot question on appeal, see post, APPEAL AND ERROR. As to right of action of assignee, see post, ASSIGNMENTS. As to actions for injuries, see specific titles, DEATH BY WRONGFUL ACT, LIBEL AND SLANDER, SEDUCTION, etc. As to abandonment by failure to prosecute, and reinstatement, see post, DISMISSAL, DISCONTINUANCE AND NON-SUIT. As to disclaimer, see post, EJECTMENT. As to action by insane persons, see post, INSANITY. As to effect of judgment against one of several defendants, see post, JUDGMENTS AND DECREES. As to form, commencement, joinder and splitting of causes of action in justice courts, see post, JUSTICES OF THE PEACE. As to abuse of process, see post, MALICIOUS PROSECUTION. As to action by notice and motion, see post, MOTIONS. As to actions to remove officers, see post, PUBLIC OFFICERS. As to transfer of cases from one side of the court to the other, see post, REMOVAL OF CAUSES. As to actions against state, see post, STATE. As to statutory abolition of certain real actions, see post, WRIT OF RIGHT.

I. DEFINITIONS AND GENERAL CONSIDERATION.**A. DEFINITIONS.**

A cause of action may ordinarily be said to consist of an obligation upon the part of one to another, and the breach or failure to perform that obligation in accordance with its terms. *Jones v. Main Island Creek Coal Co.*, 84 W. Va. 245, 248, 99 S. E. 462.

A½. CONTINUANCE OF ACTIONS UNDER VIRGINIA CONSTITUTION.

Constitution of Virginia, schedule, § 3.

B½. ACCRUAL OF ACTIONS.

For a breach of any contract, the law gives an immediate right of action unless, by the terms of the contract, such right is postponed. *Belle-Meade Lumber Co. v. Turnbull*, 77 W. Va. 349, 354, 87 S. E. 382. See post, INDEMNITY.

C. STATUTORY REMEDIES.**1. In General.**

Repeal of Statute Giving Right of Action.—A right of action that did not exist at common law, but depends solely upon statute, falls with the repeal of the statute, without a saving

clause, unless reduced to judgment. If pending such action, before judgment, the law which gave the right to sue is repealed, without a saving clause as to pending suits, no further steps towards judgment can be taken in such suits *Brown v. Western State Hospital*, 110 Va. 321, 66 S. E. 48.

2. Cumulative and Exclusive Remedies.

A statute prescribing a new remedy for an existing right should never be construed to abolish a pre-existing remedy, in the absence of express words or necessary implications. *Levy v. Davis*, 115 Va. 814, 80 S. E. 791.

E. ACTIONS EX DELICTO AND EX CONTRACTU.

1. Instances.

Actions ex contractu, are founded on a breach of contract express or implied, and are intended to redress the injury thence arising. Actions ex delicto are founded on, and designed to obtain redress for, torts; that is, for civil wrongs which do not proceed from the breach of any contract, express or implied. *Myers v. McCormick*, 109 Va. 160, 163, 63 S. E. 427.

A declaration resting a right of recovery on the ground that plaintiff has been damaged by a breach of contract states a cause of action in contract, and not in tort, though it alleges deceit on part of defendant in procuring the contract. *Jewett v. Ware*, 107 Va. 802, 60 S. E. 131.

The averment in a declaration against a common carrier, that the defendant, in consideration of the delivery to it of certain goods, issued its bill of lading, by which it "undertook, promised, and agreed" to carry the goods to their destination, is not such an averment of consideration as is necessary in assumpsit and renders the count one in tort and not in assumpsit. *Pennsylvania R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567.

2. Waiver of Tort.

See post, ASSUMPSIT.

3. Waiver of Contract.

Tort of Contract.—There is no question of a plaintiff's right to waive a contract and sue in tort for damages for breach of contract. *Hunter v. Burroughs*, 123 Va. 113, 96 S. E. 360.

F. CAUSE OF ACTION MUST EXIST WHEN SUIT BROUGHT.

Where there is no right of recovery nor of action at the time an action is commenced, the proceeding is fatally and incurably defective. Subsequent acquisition of the right to sue confers no right of recovery in an action prematurely instituted. *Bogges v. Bartlett*, 72 W. Va. 377, 78 S. E. 241, citing *Wildasin v. Long*, 74 W. Va. 583, 82 S. E. 205. See *Keister v. Keister*, 123 Va. 157, 96 S. E. 315.

G. MOOT QUESTIONS OR ABSTRACT PROPOSITIONS.

Moot Questions or Abstract Propositions.—Consent does not confer jurisdiction in a given case, and courts will not decide purely moot questions. Whenever there is no actual controversy involving real and substantial rights between the parties to the record, the case will be dismissed. *Thomas, etc., Co. v. Norton*, 110 Va. 147, 65 S. E. 466.

H. NO RIGHT WITHOUT A REMEDY.

A civil action is maintainable when, and only when, the person complaining is of a class entitled to take advantage of the law, is a sufferer from the disobedience, is not himself a partaker in the wrong of which he complains, or is not otherwise precluded by the principles of the common law from his proper standing in court. *Norman v. Virginia-Pocahontas Coal Co.*, 68 W. Va. 405, 407, 69 S. E. 857. See *Shoffner*

v. Sutherland, 111 Va. 298, 68 S. E. 996.

K. WORTHLESS JUDGMENT AS A DEFENSE.

The fact that a prospective judgment against a defendant in an action at law will be worthless is no defense to the action. *Fleming v. Fairmont*, etc., R. Co., 72 W. Va. 835, 841, 79 S. E. 826.

II. DEMAND AND NOTICE OR CONDITION PRECEDENT.

See post, SALES.

When no act on the part of the plaintiff is required by the term of the contract, to enable the defendant to pay over money, a special notice, demand or request is not a condition precedent to right of action. *Butts v. Butts*, 81 W. Va. 55, 57, 94 S. E. 360.

III. COMMENCEMENT OF SUIT OR ACTION.

It is well settled in West Virginia that the date of the original summons is the date of the commencement of a suit or action. *Oil, etc., Supply Co. v. Gartlan*, 58 W. Va. 267, 52 S. E. 524. See also, *Geiser Mfg. Co. v. Chewning* 52 W. Va. 523, 44 S. E. 193.

A suit in equity is commenced at the time process to answer the plaintiff's bill is issued although the bill be not then filed. The bill, when filed, relates back to the time the process was issued. *Columbia Finance, etc., Co. v. Fierbaugh*, 59 W. Va. 334, 53 S. E. 468.

IV. SPLITTING CAUSES OF ACTION.

As to splitting action for damages in condemnation proceedings, see post, EMINENT DOMAIN.

V. JOINDER OF CAUSES OF ACTION.

A. AT LAW.

1. General Test.

Wherever the causes of action are of the same nature and the same judg-

ment is to be given in all, they may be joined in one declaration. *Standard Paint Co. v. Vietor & Co.*, 120 Va. 595, 91 S. E. 752; *Bowman v. First Nat. Bank*, 115 Va. 463, 80 S. E. 95; *Coal Land Develop. Co. v. Chidester*, 86 W. Va. 561, 103 S. E. 923.

Even where the torts are distinct and independent, if they are of the same nature and if the same judgment may be given in each, they may, as a general rule, be joined. *Standard Paint Co. v. Vietor & Co.*, 120 Va. 595, 91 S. E. 752, citing *Fisher v. Seaboard*, etc., R. Co., 102 Va. 363, 46 S. E. 381, 1 Ann. Cas. 622. See *Schaffner v. National Supply Co.*, 80 W. Va. 111, 92 S. E. 580.

Under the pleadings of the declaration it was held that a court did not cover two separate and distinct causes of action. *Catlett v. Bloyd*, 83 W. Va. 776, 99 S. E. 81. See *Orenstein-Arthur Koppel Co. v. Martin*, 77 W. Va. 793, 88 S. E. 1064.

In determining whether there is a misjoinder of counts in a declaration in trespass on the case, one of which contains averments usual in an action of assumpsit for breach of contract, the court will look to the form of the action and reconcile the count with the form adopted if it can do so without violating some well recognized rule of pleading. *Chambers v. Spruce Lighting Co.*, 81 W. Va. 714, 95 S. E. 192.

2. Distinct and Inconsistent Causes of Action.

A declaration against a husband and wife, charging the utterance of slander by the husband on one occasion and by the wife on another, pursuant to a conspiracy previously formed, to injure the plaintiff in respect to character, is demurrable for misjoinder of actions. *Kellar v. James*, 63 W. Va. 139, 59 S. E. 939.

3. Tort and Contract.

It is a well settled elementary prin-

ciple of law that counts for tort can not be joined with counts upon contract. *Wells v. Kanawha, etc.*, R. Co., 78 W. Va. 762, 763, 90 S. E. 337; *Shafer v. Security Trust Co.*, 82 W. Va. 618, 97 S. E. 290.

A declaration in case against a carrier for wrongful ejection of a passenger is not subject to demurrer, on the ground of misjoinder of severable causes in one count, where the contract of carriage is alleged as an inducement to the real cause averred. *Phillips v. Ohio Valley Elect. Co.*, 78 W. Va. 776, 90 S. E. 342.

8½. Debt and Detinue.

It is said to be one of the anomalies of our system of pleading that debt and detinue may be joined in the same action (4 Minor's Inst. 447-8), but it has never been held that a plaintiff can sue in detinue and recover in debt. *Virginia Land, etc.*, *Bureau v. Perrow*, 119 Va. 831, 836, 89 S. E. 891.

12½. Torts Arising out of Single Transaction.

Counts for malicious prosecution and false imprisonment may be joined in a declaration in trespass on the case. *Galizian v. Henry*, 71 W. Va. 292, 76 S. E. 440.

False Warranty and Deceit.—If the declaration be in a tort upon the false warranty, counts for deceit may be added, and a recovery may be had for the false warranty or for the deceit, according to the proof. *Schaffner v. National Supply Co.*, 80 W. Va. 111, 92 S. E. 580.

Claims for permanent and temporary damages to real estate, growing out of the same act, may be united in one action. *Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 77 S. E. 525. See *Clifford v. Martinsburg*, 78 W. Va. 287, 88 S. E. 845.

15. How Objection for Misjoinder Raised.

A misjoinder of causes of action in a declaration is fatal on demurrer, dismissing the action, unless the plaintiff, as he may, amends so as to eliminate one or the other of the causes of action therein set forth. *Shafer v. Security Trust Co.*, 82 W. Va. 618, 97 S. E. 290.

VI. EQUITABLE DEFENSES.

See post, SET-OFF, RECOUPMENT AND COUNTERCLAIM. See also ante, "Worthless Judgment as a Defense," I, K.

ACTIO PERSONALIS MORITUR CUM PERSONA.—"Actio personalis moritur cum persona, a personal action dies with the person." *Pennington v. Gillaspie*, 63 W. Va. 541, 553, 51 S. E. 413. See ante, ABATEMENT, REVIVAL AND SURVIVAL, p. 1.

ACT OF GOD.—See post, CARRIERS; CONTRACTS; DEATH BY WRONGFUL ACT; FLOODS; MASTER AND SERVANT; NEGLIGENCE; WATERS AND WATERCOURSES.

The term **act of God**, in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. *Director-General v. Bryant*, 127 Va. 651, 105 S. E. 389.

Inevitable Accident.—As to injury to boat as result of inevitable accident. See *Kenova Transportation Co. v. Monongahela River Consol. Coal, etc., Co.*, 56 W. Va. 70, 48 S. E. 844. See also, post, SHIPS AND SHIPPING.

ACTUAL.—As to actual possession, see ante, ADVERSE POSSESSION. As to actual damages, see post, DAMAGES. As to actual value, see post, MARKET VALUE; VALUE. As to actual notice, see post, NOTICE.

Actual Fraud.—See *Marshall v. Locomotive Engineers Mut. Life, etc., Ass'n*, 79 W. Va. 121, 128, 90 S. E. 847. See also post, BENEFICIAL AND BENEVOLENT ASSOCIATIONS; FRAUD AND DECEIT; INSURANCE.

“Actual ratification of an act involves a voluntary adoption of the act. Full knowledge of the act assented to, and an intention to adopt the act as the act of the corporation, are therefore essential. A corporation can never be charged with an unauthorized act of its agents on the sole ground that the act has been ratified by the shareholders, unless the shareholders had full knowledge of the act.” *Third Nat. Bank v. Laboringman's Mercantile, etc., Co.*, 56 W. Va. 446, 452, 49 S. E. 544. See post, CORPORATION.

ADDITIONAL COURTS.—In the construction of § 98 of the constitution of Virginia authorizing the legislature to provide additional courts for certain cities, applying the doctrine of ejusdem generis to the exposition of the language, the additional courts, which the general assembly may establish, must be courts similar in grade, dignity and jurisdiction to existing courts, and that cannot be predicated of a court clothed with the special and limited jurisdiction conferred on the clerks. *McCurdy v. Smith*, 107 Va. 757, 60 S. E. 78.

ADDRESS.—“Webster's Dictionary defines the verb ‘To address’ to mean ‘To direct, as words (to any one or any thing); to make, as a speech, petition etc. (to any one, an audience). To direct speech to; to make a communication to, whether spoken or written; to apply to by words, as by a speech, petition, etc.; to speak to; to accost. To direct in writing, as a letter; to superscribe or to direct and transmit; as, he addressed a letter.’” *Yoder v. Commonwealth*, 107 Va. 823, 832, 57 S. E. 581.

ADEMPMENT OF LEGACIES.—See post, WILLS.

ADEQUATE REMEDY AT LAW.

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CROSS REFERENCES.

See the title ADEQUATE REMEDY AT LAW, vol. 1, p. 161, and references there given. In addition, see post, ADVERSE POSSESSION; AGENCY; APPEAL AND ERROR; CERTIORARI; DEBT, ACTION OF; DEMURRERS; DISCOVERY; EJECTMENT; EMINENT DOMAIN; EQUITY; FRAUD AND DECEIT; INJUNCTIONS; INTERPRETATION AND

CONSTRUCTION; JOINT ADVENTURES; JOINT TENANTS AND TENANTS IN COMMON; JUDGMENTS AND DECREES; JURISDICTION; LANDLORD AND TENANT; LOST INSTRUMENTS; MANDAMUS; NUISANCES; PARTNERSHIP; PLEADING; QUIETING TITLE; RESCISSION, CANCELLATION AND REFORMATION; SET-OFF, RECOURSE AND COUNTERCLAIM; SPECIFIC PERFORMANCE; SUBROGATION; VENDOR AND PURCHASER.

I. RULE STATED AND APPLIED.

A. STATEMENT OF RULE.

Equity does not have jurisdiction of cases in which the plaintiff has a full, complete, and adequate remedy at law, unless some peculiar feature of the case comes within the province of a court of equity. *Irons v. Bias*, 85 W. Va. 493, 495, 102 S. E. 126; *Bledsoe v. Robinett*, 105 Va. 723, 54 S. E. 861; *Tax Title Co. v. Denoon*, 107 Va. 201, 57 S. E. 586; *Sweeney v. Foster*, 112 Va. 499, 71 S. E. 548; *Ely v. Johnson*, 114 Va. 31, 75 S. E. 748; *Spangler v. Ashwell*, 114 Va. 325, 76 S. E. 281; *Branham v. Artrip*, 115 Va. 314, 79 S. E. 390; *Martin v. Hall*, 115 Va. 358, 79 S. E. 320; *Starke v. Storm*, 115 Va. 651, 79 S. E. 1057; *Lanston Monotype Mach. Co. v. Times-Dispatch Co.*, 115 Va. 797, 80 S. E. 736; *Fidelity, etc., Co. v. Gill*, 116 Va. 86, 81 S. E. 39; *Austin v. Sanders*, 122 Va. 209, 95 S. E. 273; *Ewing v. Dutrow*, 128 Va. 416, 104 S. E. 791; *Conrad v. Buck*, 21 W. Va. 396; *Stephenson v. Burdett*, 56 W. Va. 109, 48 S. E. 846; *Bartlett v. Armstrong*, 56 W. Va. 293, 49 S. E. 140; *Harvey v. Ryan*, 59 W. Va. 134, 53 S. E. 7; *Deepwater Co. v. Motter & Co.*, 60 W. Va. 55, 58, 53 S. E. 705; *Orr v. Cox*, 61 W. Va. 361, 56 S. E. 522; *Connell v. Yost*, 62 W. Va. 66, 57 S. E. 299; *Jackson v. Big Sandy, etc., R. Co.*, 63 W. Va. 18, 59 S. E. 749; *McDonald v. Jarvis*, 64 W. Va. 62, 60 S. E. 990; *Lewis v. Hall*, 64 W. Va. 147, 61 S. E. 317; *Annon v. Brown*, 65 W. Va. 34, 63 S. E. 691; *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740; *Teter v. Teter*, 65 W. Va. 167, 63 S. E. 967; *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935; *Prewett v. Citizens Nat. Bank*, 66 W. Va. 184, 66 S. E. 231; *Coal, etc.,*

R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613; *Hogg v. McGuffin*, 67 W. Va. 456, 68 S. E. 41; *Maxwell v. Davis Trust Co.*, 69 W. Va. 276, 71 S. E. 270; *Hall v. Philadelphia Co.*, 72 W. Va. 573, 78 S. E. 755; *Jennings v. Southern Carbon Co.*, 73 W. Va. 215, 223, 80 S. E. 368; *Wheeling v. Natural Gas Co.*, 74 W. Va. 372, 375, 82 S. E. 345; *United Fuel Gas Co. v. West Virginia Paving, etc., Co.*, 74 W. Va. 484, 82 S. E. 329; *Morgan v. Bartlett*, 75 W. Va. 293, 83 S. E. 1001; *Peterson v. Smith*, 75 W. Va. 553, 84 S. E. 250; *Horse Creek Coal Land Co. v. Trees*, 75 W. Va. 559, 84 S. E. 376; *Ritter Lumber Co. v. Lowe*, 75 W. Va. 714, 84 S. E. 566; *Big Huff Coal Co. v. Thomas*, 76 W. Va. 161, 85 S. E. 171; *Nuzum v. Nuzum*, 77 W. Va. 202, 87 S. E. 463; *United States Fidelity, etc., Co. v. Home Bank*, 77 W. Va. 665, 88 S. E. 109, 110; *Pardee, etc., Lumber Co. v. Odell*, 78 W. Va. 159, 88 S. E. 419; *Carlsbad Mfg. Co. v. Kelley*, 84 W. Va. 190, 100 S. E. 65.

B. APPLICATIONS OF RULE.

1. Relief Refused on Ground of Existence of Legal Remedy.

Agency.—Where the whole controversy sought to be litigated in a suit in chancery turns upon whether or not one person was the agent of another, the remedy at law is full, adequate and complete, whether the principal is sought to be charged in consequence of an actual or implied agency, or by the adoption of the acts of the agent, and a court of equity is without jurisdiction. *Spangler v. Ashwell*, 114 Va. 325, 76 S. E. 281.

Demand Purely Legal.—A bill in equity is bad on demurrer for want of equity when it appears that the plain-

tiff has a purely legal claim for which there is an adequate remedy at law. *Fidelity, etc., Co. v. Gill*, 116 Va. 86, 81 S. E. 39.

Creditors' Bill by General Creditor.

—A bill by a general creditor against the administrator of a decedent's estate, alleging as the only grounds for equitable relief that decedent died leaving considerable personal estate, more than sufficient to pay plaintiff's debt, that the defendant, the sole heir, has appropriated all the estate of decedent to his own use; that he has sold and conveyed a part of the real estate of which the decedent died seized and possessed, and which prays simply, that provision be made for payment of plaintiff's debt out of said estate, for reference to a commissioner, for a convention of creditors, and for general relief, is bad on demurrer, as showing no sufficient grounds for equity jurisdiction. *Shepherd v. Craig*, 70 W. Va. 218, 73 S. E. 712. See, generally post, CREDITORS' SUITS.

2. Relief Granted in Absence of Adequate Legal Remedy.

Where a dissenting stockholder filed a bill in equity to ascertain the value of his stock in a corporation which had consolidated with another without his consent and an investigation into the condition of the corporation might be made and accounts taken which can be much better done in a court of equity than in a court of law, it was held, that, "the demurrer to the bill, on the ground that the appellant had a complete and adequate remedy at law, was therefore properly overruled. *Hickman v. Stout*, 2 Leigh (29 Va.) 6; *Tyler v. Nelson*, 14 Gratt. (55 Va.), 214; *Coffman v. Sangston*, 21 Gratt. (62 Va.), 263; *National Life Ass'n v. Hopkins*, 97 Va. 167, 33 S. E. 539." *Winfree v. Riverside Cotton Mills*, 113 Va. 717, 724, 75 S. E. 309.

Remedy at Law Inadequate under Circumstances. — Where the owner of land agreed to convey part of it to

the plaintiff but subsequently without fulfilling his agreement conveyed the land to the defendant subject to his agreement with plaintiff, it was held that a bill by the plaintiff, who was in possession of said part of land, against the defendant and the former owner to get in the legal title to his part of the land and also to enjoin the defendant from prosecuting against him an action of ejectment and to enjoin the defendant from numerous and continuous trespasses was good on demurrer because of the inadequacy of the plaintiff's remedy at law. *Bent v. Barnes*, 72 W. Va. 161, 78 S. E. 374, citing *Miller v. Wills*, 95 Va. 337, 28 S. E. 337; *Callaway v. Webster*, 98 Va. 790, 37 S. E. 276.

II. EXCEPTIONS AND MODIFICATIONS OF RULE.

A. REMEDY MUST BE FULL AND COMPLETE.

In order to justify the court in refusing to take such jurisdiction, the remedy at law "must be adequate; for, if at law, it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner at the present time and in future; otherwise, equity will interfere and give such relief and aid as the exigencies of the particular case may require." 1 Story's Eq. Jur., § 33; *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509; *Southern R. Co. v. Franklin, etc., R. Co.*, 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297; *Virginia Iron, etc., Co. v. Graham*, 124 Va. 692, 709, 98 S. E. 659; *Martin v. Hall*, 115 Va. 358, 79 S. E. 320; *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423; *Crawford v. Turner*, 68 S. E. 600, 52 S. E. 716; *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836; *Buskirk v. Sanders*, 70 W. Va. 363, 368, 73 S. E. 937; *Jennings v. Southern Carbon*

Co., 73 W. Va. 215, 223, 80 S. E. 368; *Wheeling v. Natural Gas Co.*, 74 W. Va. 372, 82 S. E. 345; *Warren v. Boggs*, 83 W. Va. 89, 97 S. E. 589; *Sayre v. Kunst*, 83 W. Va. 456, 98 S. E. 559; *Yost v. Wills*, 86 W. Va. 71, 102 S. E. 728.

C. CONCURRENT JURISDICTION OF EQUITY AND LAW.

A court of equity will interpose, even in the class of cases where courts of law have concurrent jurisdiction, and without the existence of a specific ground of equity, whenever it appears that the remedy at law is less adequate than that in equity to do full and complete justice between the parties; and it, therefore, follows that each case must be determined upon its own merits. *Oglesby Co. v. Ould Co.*, 117 Va. 546, 556, 85 S. E. 475. See *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935; *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836; *Prewett v. Cit-*

izens Nat. Bank, 66 W. Va. 184, 66 S. E. 231; *Kabler v. Spencer*, 114 Va. 589, 77 S. E. 504; *Wilson v. McConnell*, 72 W. Va. 81, 77 S. E. 540; *Sperry v. Premier Pocahontas Collieries Co.*, 87 W. Va. 223, 104 S. E. 486.

D. RETENTION FOR COMPLETE RELIEF.

Generally where a court of equity has once obtained jurisdiction of a cause, it will retain it for all purposes and administer complete relief. *Carlsbad Mfg. Co. v. Kelley*, 84 W. Va. 190, 100 S. E. 65; *Smith v. Root*, 66 W. Va. 633, 66 S. E. 1005; *Tiller v. Excelsior Coal, etc., Corp.*, 110 Va. 151, 65 S. E. 507; *Woolfolk v. Graves*, 113 Va. 182, 69 S. E. 1039, 73 S. E. 721; *Dudley v. Niswander*, 65 W. Va. 461, 64 S. E. 745; *Morison v. American Ass'n*, 110 Va. 91, 65 S. E. 469; *Ely v. Johnson*, 114 Va. 31, 63, 75 S. E. 748; *Smith v. White*, 71 W. Va. 639, 78 S. E. 378, 379.

ADJACENT.—*Adjacent* is frequently used "in the sense of being near and in the vicinity or neighborhood." *Whealton v. Doughty*, 116 Va. 566, 82 S. E. 94. See post, **BOUNDARIES**.

ADJOINING LANDOWNERS.

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CROSS REFERENCES.

See the title **ADJOINING LANDOWNERS**, vol. 1, p. 175, and references there given. In addition, see post, **EVIDENCE**; **FISH AND FISHERIES**;

INJUNCTIONS; INSTRUCTIONS. As to how drainage rights are acquired by adjoining landowners, under Code Provisions, see post, **DRAINS AND SEWERS**. As to Code sections applicable to the rights, duties, etc., of the owners of adjoining fishing shores, see post, **FISH AND FISHERIES**. As to notice to adjoining landowners of petition to correct errors in land grant, see post, **PUBLIC LANDS**.

½I. IN GENERAL.

Partition and Coterminous Owners.—Barnes Code, ch. 79, §§ 7-13; Va. Code 1919, §§ 5297-5279. See generally, post, **PARTITION**.

I. USE OF PROPERTY.

In General.—The limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own, is fixed by external standards only, motive or interest being immaterial. *Koblegard v. Hale*, 60 W. Va. 37, 39, 53 S. E. 793.

A man is bound to use his premises so as not to injure his neighbor's property. *Weaver Mercantile Co. v. Thurmond*, 68 W. Va. 530, 70 S. E. 126.

"A man who erects a structure upon his premises which, because of neglect to take care of it, becomes a nuisance, either to the public or to the property of an adjoining owner, is liable. He is bound, at his peril, to prevent it from injuring the property of his neighbor." *Weaver Mercantile Co. v. Thurmond*, 68 W. Va. 532, 70 S. E. 126. See post, **NUISANCES**.

Storage of Dangerous Substances.—See post, **NUISANCES; EXPLOSIONS AND EXPLOSIVES**.

"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major*, or the act of God." *Weaver v. Mercantile*

Co. v. Thurmond, 68 W. Va. 530, 534, 70 S. E. 126.

Heat.—See post, **NUISANCES**.

Water.—See post, **WATER AND WATERCOURSES**.

II. LATERAL AND SUBJACENT SUPPORT.

A. RIGHT TO SUPPORT.

1. Land in Natural Condition.

See post, "Duty of Excavating Owner," II, A, 3.

An owner of land is entitled, *ex jure naturæ*, to lateral support in the adjacent land for his soil. *Walker v. Strohsnider*, 67 W. Va. 39, 67 S. E. 1087; *Kunst v. Grafton*, 67 W. Va. 20, 25, 67 S. E. 74.

Where one in improving his own property fails to exercise the ordinary care, prudence, skill reasonably dictated by the situation and circumstances as due for the protection of the building standing on an adjoining lot, and thereby injures the same, he is liable for the injury, whether caused by affecting the lateral support of the soil of the adjoining lot or otherwise. *Voeckler v. Stroehmann's Vienna Bakery*, 75 W. Va. 384, 83 S. E. 1025.

An excavation, made by an adjacent owner, so as to take away the lateral support, afforded to his neighbor's ground, by the earth so removed, and cause it, of its own weight, to fall, slide or break away, makes the former liable for the injury, no matter how carefully he may have excavated. Such right of support is a property right and absolute. *Walker v. Strohsnider*, 67 W. Va. 39, 67 S. E. 1087.

Pressure.—"Whether done by direct excavation or by something else, an adjoining owner can not deprive his

neighbor of lateral support for the soil. Though one builds a heavy building on the surface of the ground, if he does it so negligently as to have insecure foundation, and the pressing down of the same takes away lateral support from the adjacent land, there is liability." *Voeckler v. Stroehmann's Vienna Bakery*, 75 W. Va. 384, 387, 83 S. E. 1025.

Scope of Doctrine.—"The doctrine of justice contained in the maxim, 'Sic utere tuo ut alienum non laedas,' goes further in its application between adjoining land owners than that the one can not carelessly injure a building of the other by affecting the lateral support of the soil of the latter. A more direct injury to a building of the adjoining owner, done carelessly in the removal or erection of a house in juxtaposition thereto, certainly comes under the maxim. The wall of the adjoining owner above ground can not be carelessly cut into, or otherwise injuriously affected. *Broom's Legal Maxims* (8th ed.), 292. True, the one owes no right of lateral support for the buildings of the other. But if the one is about to remove an old building, he must observe the situation of his neighbor, and in removing the building do nothing on his own land carelessly to the injury of the latter. 2 *Washburn on Real Property* (6th ed.), § 1299. The former is not required to prop or shore up to protect his neighbor. That extraordinary care is on the owner of the building that may be affected by the removal of the adjoining building. *Washburn on Easements* (4th ed.), 604. But the owner of the building that is being removed, or of one being erected, is liable when the work is done without reasonable care under all the circumstances, to the injury of the adjoining building." *Voeckler v. Stroehmann's Vienna Bakery*, 75 W. Va. 384, 387, 83 S. E. 1025.

Architect and Contractor. — Though one in improving his own property employs therefor a competent architect

and a skilled contractor, if the work remains under his control and the architect and the contractor merely represent him as to the means of doing the same, he is not by their employment absolved from liability for injury to adjoining property caused by failure to exercise care for its protection. *Voeckler v. Stroehmann's Vienna Bakery*, 75 W. Va. 384, 83 S. E. 1025.

2. Buildings in Addition to Land.

The right to lateral support applies only to land in its natural state. *Stevenson v. Wallace*, 27 Gratt. (68 Va.) 77; *Tunstall v. Christian*, 80 Va. 1. These and other authorities hold that an adjoining owner is not entitled to lateral support for buildings or other artificial structures. *Kunst v. Grafton*, 67 W. Va. 20, 25, 67 S. E. 74; *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

Liability for Gross Negligence.—

Though an adjoining owner has no right of support in his neighbor's land for his buildings, unless he has acquired it by grant or otherwise, and the latter may excavate in his land so as to cause them to fall, without committing a trespass or taking away a property right, provided the adjacent soil would not have fallen of its own weight, he may nevertheless be liable, in respect to his conduct, for the injury done. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

3. Duty of Excavating Owner.

Mining.—Va. Code 1919, §§ 5287, 5289. And see post, MINES AND MINING.

Must Exercise Care and Skill.—An adjoining owner, excavating on his own land, must exercise reasonable care, prudence and skill, in doing so, for the safety of buildings, if any, standing on the adjacent land. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

If an adjoining owner, about to excavate, along the side of a building, belonging to another person, for the

erection of a building on his own property, adopt, as a means of protecting the building, the cutting of a trench and construction of a concrete retaining wall therein, four feet from the building along the side thereof, and then running directly to one corner thereof, and let the work of cutting the trench and constructing the retaining wall to contractors, under contracts, leaving to them no discretion as to where or how such wall shall be constructed and such measure of protection does not amount to the exercise of reasonable and ordinary care for the safety of the building, and, by reason of such neglect, the building fall, the employer is liable. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

The duty of the owner of a building to prop it up, if necessary, is not inconsistent with the requirement of care on the part of the adjoining owner in the improvement of his property. If the latter exercises reasonable care and injury nevertheless results, he is not liable, the loss being attributable in law to the failure of the owner to do further things necessary to absolute security. If, on the contrary, he did not exercise such care he is liable, although the owner could have prevented the injury. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

Must Refrain from Collateral Negligence.—In altering the condition of his land, adjoining another's building, by excavating the soil and replacing it with a structure, the owner must not only abstain from collateral negligent or wrongful acts, such as unnecessary heavy blasting, digging out the adjacent wall, projecting heavy articles against the wall or building, and the like, but must perform the work with reasonable care for the safety of the adjacent building, such as diligence in the construction of his wall after having removed the soil, removal of the soil and replacement thereof with the wall by sections, if necessary as a measure of reasonable precaution, or

the adoption of other reasonable and practicable precautions. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

Need Not Adopt Unusual Precautions.—Though this duty, respecting adjacent buildings, is imposed by law upon a person, while engaged in altering the condition of his own property, he is not a guarantor of their safety, nor bound to take precautions, or adopt measures, for their protection beyond such as are reasonably practicable, not unduly expensive, and amount to reasonable and ordinary care and prudence for the safety. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

Temporary Support to Adjacent Building.—In such case, the measure of his duty goes beyond the exercise of care in making the excavation, a mere incident of the alteration intended, and extends to reasonable means of temporary support of the adjacent building, while the work of erecting the new structure is in progress. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

Duty to Give Notice of Intention.—In such case, the adjoining owner is under the further duty of giving the owner of the building notice of his intention to alter the condition of his property, the character of the alteration to be made and the time thereof, and allow him opportunity to adopt such further measures for the absolute protection and security of his building as he may see fit to adopt. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

Object of Notice.—Where the adjoining owner has given the owner of the building notice of his intention to alter the condition of his property, such notice or knowledge on the part of the owner of the building does not absolve the adjoining owner from duty to exercise reasonable care and prudence to avoid injury to the building in improving his own property. The giving of such notice, when necessary,

is simply an additional precaution, omission of which would, under some circumstances, amount to negligence. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

Notice Not Necessary in All Cases.

—The giving of formal notice is unnecessary in such case, if the owner of the building has full knowledge of the character and time of the making of the alteration and opportunity to adopt protective measures for the safety of his building. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

4. Duty of Adjoining Owner.

See ante, "Duty of Excavating Owner," II, A, 3.

5. Actions for Damages.

a. General Rule.

Tenant of Injured House.—In the case of the fall of a building, occasioned by negligent excavation, a tenant of a single floor or room thereof, deprived of his right of occupancy and use and sustaining loss of personal property, by reason of the fall, has a right of action for at least nominal damages, in respect to the tenancy, and for consequential damages, in respect to the personal property injured and destroyed. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

b. Defenses.

Condition of Building.—Neither defective or improper construction of the

building, nor its use for manufacturing purposes, involving the running of machinery therein, will bar an action for damages for injury thereto, resulting from negligent excavating, under the law of contributory negligence. The excavator must deal with the conditions as he finds them, using reasonable and ordinary care, under all the circumstances to avoid injury to the building and its contents. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

c. Pleading.

It suffices in a declaration, seeking damages for an injury to a building or a tenant thereof, resulting from negligent excavation, to set forth the relative situation of the properties, the interest of the plaintiff, the duty of the defendant, the acts done and the results, and charge that the work was done injuriously, wrongfully, carelessly and negligently. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087.

III. LIGHT AND AIR.

B. OBSTRUCTION OF.

"This doctrine of ancient lights is not relied on to afford appellees' relief. Outside of the doctrine of ancient lights, under the common law, it seems that the owner of land has no legal right, in the absence of an easement, to the light and air unobstructed from adjoining land." *Koblegard v. Hale*, 60 W. Va. 37, 39, 53 S. E. 793. See post, INJUNCTIONS.

ADJOURNMENT.

CROSS REFERENCES.

See the title ADJOURNMENT, vol. 1, p. 179, and references there given. In addition, see post, COURTS; JUSTICES OF THE PEACE; MANDAMUS; PROHIBITION; REFERENCE AND COMMISSIONERS; STATE.

Can not Adjourn to Day Beyond Term.—While a judge of a circuit court may, under the provisions of § 3059 of the Va. Code (Va. Code 1919, § 5893) continue the term of a court by adjournment until after the beginning of

the term of the court for any other county of his circuit, he is expressly prohibited from continuing the term for a county or city beyond the day fixed by law for the beginning of the next regular court for that county or

city. *Virginia Beach, etc., Co. v. Murray*, 113 Va. 692, 75 S. E. 81.

W. Va. Code, ch. 114, § 2, authorizing the supreme court of appeals, circuit and county courts to adjourn from day to day until their business is dispatched, or until the ends of their terms does not limit or restrict the common-law powers of such courts to adjourn to a distant day, or, as it is sometimes expressed, from time to time, provided the day fixed be not beyond the time to which the term could legally continue. *Manu v. County Court*, 58 W. Va. 651, 652, 52 S. E. 776.

Va. Code 1919, § 5970 provides: "After a court is opened it shall, during the term, adjourn from day to day, unless the court shall order otherwise, and if it fail to sit on any day to which it is adjourned, it may nevertheless sit on a subsequent day of the term; provided, in the case of a circuit or corporation court, there be not more than three consecutive days of such failure."

Court of Record May Adjourn from Day to Day or Take a Recess for a Period Not Exceeding 30 Days.—Va. Code 1919, § 5959.

Supreme Court of Appeals.—Va. Code 1919, § 5970; Barnes Code, ch. 113, § 11.

Adjournment of Circuit Court.—Va. Code 1919, §§ 5893, 5895; Barnes Code, ch. 112, §§ 4, 6.

The circuit courts have common law powers to adjourn to a distant day, or from time to time, provided such distant day is not beyond the time to which the term could legally continue. *Rockhold v. Cabot*, 81 W. Va. 697, 95 S. E. 804.

Section 4 of chapter 112 of the Code providing that when a term of the circuit court is about to end without dispatching all its business, the judge thereof may, by an order entered of record, adjourn the holding of such court to any future day on which he is not required by law to hold the court in some other county, and pro-

viding that when this is done the judgments and decrees already rendered shall become final, does not restrict the common law powers of the circuit courts to adjourn from time to time, or to a distant day, providing such adjournment be to a day not beyond the time to which the term could legally continue. *Rockhold v. Cabot*, 81 W. Va. 697, 95 S. E. 804.

In order that the judgments and decrees rendered by a circuit court may become final, upon adjournment being taken to a distant day, the order taking such adjournment must by clear language show that it is the purpose of the court to end its term at that time, and that upon reconvening on the day fixed therefor it will sit in an adjourned term. *Rockhold v. Cabot*, 81 W. Va. 697, 95 S. E. 804.

Mandamus and Prohibition Proceedings.—Va. Code 1919, § 5835.

Proceedings of Commissioner in Chancery.—Va. Code 1919, §§ 6183, 6184.

Adjournment by Justice.—Va. Code 1919, § 4839.

Adjournment of Legislature.—Va. Const. § 46; West Va. Const. Art. 6, § 23.

Effect of Leaving Bench without Order for Adjournment.—Where the judge leaves the bench without any order for final adjournment, and without again holding court for that term, or, intending to do so, until a day after the beginning of the next term, then the day on which he so leaves the bench must be treated as the end of that term, at least for the purpose of signing bills of exception. *Virginia Beach, etc., Co. v. Murray*, 113 Va. 692, 75 S. E. 81.

Adjournment to Procure Attendance of Witnesses.—Upon the trial of a felony case where the jury is not required to be kept together, the propriety of adjourning the jury from time to time to secure the presence of a witness, lies in the discretion of the trial court, subject to review; but upon review, the

exercise of this discretion is not cause for reversal where it is not suggested that the jury has been tampered with, and it appears from the whole case that the accused has not been prejudiced. *Bennett v. Commonwealth*, 106 Va. 834, 55 S. E. 698.

While not approving the practice of forcing a prisoner into trial in the absence of a material witness, upon a promise to have the witness present before the end of the trial, the verdict of the jury will not be set aside for that reason, where it appears that the witness, who was detained at home by

sickness, did, after several adjournments of the case to secure his presence, appear and testify in behalf of the prisoner, and it does not appear that the prisoner was, or could have been, prejudiced by such adjournments. *Bennett v. Commonwealth*, 106 Va. 834, 55 S. E. 698.

From Saturday to Monday.—Where a law authorizes a court, or the proceedings of an officer to be adjourned from day to day, an adjournment from Saturday to Monday shall be legal. Va. Code 1919, § 5, cl. 9.

ADJUDICATING PRINCIPLES OF CAUSE.—See *Richmond v. Richmond*, 62 W. Va. 206, 57 S. E. 736. Also, see post, FORMER ADJUDICATION OR RES ADJUDICATA.

ADJUSTERS.—See *Bond v. National Fire Ins. Co.*, 77 W. Va. 736, 88 S. E. 389. See also post, FIRE INSURANCE.

ADMINISTRATORS — ADMINISTRATION. — See post, EXECUTORS AND ADMINISTRATORS.

ADMIRALTY.

CROSS REFERENCES.

See the title ADMIRALTY, vol. 1, p. 182, and references there given. In addition, see post, NAVIGABLE WATERS; PILOTS; SHIPS AND SHIP-PING.

A court of admiralty has no jurisdiction to determine the equitable title or conflicting claims to partnership property, although it consists of

a steamboat and attendant barges employed in commerce upon navigable waters of the United States. *Hulings v. Jones*, 63 W. Va. 696, 60 S. E. 874.

ADMISSIONS AND DECLARATIONS.—See post, AGENCY; CONFES-SIONS; DECLARATIONS AND ADMISSIONS; DYING DECLARA-TIONS; HEARSAY EVIDENCE.

ADJUTANT GENERAL.—See post, MILITIA.

ADOPTION.—See post, PARENT AND CHILD.

AD QUÆSTIONEM FACTI, ETC.—“Ad quæstionem facti non respondent iudices; ad quæstionem legis non respondent juratores” (to a question of fact the judges do not answer; to a question of law the jurors do not answer). *State v. Jackson*, 56 W. Va. 558, 578, 49 S. E. 465.

ADULTERATION.

CROSS REFERENCES.

See the title ADULTERATION, vol. 1, p. 183, and references there given. In addition, see post, DRUGS; DRUGGISTS; FERTILIZERS; FOOD; INSPECTION.

Dairy and Food Commissioner—Inspection, Etc.—Va. Code 1919, §§ 1153-1228; Va. Acts 1918, p. 483; Acts 1920, p. 547; Barnes Code, ch. 150, §§ 1, et seq., §§ 15-28.

Same—Stock Goods, Etc.—Va. Code 1919, §§ 1229-1249; Barnes Code, ch. 149, § 14.

Adulteration of Commercial Feeding Stuff—Trade Terms. — Plaintiff sold defendant a commodity designated in the contract as "Winter Wheat Bran." In an action by plaintiff against defendant for failure to accept the bran, evidence that under the usage or custom of the trade "Winter Wheat Bran" contained a certain percentage of screenings, did not contravene the provisions of the State and Federal statutes against the adulteration and misbranding of commercial feeding stuffs, it not being claimed that the screenings in the bran constituted an unlawful adulteration, nor that the tags which were in fact placed on the sacks, indicating the presence of screenings, constituted a misbranding. There is noth-

ing in the statutes, State or Federal, to in any way interfere with the rules of evidence in cases where parties have employed trade terms having a definite meaning, even though these statutes require that meaning to be fully defined in the stamps placed on the goods. *Walker v. Gateway Milling Co.*, 121 Va. 217, 92 S. E. 826.

Inspection of Flour, Etc.—Va. Code 1919, §§ 1400-1443; Barnes Code, ch. 150, § 1, et seq.

Drugs.—Va. Code 1919, §§ 1659, 1663; Barnes Code 1918, ch. 150, §§ 19, 19a, 20b (1)-(5), 20b (8).

Adulterating Food, Drink, or Medicine.—Va. Code 1919, § 1707; Barnes Code 1918, ch. 150, §§ 19-20b (6).

Sale of Bakery Products.—Pollard's Code 1920, p. 781; Va. Acts 1920, p. 576.

Ice Cream and Milk. — Pollard's Code 1920, §§ 1215-1217, pp. 59-60; Va. Acts 1920, p. 547.

Cold Storage.—Va. Acts 1919, p. 87.

ADULTERY, FORNICATION AND LEWDNESS.

I. Adultery.

C. By Statute.

2. Punishment.

3. Removal of County Officers for Adultery.

D. Pleading and Practice.

1. Indictment, Presentment and Information.

E. Evidence.

F. Conspiracy to Cause Wife to Commit Adultery.

II. Fornication.

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III. Lewdness.**A. What Constitutes Lewd and Lascivious Cohabitation by Statute.**

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5. What Necessary to Sustain Action.
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3. Evidence.

IV. Prostitution.**V. Pandering.****CROSS REFERENCES.**

See the title ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 184, and references there given. In addition, see post, CRIMINAL LAW; DISORDERLY HOUSE; INDICTMENTS, INFORMATIONS AND PRESENTMENTS. As to adultery as a ground for divorce, see post, DIVORCE. As to adultery as barring dower, see post, DOWER.

I. ADULTERY.**C. BY STATUTE.****2. Punishment.**

Statutory Provisions. — Va. Code 1919, § 4543; Barnes W. Va. Code, p. 1220, ch. 149, § 6.

3. Removal of County Officer for Adultery.

Barnes W. Va. Code, p. 112, ch. 7, § 7.

D. PLEADING AND PRACTICE.**1. Indictment, Presentment and Information.**

Statutory Form. — Barnes W. Va. Code, p. 1220, ch. 149, § 6.

E. EVIDENCE.

Presumption that Defendant Unmarried. — Barnes W. Va. Code, p. 1220, ch. 149, § 7.

F. CONSPIRACY TO CAUSE WIFE TO COMMIT ADULTERY.

Va. Code 1919, § 4544.

II. FORNICATION.**C%. INDICTMENT.**

Statutory Form. — Barnes' W. Va. Code, p. 1220, ch. 149, § 6.

D. EVIDENCE.

Presumption as to Marriage. —

Barnes W. Va. Code, p. 1220, ch. 149, § 7.

E. PUNISHMENT.

Va. Code 1919, § 4543; Barnes W. Va. Code, p. 1220, ch. 149, § 6.

F. JURISDICTION.

Justice of Peace Has Jurisdiction. — Barnes W. Va. Code, p. 716, ch. 50, § 219.

III. LEWDNESS.**A. WHAT CONSTITUTES LEWD AND LASCIVIOUS COHABITATION BY STATUTE.****1. In General.**

"In order to convict of 'lewd and lascivious association and cohabitation together' under § 4358, W. Va. (Barnes Code, p. 1220, ch. 149, § 7), Code 1906, it is necessary to prove that the defendants lived together as husband and wife; for this is the meaning comprehended by the words 'cohabited together,' as used in the statute referred to." *State v. White*, 66 W. Va. 45, 47, 66 S. E. 20; *State v. Ramage*, 75 W. Va. 524, 84 S. E. 246.

But it is not necessary that they should hold themselves out to the public as husband and wife. *State v. Ramage*, 75 W. Va. 524, 84 S. E. 246.

Relation Habitual and Continuous. — Occasional acts of illicit intercourse do

not prove a violation of the statute, although the man and woman occupy the same house. The illicit relation must be habitual and continuous. *State v. Ramage*, 75 W. Va. 524, 526, 84 S. E. 246.

Purpose of Statute.—"It is the more indecent, open, and demoralizing example of living in adultery or fornication as man and wife that the statute was designed to prevent." *Pruner v. Commonwealth*, 82 Va. 115." *State v. Ramage*, 75 W. Va. 524, 527, 84 S. E. 246.

Statutory Provisions.—Va. Code 1919, § 4545; Barnes W. Va. Code, p. 1220, ch. 149, § 7.

5. What Necessary to Sustain Action.

See ante, "In General," III, A, 1.

7. Punishment.

Statutory Provisions.—Va. Code 1919, § 4545; Barnes W. Va. Code, p. 1220, ch. 149, § 7.

B. PLEADING AND PRACTICE.

3. Evidence.

Presumption that Defendant Unmarried.—Barnes W. Va. Code, p. 1220, ch. 149, § 7.

Sufficiency of Proof.—Proof that de-

fendants occupied the same house together, the woman in the capacity of house servant, sleeping at night in separate rooms, and that on one occasion she was seen to leave her room and enter his bed room in the night time, clandestinely, and remain for an hour, is not sufficient evidence to sustain a verdict of guilty. The jury can not infer from the one act of incontinence, clandestinely committed, that such acts were habitual and continuous. *State v. Ramage*, 75 W. Va. 524, 84 S. E. 246.

IV. PROSTITUTION.

See post DISORDERLY HOUSES. Acts 1918, p. 436, Pollard's Code Biennial 1920, p. 441.

Examination and Punishment of Prostitutes.—Acts 1918, p. 970, Pollard's Code Biennial 1920, p. 643.

Procuring Female for House of Prostitution.—Barnes W. Va. Code, p. 1193, ch. 144, § 16b (1).

Detaining Female in House of Prostitution.—Barnes W. Va. Code, p. 1193, ch. 144, § 16a.

V. PANDERING.

Va. Code 1919, § 4579.

ADVANCEMENTS.

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CROSS REFERENCES.

See the title ADVANCEMENTS, vol. 1, p. 189, and references there given. In addition, see post, DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; GIFTS; HUSBAND AND WIFE; INFANTS; PARENT AND CHILD; TRUSTS AND TRUSTEES; WILLS.

I. DEFINITIONS AND DISTINCTIONS.

In its strictest technical sense an advancement is a perfect and irrevocable gift, not required by law, made by a parent during his lifetime to his child, with the intention on the part of the donor that such gift shall represent a part or the whole of the portion of the donor's estate that the donee would be entitled to on the death of the donor intestate. *Hill v. Stark*, 122 Va. 280, 84 S. E. 792.

An advancement is a gift from an ancestor to a descendant for the purpose of advancing him in life in anticipation of the final division of the donor's estate between his descendants after his death. *Payne v. Payne*, 128 Va. 33, 104 S. E. 712.

Gifts Distinguished.—If, from all the circumstances surrounding a particular case, it can be said that a parent intended a transfer of property to a child to represent a portion of the child's supposed share in the parent's estate, such transfer will be treated in law as an advancement. The converse is, as a matter of course, true; hence, where it appears that the ancestor intended that a gift to his child should not be treated as an advancement, such intention will be respected and enforced. *Payne v. Payne*, 128 Va. 33, 104 S. E. 712.

Loan Not An Advancement.—A will declared that "any person who shall take under my will and who shall be indebted to my estate shall pay any sums owing before participating in any estate received hereunder." Two of the legatees were indebted to the tes-

tator, evidenced by notes payable in Indiana, carrying eight per cent. interest. The bill alleges that this rate was legal in Indiana, and the answers of the legatees do not deny that fact. The legatees admit that a rate of six per cent. would apply, if any interest at all is to be charged, but insist that the provisions of the will are inconsistent with a charge of any interest, and that the sums received should be treated as advancements. The trial court decided that interest should be charged at eight per cent., but if charged at only six per cent. their whole interest in the estate would be consumed. Held: The claim of appellants that certain notes given by them to the testator, in his lifetime, for loans made to them, are barred by the common law presumption of payment, and also that the sums represented by such notes should be treated as advancements, is not sustained by the evidence. *Taylor v. Carter*, 117 Va. 845, 86 S. E. 120.

II. WHETHER A DONATION IS AN ADVANCEMENT.

1/2A. IN GENERAL.

In general, two elements are essential to constitute an advancement, a gift by the parent to the child and the intention by the donor that the gift shall be an advancement. But the latter may be inferred from the former. Nevertheless, a gift, in contradistinction to a transfer for valuable consideration, is indispensable. *Hill v. Stark*, 122 Va. 280, 84 S. E. 792.

A. DEPENDS UPON INTENTION.

See ante, "In General," II, 1/2A; post, "Husband and Wife," VI, C.

The intention of the testator determines the question as to whether or not a gift is an advancement. *Payne v. Payne*, 128 Va. 33, 104 S. E. 712. See *Neil v. Flynn Lumber Co.*, 82 W. Va. 24, 95 S. E. 523.

B. WHEN ADVANCEMENT PRESUMED.

See post, "Husband and Wife," VI, C.

Where there is a gift from a parent to a child, supposing the gift to be adapted to advance the latter in life, it would seem that there is a prima facie presumption that the gift is intended as an advancement. *Payne v. Payne*, 128 Va. 33, 104 S. E. 712; *Poff v. Poff*, 128 Va. 62, 104 S. E. 719; *Johnson v. Mundy*, 123 Va. 730, 97 S. E. 564.

Where a conveyance is made without consideration, or for a mere nominal consideration, by a father to one of his children, the same is prima facie an advancement. *Neil v. Flynn Lumber Co.*, 82 W. Va. 24, 95 S. E. 523.

A conveyance by a father of a portion of his land to one of his sons, by a deed reciting no consideration, practically contemporaneous with conveyances to other children, admittedly made by way of advancement out of his estate, is presumptively an advancement, and intended to be in lieu of the share in the land such son would have taken by partition on the death of the father intestate. *White v. White*, 64 W. Va. 30, 60 S. E. 885.

Payment by Parent—Conveyance to Child.—Where the purchase money for land is paid by a parent but the conveyance is to the child, there is a presumption that the conveyance was intended as an advancement, and a trust does not arise in favor of the parent. *Clary v. Spain*, 119 Va. 58, 89 S. E. 130. As to creation of trust under such circumstances, see post, TRUSTS AND TRUSTEES.

Rebuttal of Presumption.—The presumption in favor of an advancement may be rebutted by evidence. *Clary v.*

Spain, 119 Va. 58, 89 S. E. 130; *Neil v. Flynn Lumber Co.*, 82 W. Va. 24, 95 S. E. 523.

The presumption in favor of an advancement must be rebutted by affirmative proof that the gift was not intended to be a gift by way of advancement. *Poff v. Poff*, 128 Va. 62, 104 S. E. 719.

The presumption in favor of an advancement may be overcome by proof of the declarations of the grantor and the attendant circumstances showing a contrary purpose. *Neil v. Flynn Lumber Co.*, 82 W. Va. 24, 95 S. E. 523.

Same—Evidence Held Insufficient.—*W.*, in his lifetime, conveyed land to his daughter's husband, by deed reciting no consideration. Parol evidence offered to rebut the presumption of advancement and to prove purchase, held insufficient for that purpose. *White v. White*, 72 W. Va. 144, 77 S. E. 911.

Same—Declaration in Will Held Insufficient.—In the instant case where a testator gave a farm to his younger sons, the following declaration in his will furnishes no affirmative proof that the gift of the farm was not intended to be a gift by way of advancement: "I have other property that I do not attempt to dispose of in this will concerning the farm. I may some time in the future make a will as to the residue of my estate, or I may dispose of it in my lifetime, or I may die intestate as to said residue." *Poff v. Poff*, 128 Va. 62, 104 S. E. 719.

E. ILLUSTRATIONS.

In *Poff v. Poff*, 128 Va. 62, 104 S. E. 719, it was held that a gift of a farm under the will of a father to his younger sons was, under the circumstances, a gift by way of advancement.

In the instant case the will of testator and the deeds under which he had granted property to his children in his lifetime contained internal affirmative evidence of the fact that the gifts were intended as advancements.

The gifts to the children were substantial, some about equal to and others exceeding in value their aliquot shares of the estate had it all been divided in accordance with the statute of descents and distributions. That the father in making the gifts to his children by deed and will had the final division of his property in mind was manifest. Held: That the gifts to the children were advancements. *Payne v. Payne*, 128 Va. 33, 104 S. E. 712.

Gift by Parent-in-Law to Son-in-Law.—See post, "Parent-in-Law and Son-in-Law," VI, B.

Transaction Not Constituting Advancement.—A contract was entered into between a mother and her son. The contract provided that the mother employed her son as her agent and attorney in fact to manage and control her interest in a partnership between herself and another, according to his judgment and discretion without any interference on the part of the mother. As compensation for his services the son was to receive the profits of the business; and if his mother died during the continuance of the partnership, her interest therein, including her contribution to the capital stock, was to pass to and become the property of the son, and should not pass to her personal representative, but should the son die during the continuance of the contract, then the mother was to have the original capital, but the profits were to go to the son's estate. The son also agreed to pay his mother the interest on the capital invested by her in the partnership during the continuance of the contract. Held: That, in this agreement all the elements of an executory contract between the mother and son were present, and that the contribution by the mother of the capital towards the formation of the partnership was not a gift by the mother to her son, and that he could not be compelled to bring it into hotchpot before participating in his mother's estate. Moreover, from the agreed statement

of facts it appeared that the mother did not consider the capital advanced to the partnership part of her estate, or an advancement to her son, so that both of the essential elements of an advancement were wanting. *Hill v. Stark*, 123 Va. 280, 94 S. E. 792.

F. EVIDENCE.

See ante, "When Advancement Presumed," II, B; post, "Husband and Wife," VI, C.

The fact that a child who has received an advancement from his father, with full knowledge of his father's death and of the estate left by him, makes no claim to be entitled to further participate in the distribution or partition of the residue of the estate for more than twenty years is a circumstance to be considered in determining whether the advancement was received by him in relinquishment of his further right to participate in the estate. *Neil v. Flynn Lumber Co.*, 82 W. Va. 24, 95 S. E. 523.

III½. CHANGE OF ADVANCEMENT TO GIFT.

A parent who has made an advancement to one of his children and taken from him a writing evidencing the same can not thereafter, by a mere oral declaration, convert it into an absolute gift. *Adams v. Adams*, 82 W. Va. 244, 95 S. E. 859.

VI. BETWEEN WHOM ADVANCEMENT MAY BE MADE.

A. PARENT AND CHILD.

The doctrine of advancement is of most common application in cases of transaction between parent and child. See ante, "Definitions and Distinctions," I; "Whether a Donation is an Advancement," II.

B. PARENT-IN-LAW AND SON-IN-LAW.

A grant of land by the wife's father to the husband during coverture, reciting no consideration, is prima facie

deemed an advancement to the wife. *White v. White*, 72 W. Va. 144, 77 S. E. 911.

C. HUSBAND AND WIFE.

Always Question of Intention—Evidence.—An advancement, by a husband for his wife is always a question of intention, and it may be shown by parol evidence that the purchase was in fact exclusively for the benefit of the husband. *Taylor v. Delaney*, 118 Va. 203, 86 S. E. 831.

Payment by Husband—Conveyance to Wife.—Where the purchase price of land is paid by the husband, but the conveyance is made to his wife, no presumption of a resulting trust in favor of the husband arises, but it will be regarded prima facie as an advancement to the wife. *Taylor v. Delaney*, 118 Va. 203, 86 S. E. 831.

VI½. OPERATION AND EFFECT OF ADVANCEMENT.

See post, "Accounting for Advancements—Must Be Brought into Hotchpot," VII.

Where a child has received a certain portion in full of his share of his father's estate, on the death of his father, he, his children, and their grantee, are ordinarily barred from further participation in the distribution or partition of the residue of the estate. *Neil v. Flynn Lumber Co.*, 82 W. Va. 24, 95 S. E. 523.

Whether an advancement made to a child by a father is a bar to his further participation in the distribution or partition of the residue of the estate depends upon the intent and purpose of the father in making it and the child in receiving it; and where such purpose and intent does not appear from any writing executed by the parties, or either of them, the same may be deduced from the prior, contemporaneous or subsequent declarations and statements of the parties, their subsequent conduct in relation to the property, as well as an evident purpose or design on the part of the grantor to provide

for his children by the distribution of his estate among them before his death. *Neil v. Flynn Lumber Co.*, 82 W. Va. 24, 95 S. E. 523.

VII. ACCOUNTING FOR ADVANCEMENTS—MUST BE BROUGHT INTO HOTCHPOT.

Statutory Provisions. — Va. Code 1919, § 5278; Barnes W. Va. Code, p. 975, ch. 78, § 13.

Intent of.—The intent of § 5278, Va. Statute Code of 1919, is to bring about, as nearly as may be, an equal division of the estate of a decedent among his children or other descendants, except so far as he may have himself distributed his estate unequally. The descendant who has received an advancement is not required to submit to a redivision of the property by giving up what he has already received, but is only subjected to the alternative of so surrendering what he has received, or of being excluded from any participation in the residue of the decedent's estate which has not been disposed of. *Payne v. Payne*, 128 Va. 33, 104 S. E. 712; *Poff v. Poff*, 128 Va. 62, 104 S. E. 719.

Doctrine at Common Law and in Virginia.—Under the Virginia statute the doctrine of hotchpot has been greatly enlarged. At the common law, it only applied when the decedent died wholly intestate, while under the Virginia statute (Code 1919, § 5278) it is only necessary that there be a partial intestacy. *Payne v. Payne*, 128 Va. 33, 104 S. E. 712.

Code of 1919, § 5278, is operative if the decedent dies intestate as to part of his property and one or more of his descendants who have received gifts by way of advancement, also claim the right to participate in the distribution of the property which has not been disposed of, either in the lifetime of the decedent or by his will. The statute does not assume to interfere with the freedom of the ancestor to

prefer one or more of his descendants in the distribution of his estate, but applies only where, having distributed a part of his estate to them, he has left part of it undisposed of, to be distributed under the statute of descents and distributions. *Payne v. Payne*, 128 Va. 33, 104 S. E. 712.

The doctrine of advancements is applicable only to the division of the portion of the donor's estate of which he dies intestate. *Poff v. Poff*, 128 Va. 62, 104 S. E. 719.

When Doctrine Does Not Apply.—The doctrine does not apply unless the property has been received from the ancestor, either in his lifetime, or by his will, and by way of advancement. *Payne v. Payne*, 128 Va. 33, 104 S. E. 712.

Agreement to Relinquish All Interest in Estate.—Upon the principle that equality is equity, advancements in the lifetime of a parent must be brought into hotchpot by those who receive them, in order that there may be perfect equality among those to share in the estate of the parent; and this rule is unaffected by the fact that some of the heirs, at the time of receiving their advancements, entered into covenants with the parent, whereby they relinquished all interest in or claim to any portion of the estate then owned or which might be thereafter acquired by the parent, and as to which he might die intestate. *McCoy v. McCoy*, 105 Va. 829, 54 S. E. 995; *Mort v. Jones*, 105 Va. 668, 51 S. E. 220, 54 S. E. 857.

If, however, part of the parent's real estate lies in another state which upholds such relinquishment, the proper method of procedure in this state is for the court to ascertain the entire estate of the parent, wherever situated, and then proceed to divide and distribute the estate in Virginia among all the heirs and distributees, without accounting for such advancements, unless it appears that the advancements so received, added to their aliquot portion of the estate in Virginia shall ex-

ceed the shares of the other heirs in the entire estate, in which event those so advanced as aforesaid should be required to account for so much of such advancements to each of them as will produce equality. It is error to seek to enjoin those not advanced from enforcing the law of the situs of real estate as to the lands outside of Virginia. *Mort v. Jones*, 105 Va. 668, 51 S. E. 220, 54 S. E. 857.

A Child May Elect to Bring Property into Hotchpot or Keep What He Has.—A child who has received advancements from his father during the latter's lifetime, may elect either to bring the property so advanced into hotchpot in a suit to distribute the father's estate and receive his share of the property to be distributed, or to take the property advanced as his full share without participating in the distribution. If he elects to bring the advancement into hotchpot, he is entitled to share in the property to be divided, being charged as against his interest therein with the value of the property advanced as of the time of the advancement, but without interest; if he elects not to bring the advancement into the hotchpot, he will be debarred from participation in the distribution, but his title to the property advanced, if incomplete, will be perfected under a decree of the court. *McCoy v. McCoy*, 105 Va. 829, 54 S. E. 995.

Effect of Election.—The election by a child not to bring an advancement of real property into hotchpot does not debar him from participating in the division of his father's personal estate where such advancement does not exceed his share of the real estate. *McCoy v. McCoy*, 105 Va. 829, 54 S. E. 995.

Child Cannot Be Required to Pay Back Part of Advancement to Estate.—While a child receiving an advancement from a parent may bring such advancement into hotchpot and share in the division or distribution of the

estate of the parent after his death, he can not be required to pay back to the estate any part of the advancement, and if it turns out that he has received, by way of advancement, an equal share with the others of the estate, or more than his share, he can only be excluded from participation in the division or distribution of the estate. *McCoy v. McCoy*, 105 Va. 829, 54 S. E. 995.

Incomplete Advancement.—Where a father intends to give certain land to a child as an advancement, but neither gives the child a deed to the land nor puts him in possession, and afterwards sells the land and gives the child the proceeds, the advancement is incomplete and the child is entitled, on the distribution of the father's estate, to a share of both the real and the personal estate, being charged in the division of the real estate with the amount of the proceeds of the land. *McCoy v. McCoy*, 105 Va. 829, 830, 54 S. E. 995.

When Estate Can Be Brought into Hotchpot.—A descendant, who has received an advancement from a person dying intestate as to his estate or any part thereof, is not compelled to await the expiration of a year from the date of the order appointing the first personal representative of such intestate, before instituting a suit in equity for the purpose of bringing the estate into hotchpot under W. Va. Code, § 13, ch. 78. *Meyer v. Meyer*, 60 W. Va. 473, 56 S. E. 209.

Right of Equity to Control Widow's Discretionary Power of Advancement.—Where a husband by his will confers upon his widow the power "to make advances or give such aid to our children as circumstances may from time to time require," and requires her to keep an account thereof "so that they shall enjoy as nearly as possible in equal degree the estate I may leave," the children have no right to demand that they be advanced the same amounts, but the widow is clothed with discretionary power as to the amount to be advanced to each, which a court of equity can not control or review in

the absence of bad faith on her part, or abuse of the confidence reposed in her. The equality intended by the will is in the final distribution. *Trout v. Pratt*, 106 Va. 431, 56 S. E. 165.

Where all of the heirs have severally received conveyances of land from the ancestor in his life time, each covenanting that the conveyance to him is in full of all that he is ever to have as heir, and the ancestor dies intestate leaving other land, no one of the heirs can cause the conveyances to be brought into hotchpot as advancements, but all must share equally in partitioning the land of which the ancestor died seized. *Pendry v. Cozort*, 72 W. Va. 100, 77 S. E. 546.

Purchaser from Distributee.—Under the statute where the advancement to a descendant is equal to or exceeds his share in the estate, it bars his right to further participation; and, although the section does not refer to a purchaser from the descendant, yet such purchaser is charged with knowledge of the public statutes of the state, and only buys and can only take the interest of his grantor in the estate. The doctrine of bona fide purchaser has no application. The purchaser only buys the heir's interest, and when that interest is ascertained he is entitled to that and to nothing more. *Corbitt v. Wright*, 120 Va. 471, 91 S. E. 612. See post, DESCENT AND DISTRIBUTION.

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ADVERSE.—Adverse Title—Adverse Claim.—In *State v. West Branch Lumber Co.*, 64 W. Va. 673, 695, 63 S. E. 372, the court, in discussing the opinion of Judge Snyder in *Simpson v. Edmiston*, 23 W. Va. 675, says: "He failed to distinguish between adverse titles and adverse claimants to the same title. The latter kind of **adverseness** would exist in the case of conflicting claimants to the same title under a deed by private persons, under a will, under a decree of a court, and under any other kind of an instrument. There was **adverseness** of claim, but it was indubitably a case of adverse claim to the same title."

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See the title ADVERSE POSSESSION, vol. 1, p. 199, and references there given. In addition, see ante, ADEQUATE REMEDY AT LAW; post, CONFLICT OF LAWS; EQUITY; JOINT TENANTS AND TENANTS IN COMMON; PUBLIC LANDS; SPECIFIC PERFORMANCE.

¼I. FOUNDATION OF TITLE BY ADVERSE POSSESSION AND OBJECT OF STATUTES.

"The acquisition of title to land by adverse user is referable to and predicted upon the statutes of limitations in force in the several states, which, provide that an uninterrupted occupancy of lands by a person who has in fact no title thereto, for a certain number of years, shall operate to extinguish the title of the true owner thereto, and vest a right to the premises absolutely in the occupier. The object of these statutes is to quiet the titles to land, and prevent that confusion relative thereto which would necessarily exist if no period was limited within which an entry upon lands could be made; and they are believed to be of even more importance to the interest of society than those relating to personal actions. 2 Wood on Limitations (4th ed.), § 254, page 1219." *McClanahan v. Norfolk, etc.*, R. Co., 122 Va. 705, 714, 96 S. E. 453.

The statute of Virginia, § 2915 of the Code of 1887 (Code 1919, § 5805), and statutes of substantially the same tenor and effect in the other states, constitute the foundation for all title by adverse possession in this country. The ruling purpose and policy of these statutes, which must be looked to in

determining their true meaning and effect, is to give stability to land titles. *McClanahan v. Norfolk, etc.*, R. Co., 122 Va. 705, 714, 96 S. E. 453.

One of the objects of the statute of limitations is to settle disputed boundaries, as well as disputed claims of ownership, regardless of what the true boundary or better right may turn out to be. *Point Mountain Coal, etc., Co. v. Holly Lumber Co.*, 71 W. Va. 21, 75 S. E. 197.

I. WHAT CONSTITUTES ADVERSE POSSESSION.

Adverse possession "is a prescriptive title or right, presupposing a valid grant, and deriving its strength and virtue from the statute of limitations, barring the remedy." *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 157, 53 S. E. 409. *Riffle v. Skinner*, 67 W. Va. 75, 80, 67 S. E. 1075.

"By 'adverse possession' we mean a possession which presupposes a disseisin of the rightful occupant, and not a possession under or through the latter." *McClanahan v. Norfolk, etc.*, R. Co., 122 Va. 705, 717, 96 S. E. 453.

II. REQUISITIES.**¼A. IN GENERAL.**

Adverse possession must be actual, exclusive, open and notorious, accompanied by a bona fide claim of title

against all other persons, and must be continued for the period of the statutory bar. *Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612, 62 S. E. 358.

½A. POSSESSION FOR STATUTORY PERIOD.

1. Period of Limitation.

a. In Virginia.

Va. Code 1919, § 5805.

Bill in Equity to Repeal Grant. —

Va. Code 1919, § 5822.

b. In West Virginia.

Barnes Code, W. Va. p. 1044, ch. 104, §§ 1, 5.

In West Virginia suit for the purpose of cancelling a patent to an entryman who, prior to the foundation of the state, had made entries and surveys of lands included within its boundaries, under the laws of the state of Virginia, must be brought within ten years from the date thereof, and this Statute of Limitation applies to a suit brought for that purpose by the State, as well as to one brought by an individual whose interests are involved. *State v. Miller*, 84 W. Va. 175, 99 S. E. 447.

2. When Statute Commences to Run.

Against Remainderman.—Possession under a claim of title for a period of fifteen years ripens into a perfect title as well against a life tenant as against others, and if such possessor also has title to the remainder in fee, the fee merges the lesser estate, and the statute of limitations against one claiming an interest as a remainderman begins to run from the time of the merger, and not from the death of the life tenant. *McCauley v. Grim*, 115 Va. 610, 79 S. E. 1041.

But a vendee in possession under a deed or contract of sale, executed jointly by a life tenant and the remainderman in fee and valid as to the former but void as to the latter, can not claim the benefit of the statute of limitations as against the remainder-

man, until after the death of the life tenant, or no right of action accrues to the remainderman until the happening of that event. *Titchenell v. Titchenell*, 74 W. Va. 237, 81 S. E. 978.

Possession under a tax deed for the statutory period may give title as against the owner, but the statute begins to run only from the date of possession under the deed, and the power to issue the deed does not arise until after the expiration of the period allowed for redemption. *Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612, 62 S. E. 358. See post TAXATION.

3. Effect of Disability of Owner of Property.

Va. Code 1919, §§ 5807, 5808; Barnes Code, W. Va. p. 1044, ch. 104, §§ 3, 4.

Effect of Coverture.—Title by adverse possession can not be maintained against a woman under coverture from the date of her marriage in 1867 until the death of her husband in 1913. The adverse possession which was claimed not having begun before marriage, the statute did not run during that period. *Nickels v. Miller*, 126 Va. 59, 101 S. E. 63.

An action of ejectment, in the name of husband and wife, to recover the common law lands of the wife, must, if the husband be living at the time of trial, be brought within the statutory period, without deduction, on account of the coverture of the wife; but if the husband be dead and the action survives to the wife, the period of her coverture is deducted, provided the whole time elapsing from the time then right of action accrued until action brought does not exceed twenty years. *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481.

If a woman married and owning land before April 1, 1869, conveyed it by deed to which her husband was not a party, and her grantee went into possession, and later she and her husband conveyed to another by a deed good as to the husband, but void as to

the wife, no action accrued to her to recover the land from her grantee in her sole deed until her husband's death, and limitation did not run against her until her husband's life estate ceased by his death, her right of entry not accruing until his death. *Duffy v. Currence*, 66 W. Va. 252, 66 S. E. 755.

Bill in Equity to Repeal Grant by Commonwealth.—Va. Code 1919, § 5823.

4. Effect of Death of a Party.

Va. Code 1919, § 5809.

The amendment to section 2919, Code of 1887 (Acts 1887-88, p. 345), providing that "the period of one year from the qualification of a personal representative" shall be excluded from the computation of time within which it might be necessary to commence any proceeding, and the amendment by Acts of 1895-96, p. 331, which substituted "the period of one year from the death of any party" for "the period of one year from the qualification of a personal representative" (Code 1904, section 2919; Code 1919, § 5809), do not apply to real actions. *Steffey v. King*, 126 Va. 120, 127, 101 S. E. 62.

When the legislature by the act of 1895-6, p. 331, Code of 1904, section 2919, (Code 1919, § 5809) provided for the exclusion of "one year from the death of any party" in computing the time of running of the statute of limitations, it meant some party having a right and cause of action. This right must have existed or at least have been capable of coming into existence during the life of the party, therefore the statute, regardless of the question of its application to real actions has no application to the instant case, where the life tenant's possession was not questioned and could not have been questioned so long as she lived. Therefore, when the remainderman under the void remainder took possession the statute began to run from the time of such taking of possession and not from one year after the death

of the life tenant. *Steffey v. King*, 126 Va. 120, 101 S. E. 62.

5. Effect of Attornment of a Tenant in Possession.

Attornment by a tenant in possession, with knowledge of his lessor who takes no steps to regain possession, is sufficient to break the continuity of possession and stop the running of the statute. *Custer v. Hall*, 71 W. Va. 119, 128, 76 S. E. 183.

A. ACTUAL POSSESSION.

1. In General.

Possession must be actual. *Wade v. McDougle*, 59 W. Va. 113, 129, 52 S. E. 1026; *Wilson v. Braden*, 56 W. Va. 372, 373, 49 S. E. 409; *Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612, 62 S. E. 358.

Constructive possession of land does not apply in favor of a claimant thereof, against the true owner, unless such claimant has had actual adverse possession of some part of the controverted land. *Chilton v. White*, 72 W. Va. 545, 78 S. E. 1048.

A deed for land, though executed in due form by one not having authority to do so, is not in itself sufficient to work an ouster in the absence of notice to the true owner of the adverse claim and possession. *Guthrie v. Beury*, 82 W. Va. 443, 96 S. E. 514. See also *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 160, 53 S. E. 409.

2. What Constitutes Actual Possession.

1/2a. In General.

A grant from the commonwealth puts the patentee of the land constructively into possession thereof, and there can be no ouster of that possession except by actual adversary possession—some act or acts palpable to the senses which serve to admonish the patentee that his seisin is molested. *Richmond v. Jones*, 111 Va. 214, 68 S. E. 181, citing *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

"To work a disseizin or ouster, it is not enough to set up a mere claim by obtaining a deed or patent or otherwise. It requires an adverse holding, actual occupation of the land, and such as is calculated to give notice." *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 160, 53 S. E. 409.

To sustain the defense of adverse possession the defendants, or those under whom they claim, must have entered upon the land in controversy and taken possession thereof by residence, improvement, cultivation, or other open, notorious, and habitual act of ownership. The acts of paying taxes, asserting title and forbidding trespassers, do not aid the claimant to adverse possession. The primary fact of actual possession must first be established. When this is done, proof of such additional acts is admissible, not as showing the possession itself, but as showing its good faith, exclusiveness, notoriousness and hostility. *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225.

Actual inclosure by fence is not indispensable for adverse possession under the statute of limitations. It is sufficient if the possession be marked or held by inclosure by fence, by cultivation, residence, clearing, or any plainly visible and notorious manifestation or sole, exclusive possession, according to the nature of the case. *Wade v. McDougle*, 59 W. Va. 113, 114, 52 S. E. 1026.

The other requisites of the law of title by adverse possession under a claim of title only having been complied with, actual physical enclosure of the land by fence is not necessary, if the claimant has shown his occupancy and claim of title and the limits thereof in some other reasonably certain way, as by clearing and cultivation, or cultivation without clearing, or by some recognized mode of improvement. *Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 77 S. E.

525, explaining *Card v. Fanel*, 24 W. Va. 238.

It is not necessary in order to the acquirement of a right in a burial lot by adverse possession that the same be fenced. If the limits of such claim are clearly defined by improvements upon the lot and by a slight barrier or ridge extending all the way around the same, and so maintained for the period of 10 years, clearly indicating the extent and nature of the claim, it will be sufficient to confer the right by adverse possession. *Sherrard v. Henry* (W. Va.), 106 S. E. 705.

"The proof of absence of occupancy and improvement by fencing, cultivation or otherwise, however good or sufficient the reason for not building, or not fencing, or not clearing or performing any other act of ownership may be, can not prove or tend to prove a claim by adversary possession. If it were otherwise, it is conceivable that lands remaining in a state of nature might be recovered by adversary possession, or the possession might be retained against the older patentee by proving, item by item, and circumstance by circumstance, a plausible excuse to the jury for the failure to do or perform this or that act essential to adversary possession." *Richmond v. Jones*, 111 Va. 214, 217, 68 S. E. 181.

The character of the acts necessary to give to the party the seisin required must, of course, vary with the situation of the land and the condition of the country. In a settled and cultivated region an actual occupancy and pernanancy of the profits may be requisite; whilst in the wilderness a possession less definite might suffice, if it appeared that the property was not susceptible of a stricter occupation; but it must always be an actual, visible, notorious, and continued possession. *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225. See post, "Of Wild and Uncultivated Lands," II,

A, 2, d $\frac{1}{4}$; "Notorious and Visible," II, B; "Continuous," II, D.

One who lives in a dwelling house on an enclosed tract of land, and has and uses outbuildings, fruit trees and a garden thereon, cultivates a part thereof, and grazes the whole, and whose dominion over the land is notorious and is recognized and respected by all the countryside, had adverse possession of the whole tract. *Roller v. Armentrout*, 118 Va. 173, 86 S. E. 906.

b. Making Improvements on Land or Cultivating It.

"All the authorities agree that acts done upon land, requisite to constitute adverse possession, must be such as to indicate and serve as notice of an intention to appropriate the land itself, and not the mere products of it, to the dominion and ownership of the party entering, being acts of permanent improvement." *Whealton v. Doughty*, 112 Va. 649, 656, 72 S. E. 112.

It is not necessary that cultivation or improvement extend to the line claimed at every point, if the acts manifest unequivocal intent to claim up to the line. *Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 77 S. E. 525.

c. Cutting Timber, Sod or Grass.

Mere occasional cutting timber or sod on land does not constitute adverse possession under the statute of limitations. *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1026.

"In 1 Cyc., p. 990, it is said, that although there are some decisions apparently to the contrary, the weight of authority sustains the rule that the mere occasional cutting of timber on land is not alone such evidence of ownership as to amount to a possession adverse to the true owner, and the additional circumstances that the claimant * * * pastured his hogs or cattle there occasionally, or did other similar acts, will not constitute actual possession; and on p. 992, it is said

that the occasional or periodical entry upon land to cut wild grass is not an act manifesting a purpose to take possession as owner, and does not constitute actual possession." *Whealton v. Doughty*, 112 Va. 649, 656, 72 S. E. 112. See post, "Grazing Cattle," II, A, 2, c $\frac{1}{2}$.

c $\frac{1}{2}$. Grazing Cattle.

Mere occasional grazing cattle on land does not constitute adverse possession under the statute of limitations. *Wade v. McDougle*, 59 W. Va. 113, 114, 52 S. E. 1026. See also, *Whealton v. Doughty*, 112 Va. 649, 656, 72 S. E. 112.

d $\frac{1}{4}$. Of Wild and Uncultivated Lands.

"There can be no adverse possession of wild lands as against the superior title unless such possession is actual." *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409. *Chilton v. White*, 72 W. Va. 545, 549, 78 S. E. 1048.

The mere possession of wild and uninclosed land is not and does not become adverse to the owner of the superior title unless and until the possession is evidenced by such actual, exclusive, visible, and notorious occupation, use and dominion over the land, or by such visible change in its character as amount in law to a complete ouster of the superior claimant. *Guthrie v. Beury*, 82 W. Va. 443, 96 S. E. 514. See also, *Wilson v. Braden*, 56 W. Va. 372, 373, 49 S. E. 409. And see post, "Notorious and Visible," II, B; "Exclusive," II, C.

Such actual possession depends on the acts of the junior claimant of the land rather than upon the things left undone by the senior claimant, and must effect such change in the condition, as from a wild to an inclosed or cultivated state, and be so continuous and visible as would entitle the superior claimant to proceed against the inferior claimant as a trespasser at any time within the statutory limitation

period. *Guthrie v. Beury*, 82 W. Va. 443, 96 S. E. 514.

While lands remain uncleared, or in a state of nature, they are not susceptible of adverse possession against the older patentee, unless by acts of ownership effecting a change in their condition, and to constitute adverse possession there must be occupancy, cultivation, improvement or other open, notorious and habitual acts of ownership. *Richmond v. Jones*, 111 Va. 214, 217, 68 S. E. 181.

Wild and uncultivated lands can not be made the subjects of adversary possession, while they remain completely in a state of nature. A change in their condition, to some extent, is therefore essential; and the acts by which it is effected are often the strongest evidence of actual possession. Without such change, accomplished or in progress, there can be no residence, cultivation, or improvement; no occupation, use, or enjoyment. Evidence short of this may prove an adversary claim, but, in the nature of things, can not establish an adversary possession. Nor is there any reason for relaxing the rules of law on this subject, in behalf of the adversary claimant of such property. There ought to be no presumption in his favor against the better title. It is vain for him to say that he has had all the possession of which the property was then susceptible; for that would lead to a constructive possession, which is only attributable to the rightful owner. *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225; *Richmond v. Jones*, 111 Va. 214, 216, 68 S. E. 181; *Wheaton v. Doughty*, 112 Va. 649, 656, 72 S. E. 112.

The mere cutting and sale of timber at widely separated intervals upon mountain land in a state of nature by the holders of a junior grant does not operate as a disseisin and ouster of the owners under a senior grant, where what was done effected no substantial

change in the condition of the property. *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225.

Occasional cutting of timber on, and ranging cattle over, wild and unenclosed land, is not such occupation of it as will amount to adverse possession. Possession must be such as amounts to constructive notice of the adverse claim, and such as would give the true owner a right to sue for trespass. *Chilton v. White*, 72 W. Va. 545, 549, 78 S. E. 1048.

A mere claim to possession accompanied by the occasional cutting of timber, the prevention of trespasses, the payment of taxes and the assertion of title is not sufficient, but it must be such occupation, use or holding of the property or change in its character, as will make such claimant during such statutory period continuously subject to be treated as a trespasser by the holder of the superior title constructively or actually in possession of such land. Such claim of possession does not amount to an ouster of the superior claimant. *Wilson v. Braden*, 56 W. Va. 372, 373, 49 S. E. 409. See post, "Notorious and Visible," II, B; "Exclusive," II, C.

d $\frac{1}{2}$. Of Tide Lands.

It is doubtful if title by adverse possession can be acquired of land over which the tide ebbs and flows, separate and distinct from the rights of the riparian owner. In the case of wild land, it is held that, in order to acquire title by adverse possession, there must be some change in their physical condition as a visible evidence of occupation and ownership, and it would seem that the same rule should apply to land under water, subject to the ebb and flow of the tide. *Austin v. Minor*, 107 Va. 101, 102, 57 S. E. 609. See ante, "Of Wild and Uncultivated Lands," II, A, 2. d $\frac{1}{4}$.

If title by adverse possession can be acquired of marsh lands on the sea-

shore, separate and distinct from the rights of the riparian owner, the mere fact that the adverse claimant and his predecessors in title permitted their cattle to roam over said marshes when not covered by water, just as they roamed over adjacent marsh lands, and that they cut grass from the marsh lands and hauled it away for use as manure on their highlands, does not constitute such actual possession as will deprive the true owner of his title. *Wheaton v. Doughty*, 112 Va. 649, 72 S. E. 112.

d34. Of Underground Minerals, Oil or Gas.

The title to the surface of land and to the underlying minerals may be vested in different persons, but after severance, the title to neither can be acquired by adverse possession of the other. *Morison v. American Ass'n*, 110 Va. 91, 65 S. E. 469; *Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co.*, 105 Va. 574, 54 S. E. 593.

"It is a general presumption that one who has the possession of the surface of the land has possession of the sub-soil also. But when, by conveyance or reservation, a separation has been made of the ownership of the surface of the land from that of the underground minerals, the owner of the former can acquire no title to the latter by his exclusive and continued enjoyment of the surface; nor does the owner of the minerals lose his right or his possession by any length of nonusage. He must be disseized to lose his right, and there can be no disseizin by an act which does not actually take the minerals out of his possession." *Wallace v. Elm Grove Coal Co.*, 58 W. Va. 449, 453, 52 S. E. 485. See also *Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co.*, 105 Va. 574, 54 S. E. 593.

The statute of limitations, for want of adverse actual possession, does not apply in favor of one claiming coal in state of nature in place, not developed.

Newman v. Newman, 60 W. Va. 371, 55 S. E. 377.

Actual possession in drilling and producing oil and gas by a lessee of land under the usual lease for production of oil and gas, is actual possession of the land by the lessor for adversary possession. *Lloyd v. Mills*, 68 W. Va. 241, 69 S. E. 1094.

c. Possession of Part Possession of Whole.

See post, "Office, Effect and Extent of Possession," III, C.

B. NOTORIOUS AND VISIBLE.

In order to get good title to land by adverse possession, the possession must be open and notorious. *Austin v. Minor*, 107 Va. 101, 57 S. E. 609; *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409; *Wade v. McDougale*, 59 W. Va. 113, 52 S. E. 1026; *Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612, 62 S. E. 358; *Craig-Giles Iron v. Wickline*, 126 Va. 223, 101 S. E. 225.

Possession must be so notorious, exclusive and hostile as to give notice to the owner or put him upon inquiry as to the right under or by which such dominion is exercised. *Guthrie v. Beury*, 82 W. Va. 443, 449, 96 S. E. 514. See post, "Exclusive," II, C; "Hostile and under Claim of Right," II, E.

There can be no adverse possession of wild lands as against a superior title unless such possession is visible and notorious. *Wilson v. Braden*, 56 W. Va. 372, 373, 49 S. E. 409; *Chilton v. White*, 72 W. Va. 545, 549, 78 S. E. 1048.

C. EXCLUSIVE.

To acquire good title by adverse possession, the possession must be exclusive. *Austin v. Minor*, 107 Va. 101, 57 S. E. 609; *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409; *Wade v. McDougale*, 59 W. Va. 113, 129, 52 S. E. 1026; *Gardner v. Montague*, 108 Va. 192, 60 S. E. 870; *Yellow Poplar*

Lumber Co. v. Thompson, 108 Va. 612, 62 S. E. 358; *Cumbee v. Ritter*, 123 Va. 448, 96 S. E. 747; *Providence Forge Fishing, etc., Club v. Miller, Mfg. Co.*, 117 Va. 129, 83 S. E. 1047.

And this rule applies to the acquisition by adverse possession of wild lands. *Wilson v. Braden*, 56 W. Va. 372, 373, 49 S. E. 409; *Chilton v. White*, 72 W. Va. 545, 549, 78 S. E. 1048.

The possession must be so notorious, exclusive and hostile as to give notice to the owner or put him upon inquiry as to the right under or by which such dominion is exercised. *Guthrie v. Beury*, 82 W. Va. 443, 449, 96 S. E. 514.

"To make the possession open and exclusive within the meaning of the law of title by adverse possession, nothing is required beyond acts clearly indicating a claim of ownership of the property and the extent of the claim. The occupancy need not be such as physically to bar out trespassers, but only to manifest unequivocally a claim of ownership on the part of the occupant and preclude all others, not merely from trespassing upon it, but from using it as their own or in common with the claimant. Obviously, this may be done in more than one way and what acts are sufficient depends upon the condition of the land and its adaptability to use." *Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 770, 77 S. E. 525.

Fishing and hunting on a pond, renting boats to others to fish and hunt thereon and instructing one's agent not to permit others to boat or fish on the pond without the principal's permission, are not such acts of adverse possession as will confer title as against an adjacent owner who used the pond for boating and fishing whenever he desired to do so. *Providence Forge Fishing, etc., Club v. Miller Mfg. Co.*, 117 Va. 129, 83 S. E. 1047.

In a suit to remove a cloud on title

it appeared that the property was valuable only for hunting, fishing and trapping, and that a great many people hunted, fished and trapped thereon. The persons under whom complainant claimed used and enjoyed it in these respects far more than any one else, but it was also hunted over, used, and enjoyed by defendant and others. Held, insufficient to show such use and occupation of the premises by any one as was necessary to constitute adverse possession. *Austin v. Minor*, 107 Va. 101, 57 S. E. 609.

D. CONTINUOUS.

$\frac{1}{2}$. In General.

To acquire good title by adverse possession the possession must be continuous. *Austin v. Minor*, 107 Va. 101, 57 S. E. 609; *Wade v. McDougle*, 59 W. Va. 113, 129, 52 S. E. 1026; *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409; *Mitchell v. Carder*, 21 W. Va. 277.

"The moment the premises become vacant, that moment the owner, by reason of his legal title will be regarded in the constructive possession and adverse possession of the wrong doer is at an end." *Wilson v. Braden*, 56 W. Va. 372, 378, 49 S. E. 409.

"Continuity of possession is one of the essential requisites to constitute such adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession, the seisin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseisin, and it is equally well settled that if the continuity of possession is broken before the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute a new adverse possession for the time limited must be taken for that purpose." *Merryman v. Hoover*, 107 Va. 485, 503, 59 S. E. 483.

For possession to be continuous it

must be such as will permit the superior claimant to sue the adverse holder as a trespasser at any time during the period of limitation. Unless he makes out a *prima facie* case of such unbroken, continuous possession, on demurrer to evidence, the judgment should be against him. *Wilson v. Braden*, 56 W. Va. 372, 373, 49 S. E. 409.

"If the land is of a character to admit permanent useful improvement, the possession must be kept up during the whole statutory period by actual residence or by continued cultivation or enclosure." *Wilson v. Braden*, 56 W. Va. 372, 378, 49 S. E. 409.

In *Wilson v. Braden*, 56 W. Va. 372, 378, 49 S. E. 409, the court said: "The plaintiff when he purchased found the premises entirely vacant, and for more than five years thereafter he never found any one in possession of the premises whom he could treat as a trespasser. Even prior to that time the possession is not shown to be continuous. The defendant did not have it enclosed, did not live on it, did not cultivate it except occasionally cropped a portion of it, and cut some timber off of it. His occupancy thereof in any manner was intermittent. No time after the plaintiff purchased had he noticed by the defendant's actual occupancy thereof in such manner that he could have brought suit against him as a trespasser until just before this suit was brought. The defendant has wholly failed to show such continuous possession of the land that the law requires."

1. Effect of Entry by True Owner.

Upon entry by the true owner before the statutory period, the premises revert in him. *Wilson v. Braden*, 56 W. Va. 372, 378, 49 S. E. 409.

2. Tacking Several Possessions Together.

In fixing the duration of adverse possession, a party has the right to tack

to his possession the possession of those under whom he claims. *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

But "where there are several adverse possessions, they can not be tacked together so as to effect a bar or ouster of the title of the owner, unless the several occupants claim in privity, and there was no break in the succession of the one to the other. The possessory estates must be connected and continuous." *Wilson v. Braden*, 56 W. Va. 372, 378, 49 S. E. 409.

Possession of Trees Can Not Be Tacked to Possession of Surface of Land.—Where there has been a severance of title of the surface of land, and of the trees growing thereon, if it be conceded that there was such adverse possession of the trees as would ripen into title if held for the statutory period, still the possession of the trees after the severance of title as aforesaid can not be added to the possession of the owner of the surface, and those under whom he claims, so as to complete the period of the statutory bar to a recovery of the true owner thereof. *Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612, 613, 62 S. E. 358.

E. HOSTILE AND UNDER CLAIM OF RIGHT.

See post, "Claimants Possession Originally Consistent with True Owner's Title," V.

The occupancy which is necessary to support a claim of title by adverse possession must be hostile. *Cumbee v. Ritter*, 123 Va. 448, 96 S. E. 747; *Providence Forge Fishing, etc., Club v. Miller Mfg. Co.*, 117 Va. 129, 83 S. E. 1047.

The statute of limitations demands ten years of hostile possession, with claim of title. *Wade v. McDougle*, 59 W. Va. 113, 129, 52 S. E. 1026.

A mere naked possession, without claim of right, no matter how long, never ripens into a good title, but is regarded as being held for the benefit

of the true owner. *Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612, 62 S. E. 358; *Custer v. Hall*, 71 W. Va. 119, 120, 76 S. E. 183.

"The books say that when possession is taken there must be then intent to claim adversely." *Clark v. Beard*, 69 W. Va. 313, 315, 71 S. E. 188, citing *Hudson v. Putney*, 14 W. Va. 561.

In an action of ejectment the jury were properly instructed that to constitute an adverse possession of land, entry and possession under claim of right or title is required, and possession for any length of time of the land in the declaration mentioned by the defendant and those under whom he claims constitutes no title to the said land and is no bar to the plaintiff's right of entry upon said land where such claim of right or title do not exist. *Gardner v. Montague*, 108 Va. 192, 60 S. E. 870.

Adverse possession of land sufficient to constitute title is not established by proof that the possession was open, uninterrupted and notorious. It may have been all of these and yet not hostile. *Gardner v. Montague*, 108 Va. 192, 60 S. E. 870.

Possession must be so notorious, exclusive and hostile as to give notice to the owner or put him upon inquiry as to the right under or by which such dominion is exercised. *Guthrie v. Beury*, 82 W. Va. 443, 449, 96 S. E. 514. See ante, "Notorious and Visible," II, B; "Exclusive," II, C.

One who enters upon land with the verbal permission of the owner and makes improvements thereon, but without deed or other paper title, does not hold adversely to such owner in the absence of a clear, positive and continued disclaimer of the owner's title brought home to his knowledge. One who admits the title of another in order to acquire possession can not deny that title in order to retain it. *Thomp-*

son v. Camper, 106 Va. 315, 55 S. E. 674.

To constitute adverse possession there must be what is considered in law an ouster, an intention to oust and deprive the true owner, evidenced by acts importing only hostility, acts under circumstances importing hostility. And such acts and intent to claim adversely must be brought home to the knowledge and notice of the owner. *Clark v. Beard*, 69 W. Va. 313, 315, 71 S. E. 188.

Mistake.—Where a person occupies and possesses the land of another through a misapprehension or mistake as to the boundaries of his land, with no intention to claim as his own that which does not belong to him, but only intending to claim to the true line, wherever that may be, he does not hold adversely, and the reason why this is so is because in this state intention to hold adversely is an indispensable requisite to adverse possession, and such intention is then wanting. *Schaubach v. Dilleuth*, 108 Va. 86, 60 S. E. 745; *Clinchfield Coal Co. v. Viers*, 111 Va. 261, 264, 68 S. E. 976. See also, *Oneal v. Stimson*, 61 W. Va. 551, 558, 56 S. E. 889.

Possession taken by mistake, and not under a claim of right, can not ripen into adverse possession, and hence in this case the bill was rightly dismissed. *Davis v. Owen*, 107 Va. 283, 58 S. E. 581.

III. COLOR OF TITLE.

A. DEFINED.

As the doctrine of color of title is technical and peculiar to the common law, its definition is to be found there and not elsewhere. That is the source from which it was imported into the constitution and the statute. To ascertain what it means, we must resort to its origin and repository. *State v. King*, 77 W. Va. 37, 47, 87 S. E. 170.

The doctrine of "color of title" is not

literally a part of the statute of limitations. It is really a judicial addition to its terms by construction, in obedience to its spirit and purpose, or an implied legislative adoption of a judicial fiction devised for beneficent purposes. *State v. King*, 77 W. Va. 87 S. E. 170.

The phrase, "color of title," is used in § 3 of Art. XIII of the Constitution of this state and § 40 of ch. 31, Code, ser. § 1099, in the sense in which it is used in the judicial administration of the statute of limitations and other judicial proceedings. *State v. King*, 77 W. Va. 37, 87 S. E. 170.

Color of title, for the purposes of the statute of limitations as to land, is that which has the semblance or appearance of title, legal or equitable, but which in fact is not title. *Point Mountain Coal, etc., Co. v. Holly Lumber Co.*, 71 W. Va. 21, 75 S. E. 197; *Knight v. Grim*, 110 Va. 400, 404, 66 S. E. 42. See also, *Ritz v. Ritz*, 64 W. Va. 107, 60 S. E. 1095; *Lewis v. Yates*, 62 W. Va. 575, 598, 59 S. E. 1073.

"Color of title is not, in law, title at all. It is a void paper having the semblance of a muniment of title, to which, for certain purposes, the law attributes certain qualities of title." *State v. King*, 77 W. Va. 37, 41, 87 S. E. 170.

"Color of title is anything in writing purporting to convey title to the land which defines the extent of the claim, it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance or color of title." *Stover v. Stover*, 60 W. Va. 285, 293, 54 S. E. 350. See post, "Title Need Not Be Good and May Be Equitable." III, B.

To serve as color of title a deed or paper should be one purporting to give right or title to the claimant or some one under whom he claims. *Waldron v. Ritter Lumber Co.*, 80 W. Va. 792, 798, 94 S. E. 393, citing *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423;

Swann v. Young, 36 W. Va. 57, 14 S. E. 426.

Therefore a deed or other title paper to which one is not a party, and under which he does not claim, but who claims adversely to it, though made by a tenant occupying some portion of the land under a lease from him, will not as against third persons claiming adversely operate to give him title by adverse possession to land not covered by his title papers or actually occupied. *Waldron v. Ritter Lumber Co.*, 80 W. Va. 792, 94 S. E. 393. See post, "Office, Effect and Extent of Possession," III, C.

A contract of partition in writing under seal partitioning land between the parties thereto describing and defining the boundaries of the land to be held by each in severalty, mutually binding themselves to each other in a specified sum that if any of them should lose any of the land so held and improved by him that the others should make it good, where each of the parties enters into possession of the portion so set apart to him and continues in open, notorious and adverse possession thereof, such contract with such possession is "color of title." *Stover v. Stover*, 60 W. Va. 285, 54 S. E. 350.

No Color of Title Shown.—The defendants could not claim any color of title, as they either had an absolutely and decisively good paper title or no paper title at all. The title which they derived from their predecessor in title, the grantor, either did or did not cover the land in controversy. If it did, no question of color of title or adverse possession arises or can arise; if it did not, they are solely dependent upon their defense of adverse possession, they are wholly without color of title under the grantor, and, having shown none from any other source, they are limited under that defense to their actual possession of the minerals. *Blacksburg Min., etc., Co. v. Bell*, 125 Va. 565, 100 S. E. 806. See ante, "Actual

Possession," II, A; post, "Office, Effect and Extent of Possession," III, C.

The term "claimant under color of title," in Const., art. 13 (Code 1906, p. lxxxiv), relating to the transfer of title of land forfeited to the state, is the status of one who relies on the doctrine of adverse possession, however defective his color of title may be, so long as his claim is not predicated on fraud or breach of trust. *State v. West Branch Lumber Co.*, 64 W. Va. 673, 63 S. E. 372.

B. TITLE NEED NOT BE GOOD AND MAY BE EQUITABLE.

1. Rule Stated.

It is inherent in color of title that the title claimed thereunder is invalid—is in fact no title—and the writing may indeed be absolutely void; but if the other requisites of the statute of limitation are complied with by the disseisor, it will constitute color of title. *Baber v. Baber*, 121 Va. 740, 94 S. E. 209; *Blacksburg Min., etc., Co. v. Bell*, 125 Va. 565, 100 S. E. 806; *Lloyd v. Mills*, 68 W. Va. 241, 246, 69 S. E. 1094. See also *Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co.*, 105 Va. 574, 581, 54 S. E. 593. And see ante, "Defined," III, A.

It is well settled in this state that a deed which purports to convey title, however defective, gives color of title, and when accompanied by adverse possession thereunder for the statutory period of ten years will ripen into a good title. *Ritz v. Ritz*, 64 W. Va. 107, 60 S. E. 1095, citing *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423; *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231; *Russell v. Tennant*, 63 W. Va. 623, 60 S. E. 609; *Calvert v. Murphy*, 73 W. Va. 731, 733, 81 S. E. 403, citing *Core v. Fanpel*, 24 W. Va. 238, 242; *Deepwater R. Co. v. Honaker*, 66 W. Va. 136, 137, 66 S. E. 104.

"This rule is applicable, so far as it effects her separate estate, though the grantor be a married woman." *Deep-*

water R. Co. v. Honaker, 66 W. Va. 136, 147, 66 S. E. 104.

The title to which the writing gives the color, or semblance of title, may be an equitable as well as a legal title. *Baber v. Baber*, 121 Va. 740, 94 S. E. 209; *Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co.*, 105 Va. 574, 581, 54 S. E. 593.

2. Rule Illustrated.

A deed, void for defect apparent upon its face, constitutes color of title, open, notorious, exclusive and hostile possession under which, for a period of ten years, gives title under the statute of limitations. *Russell v. Tennant*, 63 W. Va. 623, 60 S. E. 609.

An invalid tax deed, which purports to convey land, and sufficiently describes it to render identification possible, gives color of title to the land granted. *Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612, 62 S. E. 358; *Jarrett v. Osborne*, 84 W. Va. 559, 101 S. E. 162, 166, citing *State v. Harman*, 57 W. Va. 447, 50 S. E. 828.

A void tax deed is good color of title both for the purposes of § 3, art. 13, of the constitution, and the statute of limitations. *State v. Harman*, 57 W. Va. 447, 449, 50 S. E. 828.

A quitclaim deed for land is good color of title on which to base adversary possession under the statute of limitations. *Lloyd v. Mills*, 68 W. Va. 241, 69 S. E. 1094; *State v. United States Coal, etc., Co.*, 86 W. Va. 256, 103 S. E. 50.

Possession under Unrecorded Deed.—Though an unrecorded deed is void as to a subsequent purchaser for value and without notice, the grantee therein and others claiming under him may rely upon and use the same as color of title, against such purchaser, in proving title in themselves by adverse possession, to the land the deed purports to convey. *Williamson v. Wayland Oil, etc., Co.*, 79 W. Va. 754, 92 S. E. 424.

Conveyance by One without Title.

—A deed, even though made by a stranger to the title, may serve as color of title to an occupant of land claiming the forfeited title, under § 3, Art. 13 of the Constitution. *State v. Sommers*, 77 W. Va. 675, 89 S. E. 1.

A quitclaim deed, describing by metes and bounds the land remised, is good color on which to base a claim of title, regardless of whether or not the grantor appears to have any interest in or title to the land. *State v. United States Coal, etc., Co.*, 86 W. Va. 256, 103 S. E. 50.

Conveyance by One Not Authorized.

—A paper, purporting to convey land by proper description, though void as a conveyance for want of authority in the grantor, is admissible as evidence of color of title. *Goad v. Walker*, 73 W. Va. 431, 80 S. E. 873.

A deed by a married woman, her husband not joining therein, and therefore void, purporting to convey her sole and separate estate in land, is nevertheless color of title, by which and adverse possession thereunder for ten years and payment of taxes, the grantee may acquire absolute title, working a disseizin of her estate in the land. *Calvert v. Murphy*, 73 W. Va. 731, 81 S. E. 403.

Married Woman's Deed Void for Want of Privy Examination.—Church trustees, like other persons, may, under a deed as color of title, acquire good title to land by adverse possession, though the deed be the deed of a married woman, purporting to convey her separate estate, but void for want of privy examination, and they will acquire such title as the deed purports to convey. *Deepwater R. Co. v. Honaker*, 66 W. Va. 136, 66 S. E. 104.

Written Contract of Sale with Possession Accompanied by Claim of Performance.—It is not necessary to consider the question whether the vendee in fact performed the contract on his part so as to have acquired a

valid title to the land. The inquiry stops with the ascertainment of the fact that he accompanied his possession with the bona fide claim to have so done, and continued such possession unbroken for the statutory period. *Baber v. Baber*, 121 Va. 740, 94 S. E. 209.

B $\frac{1}{4}$. CAN NOT BE USED TO ACHIEVE UNJUST OR FRAUDULENT RESULTS.

1. Rule Stated.

Being a mere judicial fiction used in the administration of the statute in order to effectuate its full, fair and just purpose, the doctrine of color of title imposes no duty upon the courts to permit it to be used for the achievement of unjust or fraudulent results. *State v. King*, 77 W. Va. 37, 87 S. E. 170.

Effect of Fraud on Claim. — "The courts, with few exceptions, have declared that possession under color, to be adverse, must not be fraudulent. 'It must be bona fide but it is not necessary that the claimant should believe his claim to be a good or valid one. He may know that some other person has the better right. It is not necessary that he should think his claim good in its inception, for it generally begins in and presupposes wrong; but it must not be fraudulent, nor, except in certain cases well settled, involve any breach of trust.' *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426." *State v. King*, 77 W. Va. 37, 42, 87 S. E. 170.

2. Rule Illustrated.

Fraudulent Conveyance. — A deed made by a person to a trustee for himself, or to himself by another, at his solicitation and without consideration, for land he does not own nor occupy and in which he has no interest, or for such land in addition to his actual possession, with specific intent and purpose to use the same as color of title, can not be so used by him. His

fraud denies it the virtue, force and effect of color of title in his hands. *State v. King*, 77 W. Va. 37, 87 S. E. 170.

B½. SUFFICIENCY OF INSTRUMENT AS COLOR OF TITLE.

Color of title must be by deed or will, or other writing, which purports or contracts to pass title, legal or equitable, and which contains sufficient terms to designate the land in question with such certainty that the boundaries thereof can be ascertained therefrom by the application thereto of the general rules governing the location of lands conveyed by a deed. *Baber v. Baber*, 121 Va. 740, 94 S. E. 209; *Blacksburg Min., etc., Co. v. Bell*, 125 Va. 565, 100 S. E. 806; *State v. King*, 77 W. Va. 37, 87 S. E. 170.

A deed which does not identify the land in controversy, and is not shown to include it, is not evidence of colorable title thereto. *Chilton v. White*, 72 W. Va. 545, 78 S. E. 1048.

The possession of highland under a deed conveying the same can not be extended so as to embrace marsh land on the seashore not adjacent to the highland, where neither in the deed conveying the highland, nor in any other paper under which title is claimed, is there a description of boundaries which embraces or includes the marsh land. *Whealton v. Doughty*, 112 Va. 649, 72 S. E. 112.

An adverse claimant under color of title can not enlarge his boundary by testimony tending to prove marked timber as corners and lines not called for in any of his colorable deeds. *Goad v. Walker*, 73 W. Va. 431, 80 S. E. 873.

As the principal purpose of color of title is to define boundaries, if it fails to do so with reasonable certainty, it is not admissible evidence. But it is not indispensable that the colorable deed should, in terms, contain a complete description of boundaries; it may expressly refer to, and adopt, some

other existing paper containing them, and a paper thus referred to becomes a part of such colorable deed. *Goad v. Walker*, 73 W. Va. 431, 80 S. E. 873.

A description of land in a deed by reference to land of adjoining owners and not as a distinct tract is sufficient as color of title even though made by a stranger to the title. *State v. Sommers*, 77 W. Va. 675, 89 S. E. 1.

C. OFFICE, EFFECT AND EXTENT OF POSSESSION.

1. Office or Purpose.

The chief office or purpose of color of title is to define the limits of the claim under it. *State v. King*, 77 W. Va. 37, 87 S. E. 170.

The principal purpose of color of title is not to show actual grant of the land or of any interest therein, but is to designate the boundary of plaintiff's claim. *Goad v. Walker*, 73 W. Va. 431, 80 S. E. 873; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423; *Mullan v. Carper*, 37 W. Va. 215, 16 S. E. 527; *State v. United States Coal, etc., Co.*, 86 W. Va. 256, 103 S. E. 50, 51; *Blacksburg Min., etc., Co. v. Bell*, 125 Va. 565, 100 S. E. 806.

"The principal office of a claim or color of title is to define the boundaries and describe the extent of the adverse holding." *Stover v. Stover*, 60 W. Va. 285, 292, 54 S. E. 350.

Such qualities as are imputed to color of title by the law, for limited purposes, are purely fictitious and are accorded to it only to work out just results. *State v. King*, 77 W. Va. 37, 87 S. E. 170.

2. Effect and Extent of Possession Essential Under.

a. Rule Stated.

Barnes Code, W. Va. p. 1004, ch. 90, § 19.

"Without attempting now to describe color of title it may be perhaps sufficient to say its effect is to fix the character of the occupant's possession and

to define its extent and limits." *Stover v. Stover*, 60 W. Va. 285, 292, 54 S. E. 350, quoting Judge Staples, in *Creekmur v. Creekmur*, 75 Va. 430.

There can be no constructive possession of real estate under a mere claim of title; adversary possession to extend beyond the limits of actual occupancy must be under color of title. *Blacksburg Min., etc., Co. v. Bell*, 125 Va. 565, 100 S. E. 806; *Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 770, 77 S. E. 525.

"The rule that possession of part is possession of the whole does not apply where there is no color, but only claim of title. There is no whole in such case, as there is no writing to call for or bound such whole." *Wade v. McDougle*, 59 W. Va. 113, 127, 52 S. E. 1026.

"The possession of the apparent owner of land who holds under color of title, having possession of part, like that of the real owner, extends to the bounds of lands embraced in his title papers, while the possession of the intruder can extend no farther than his actual occupancy." *Whealton v. Doughty*, 112 Va. 649, 656, 72 S. E. 112; *Stover v. Stover*, 60 W. Va. 285, 292, 54 S. E. 350; *Marshall v. Stalnaker*, 70 W. Va. 394, 74 S. E. 48; *Wade v. McDougle*, 59 W. Va. 113, 114, 52 S. E. 1026.

Adverse possession under a deed or other title paper, is limited to the premises actually covered thereby. *Waldron v. Ritter Lumber Co.*, 80 W. Va. 792, 796, 94 S. E. 393, citing *Marshall v. Stalnaker*, 70 W. Va. 394, 398, 74 S. E. 48.

One who enters upon land under color of title is presumed to have entered in accordance therewith; wherefore his actual possession of a portion of the property will by presumption of law be constructively extended to the boundaries defined by his color of title, except so far as the land so included is in the adverse possession of

another. *Ahner v. Young*, 84 W. Va. 336, 99 S. E. 552; *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 157, 53 S. E. 409; *Richmond v. Jones*, 111 Va. 214, 221, 68 S. E. 181; *Bradley v. Swope*, 77 W. Va. 113, 87 S. E. 86; *Curtis v. Meadows*, 77 W. Va. 22, 86 S. E. 886; *Point Mountain Coal, etc., Co. v. Holly Lumber Co.*, 71 W. Va. 21, 28, 75 S. E. 197; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

This is true whether the land in controversy is embraced by one or several tracts, because actual possession within one of two or more adjoining tracts of land of the same owner is possession of all of them. *Ahner v. Young*, 84 W. Va. 336, 99 S. E. 552, 556, citing *Overton v. Davisson*, 1 Gratt. (42 Va.) 212, 42 Am. Dec. 544; *State v. Harman*, 57 W. Va. 447, 50 S. E. 828; *State v. Haymond*, 84 W. Va. 292, 100 S. E. 81, 84.

Upon the question of adversary possession it is immaterial whether the land in controversy be embraced by one or several coterminous grants of the older patentee; or one or several coterminous grants of the younger patentee; in either case the lands granted to the same person by several patents must be regarded as forming one entire tract. *State v. Harman*, 57 W. Va. 447, 462, 50 S. E. 828.

Where a party in possession of a tract of land purchases an adjoining tract which is vacant or not in the adverse possession of another, and grazes it and has the timber cleared off it, he will be considered as in the possession of the newly acquired tract. *Roller v. Armetrout*, 118 Va. 173, 86 S. E. 906.

But in *Chilton v. White*, 72 W. Va. 545, 78 S. E. 1048, it was held that actual possession of one or more tracts of land, contiguous to another tract in controversy, under a deed for a larger boundary which includes them all, does not give constructive possession of the controverted tract, against

the true owner thereof; that there must be actual possession of some part of the land in controversy before the rule of constructive possession can apply.

Rule Applies to Lands of Commonwealth. — The principle that actual possession of a part of a tract of land, under color and claim of title to the whole, is possession of the whole, applies to the lands of the commonwealth, as against persons not lawfully claiming under her. *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

Acts of Stranger Not Interrupting Adverse Possession—West Virginia Statute.— By § 19, chapter 90, Code 1906 adversary "possession of any part of the land in controversy under such patent, deed or other writing, for which some other person has the better title" is "taken and held to the boundaries embraced or included by such patent, deed or other writing unless the person having the better title shall have actual adverse possession of some part of the land embraced by such patent, deed or other writing;" and the fact that some stranger to the better title, not shown to have entered under or by authority or sufferance of the owner of the better title may have cropped or otherwise used and had enclosed by an indifferent fence or barrier a small portion of the disputed boundary, does not interrupt the operation of the statute of limitations in favor of one in possession of the residue of the disputed boundary, occupying and claiming the whole thereof by color of title, or render the possession of the latter less exclusive of the owner of such better title. *Point Mountain Coal, etc., Co. v. Holly Lumber Co.*, 71 W. Va. 21, 75 S. E. 197.

b. Rule Illustrated.

Color of Title Under Junior Grant—Possession Essential.—Where plaintiff held a 15,000-acre boundary under a senior grant, defendants' paper title under a junior grant to a tract

within this boundary was valueless except as color of title. The plaintiff showed no actual possession, but it was under no obligation to do so. Its senior grant conferred upon it a constructive possession of the whole tract, and this constructive possession would continue good regardless of the junior grant, unless and until there was a disseisin. *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225.

To constitute such disseisin, it was just as necessary for the defendants to take actual possession of some part of the land as if they had entered without any color. In the one case, their possession of part would be possession of the whole, while in the other their possession would be limited to their actual occupancy; but in both cases it would be primarily essential that they should do some act indicating an actual possession of the land itself as distinguished from the mere taking of the products thereof. *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225.

"The true or apparent owner dwelling upon his farm by himself or his tenant is as truly in the actual possession of his waters and unimproved woodlands, however extensive they may be, as he is of his pastures, fields, and gardens or that part of his land covered by his residence. *Garrett v. Ramsey*, 26 W. Va. 345. Such possession is deemed to be coextensive with and limited only by the title or color of title under which he claims. *Ahner v. Young*, 84 W. Va. 336, 99 S. E. 552, 556.

Entry by Mistake.—While the general rule is, that one who by mistake enters lands of another not covered by his title papers will be limited in his adversary possession to the land actually enclosed or of which he has had the *pedis possessio*; yet, if his title papers do cover the land entered, and the entry be with the purpose and intent of holding the same to the limits of

boundaries described in his deed or title papers, and as conveyed, and located on the ground by natural and fixed objects called for, he may by such entry and adversary possession and color of title, continued openly, notoriously and exclusively for the requisite period acquire title to all the land comprehended in his title papers, although such land may have been located and entered, by mistake as to the true location of original lines and corners called for in some prior or ancient patent, deed or title paper, by which he traces his title to the commonwealth. *Point Mountain Coal, etc., Co. v. Holly Lumber Co.*, 71 W. Va. 21, 75 S. E. 197.

If the defendant in an action of unlawful entry and detainer holds, not under color title, but under a mere claim of title, there being no written instrument defining the limits of his claim, his right of possession is limited to the *pedis possessio*, his actual enclosure. But if he holds under color of title, it extends to the boundaries therein. *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 158, 53 S. E. 409. In general as to unlawful entry and detainer, see post, **FORCIBLE ENTRY AND DETAINER**.

Where in controversy concerning the location of the dividing line between adjoining city lots one of the parties relies upon paper title and adverse possession it is not indispensable that he should have had his entire lot enclosed by fence. A fence along a portion of the dividing line, which is admittedly a straight one, marking the extent of his claim, the erection and use of a barn on the lot, and other continuous and visible acts exercised thereon for a period of ten years, to the exclusion of all others, clearly indicating his claim to the entire lot, are sufficient evidence of adverse possession of the whole. *Ward v. Medley*, 81 W. Va. 25, 93 S. E. 941.

Possession Taken Under Deed Pur-

porting to Convey Fee—Title to Minerals.—Where there has been no severance of title to the surface of land and the underlying minerals, a conveyance in fee of the land constitutes color of title to the whole tract, minerals as well as surface, and adverse possession of the surface for the statutory period, claiming title to both surface and the underlying minerals, gives title to both, although the minerals be claimed by another under a prior deed, which was ineffectual to constitute a severance. *Virginia Coal, etc., Co. v. Hylton*, 115 Va. 418, 79 S. E. 337; *Virginia Coal, etc., Co. v. Richmond, etc., Coal Corp.*, 128 Va. 258, 104 S. E. 805.

To obtain the title to all the coal in a tract of land, under the law of title by adverse possession, by means of exclusive, open, notorious, and hostile operation of a single mine on the land, it is essential that such possession be taken and held for the requisite period of time, under color of title to the coal. *White Flame Coal Co. v. Burgess*, 86 W. Va. 16, 102 S. E. 690.

D. EFFECT OF GRANT OF PORTION OF LAND IN ACTUAL POSSESSION.

When one in actual possession of a tract of land conveys legal title to that portion on which is the actual possession, his constructive, actual possession of the residue of the tract ceases. It is not so, if the owner sells such portion by executory contract. *State v. Harman*, 57 W. Va. 447, 448, 50 S. E. 828. See post, "Possession under Executory Contract of Sale," V, E, 2.

III½. AGAINST WHOM POSSESSION RUNS.

As to rights in land there can be no ouster or running of the statute of limitations against one until he has a right of entry. *Lynch v. Brookover*, 72 W. Va. 211, 77 S. E. 983.

The dower of a widow confers no right of possession upon her, except as to the mansion house and curtilage,

until after assignment, and, before assignment, it is no obstacle to the right of entry on the part of an heir and does not prevent the running of the statute of limitations against him in favor of an adverse claimant in possession who has procured a relinquishment of the dower in his favor by purchase thereof. *Russell v. Tennant*, 63 W. Va. 623, 60 S. E. 609.

IV. CONFLICTING GRANTS—INTERLOCKS.

A. IN GENERAL.

Where one grant conflicts in part with another, occasioning an interlock, the elder patentee under his grant acquires at once constructive seisin in deed of all the land embraced within its boundaries, although he has taken no actual possession of any part thereof. The junior grantee under his grant acquires similar constructive seisin in deed of all the land embraced by his boundaries, except that portion within the interlock, the seisin of which had already vested in the senior grantee. *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

"An interlock occurs where the title papers of one person are not limited to or bounded by those of another, but the courses and distances or natural objects called for carry the claim of the one over into the land of the other so that the calls in the title papers of the former necessarily describe a portion of the land included in those of the latter. The word itself, as used in our cases, necessarily implies a lapping of boundaries, or there can be no interlock within which actual adverse possession of a part can ripen the junior title into good title to the whole as against the senior claimant. Where there is an interlock, and the calls of the junior are for lines and corners of the older grant, the only question to be determined is the true location of such common lines and corners. A mere dispute between conflicting claim-

ants as to where the true lines and corners are does not constitute an interlock within the meaning of our decisions respecting adverse possession of interlocks." *Robinson v. Sheets*, 63 W. Va. 394, 397, 61 S. E. 347.

B. C. D. POSSESSION BY SENIOR OR JUNIOR PATENTEE OR GRANTEE OR THEIR PRIVIES.

In the absence of actual adverse possession, constructive possession follows the older and better title to the full limit of the claimant's boundaries. *Pardee v. Johnston*, 70 W. Va. 347, 74 S. E. 721; *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 155, 53 S. E. 409.

The junior grantee, though in possession within his bounds, can not be accounted in possession of the interlock, unless he has actual physical possession in it. Constructive—actual possession arising from possession elsewhere will not do. *Robinson v. Lowe*, 66 W. Va. 665, 666, 66 S. E. 1001; *State v. Haymond*, 84 W. Va. 292, 100 S. E. 81, 84; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

"If the owner of the elder title be in the actual possession of a part of the land covered by his patent, but outside of the interlock, and the holder of the junior patent be in possession of a part of the land covered by his patent, but outside of the interlock, the actual possession of the holder of the better title is deemed to extend to, and cover, every part of the interlock. Strict adherence to this common-law rule would limit the adverse possession of the junior patentee within the interlock to his enclosure or the land actually occupied, his *pedis possessio*. As this would work great hardship and injustice, the courts have so far modified it as to make the actual possession of the junior patentee within the interlock extend to the whole thereof, provided the senior patentee has not also

a pedis possessio within it." *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 157, 53 S. E. 409; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877; *Chilton v. White*, 72 W. Va. 545, 549, 78 S. E. 1048; *Robinson v. Sheets*, 63 W. Va. 394, 61 S. E. 347.

A grant from the commonwealth invests the senior patentee with constructive seisin of all land included in the grant, and this seisin continues until disturbed by actual entry of an adverse claimant, and is then affected only to the extent to which the first patentee is dispossessed by the junior claimant. But this principle has no application to the case of a junior patentee or claimant where the continuity of the original boundary had been severed anterior to the acquisition of the title, or color of title, under which he claims. In such case, quoad the junior claimant who does not connect his title with that of the original patentee, there is no such contiguity of seisin with respect to the dissevered tracts as would render actual possession of one constructive possession of the other. *Hot Springs Lumber, etc., Co. v. Sterrett*, 108 Va. 710, 62 S. E. 797.

"The actual possession of the owner of a tract of land, lying adjacent to another tract of uncleared land, the title to which is vested in another person by a grant from the State, is not extended over a portion of such other tract by the acquisition of a junior patent, covering such portion and purporting to vest title thereto in the owner of such first mentioned tract, however long such possession may continue. To work an ouster of the elder patentee and hold adversely to him, the junior patentee must take actual possession of some part of the land included in the junior patent and within the boundaries of the senior patent. Such is also the statute law of this state. Sec. 19, ch. 90, Code." *Chilton v. White*, 72 W. Va. 545, 549,

78 S. E. 1048; *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 53 S. E. 409.

"Where the state has, by conflicting patents, granted uncleared lands, which adjoin the home tract of the junior patentee, the possession by the junior patentee of his home tract, claiming possession of the land granted by the conflicting patents, is not extended to the lands thus granted so as to give him adverse possession as against the senior patentee." *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 162, 53 S. E. 409.

While plaintiff, under deed for 174 acres wholly within the junior, but interlocking to the extent of 25 acres with the senior, patent, is entitled to recover the interlock if it falls within the exceptions in the older grant and he has been in actual possession for ten years of any portion of the 174 acres; yet, if the area in controversy is not covered by any of the exceptions, he can not recover it without showing actual and adverse possession for the requisite period of some part of the interlock. *Williams v. Smith*, 76 W. Va. 287, 85 S. E. 546.

A deed made by a claimant under a patent, which interlocks with an older one, purporting to convey land lying partly beyond the interlock and within the boundaries of the senior patent, is color of title to the extent of the boundary lines therein designated, but it does not extend the boundary lines of the junior patent beyond their locations as they would be fixed and determined, had such deed never been made, and it remains color of title as to land included in the older grant only to the extent of its boundaries, determined independently of the deed. *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073.

Character of Possession Required of Junior Claimant to Make His Possession Adverse.—To overcome the constructive seisin in deed of the senior patentee and work an ouster, there

must be an actual invasion of his boundary by some act or acts palpable to the senses and which would serve to admonish him that his seisin was molested. *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

The junior patentee can not under any circumstances disseize or oust the older patentee from, or acquire an adversary possession of, the land in controversy, but by the actual occupation of some part thereof, by acts of ownership equivalent to such actual occupation; and while such patented lands remain completely in a state of nature, they are not susceptible of a disseizin or ouster of, or adversary possession against, the older patentee, unless by acts of ownership effecting a change in their condition. *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 162, 53 S. E. 409.

In the case of an interlock, the junior claimant must put his foot on some part of the land in controversy, and it is not enough to make his actual enclosure or perform other acts of dominion, on land claimed by him outside the interlock. *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 160, 53 S. E. 409.

Adversary possession never occurs until there is a disseizin or ouster of the owner. To effect that, an actual, not merely a legal or constructive, entry must be made within the bounds of the title to which adverse possession is asserted, and the possession relied upon must be there only, or there as well as on other portions of the junior grant, lying outside of the interlock. In other words, possession of part is not possession of the whole, if the junior grant conflicts with the senior, unless the actual possession itself is within the interlock, as shown by improvements, or other sufficient acts of dominion, done on the interlock. *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 161, 53 S. E. 409.

V. CLAIMANT'S POSSESSION ORIGINALLY CONSISTENT WITH TRUE OWNER'S TITLE.

A. IN GENERAL.

Title to land can not be acquired by possession for the statutory period unless that possession is adverse. An intent to hold adversely is necessary. *Union Trust, etc., Co. v. Paulhamus*, 74 W. Va. 1, 6, 81 S. E. 547. See ante, "Hostile and under Claim of Right," II, E.

One who enters upon land with the verbal permission of the owner and makes improvements thereof, but without deed or other paper title, does not hold adversely to such owner in the absence of a clear, positive and continued disclaimer of the owner's title brought home to his knowledge. One who admits the title of another in order to acquire possession can not deny that title in order to retain it. *Thompson v. Camper*, 106 Va. 315, 55 S. E. 674.

Where possession is originally taken and held in subserviency to, or in privity with, the title of the adverse claimant, the statute of limitations does not begin to run until the possession, before consistent with the title of the adverse claimant, becomes tortious and wrongful by the disloyal acts of the party in possession, which must be so open, notorious and continued as will fully and clearly show such change on the part of the adverse claimant. *Duggins v. Woodson*, 117 Va. 299, 84 S. E. 652.

"As between parties and privies a possession originally taken in subserviency to another's title cannot be changed into an adverse possession without proof, not only of a subsequent specific intention to claim adversely, but such proof must go to the extent of bringing home notice of such intention to claim adversely to the owner of the dominant estate, or

be of such a character that such notice will be presumed. *Creekmur v. Creekmur*, 75 Va. 430;" *Christian v. Bulbeck*, 120 Va. 74, 104, 90 S. E. 661.

A possession which, in its beginning, was consistent with the possession of the true owner will not be rendered adverse by the lapse of any length of time unless there be such a change in the character of the original possession as will charge the true owner with notice thereof. *Stuart v. Meade*, 119 Va. 753, 89 S. E. 866.

But if in a given case there is proof of a specific intention to claim adversely, and there is no complication arising from the possession having been taken originally by agreement or in subservience to a dominant estate, (or, if there is such complication, the facts are such that notice of the intention to claim adversely is brought home to the owner of such estate, or the proof as to it is of such character that such notice will be presumed), from that moment, the possession will be adverse, and the statute of limitations will begin to run, regardless of the prior absence of intent to claim adversely. *Christian v. Bulbeck*, 120 Va. 74, 104, 90 S. E. 661.

Where possession has been taken in privity with another, the true owner has the right to presume that the original character and intent of the possession remain unchanged until something has been done which will bring home to him notice of a disloyal severance of the privity. *Stuart v. Meade*, 119 Va. 753, 89 S. E. 866.

The notice to or knowledge of the true owner, or others originally having privity of title with the disseisor, of his disclaimer and assertion of an adverse right, required to be proved before the running of the statute of limitations will begin, need not be actual; it may be constructive. *Baber v. Baber*, 121 Va. 740, 94 S. E. 209.

But a mere transfer of a record title with no material change in the charac-

ter of the possession is not alone sufficient for this purpose. *Stuart v. Meade*, 119 Va. 753, 89 S. E. 866.

A disclaimer or assertion of an adverse right, where possession is originally taken or held under the true owner, may be presumed from a great lapse of time, with other circumstances which might warrant such presumption, and proof of the fact is not required to be so convincing as to preclude all doubt. It may be proved as any other fact involved in a civil case may be proved by circumstantial evidence, the probative value and sufficiency of the circumstantial evidence to sustain the burden of proof required (i. e., by a preponderance of the evidence), being entirely with the jury. *Baber v. Baber*, 121 Va. 740, 94 S. E. 209.

B. INTENT.

"Intention to hold adversely is an indispensable element of adversary possession (see *Clark v. McClure*, 10 Gratt. (51 Va.) 305, 310; *Early v. Garland*, 13 Gratt. (54 Va.) 1; *Haney v. Breeden*, 100 Va. 781, 784, 42 S. E. 916), and it is wanting where the occupant does not intend to claim the fence as his line unless it be the true line." *Stuart v. Meade*, 119 Va. 753, 761, 89 S. E. 866.

Where a person occupies and possesses the land of another, through a misapprehension or mistake as to the boundaries of his land, with no intention to claim as his own that which does not belong to him, but only intends to claim to the true line, wherever it may be, he does not hold adversely, for, in this state, the intention to hold adversely is an indispensable element of adverse possession. *Stuart v. Meade*, 119 Va. 753, 89 S. E. 866; *Clinchfield Coal Co. v. Viers*, 111 Va. 261, 68 S. E. 976; *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

This rule does not apply where it is shown that a specific intention ex-

ists on the part of the possessor to claim title to a definite line on the ground in fact beyond the true title. If a party takes and holds actual possession beyond his true boundary line, and with good faith, though mistaken, claims title to and occupies the land, his possession is adverse to the extent of his actual possession, and such possession, if continued unbroken for the statutory period, will ripen into a perfect title under the statute of limitations. *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

B $\frac{1}{2}$. ENTRY UNDER PAROL GIFT.

An entry on land under a parol gift from the owner, and a claim to hold any estate by virtue of the gift, is in its nature a recognition of the continued existence of a subsisting title in the legal owner; and a claim to hold an estate by gift from the legal owner is a claim to hold, in subordination to his title and not adversely. *Thompson v. Camper*, 106 Va. 315, 317, 55 S. E. 674.

C. COTENANTS.

See post, JOINT TENANTS AND TENANTS IN COMMON.

D. BETWEEN MORTGAGOR AND MORTGAGEE.

In the case of a mortgagor, who holds under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession which could silently ripen into a title by adverse possession under the statute of limitations. *Thompson v. Camper*, 106 Va. 315, 317, 55 S. E. 674.

E. VENDOR AND PURCHASER.

1. In General.

The possession of a vendor of land after a conveyance in fee to his grantee is in subserviency to the grantee, and a clear, positive and continued disclaimer and disavowal of such relation, and the assertion of an adverse right, brought home to the knowledge of the true owner, are indispensable to change

the character of the grantor's possession and render it adverse to the grantee. *Schaubach v. Dillemath*, 108 Va. 86, 60 S. E. 745.

Deed by Father to Child of Part of Tract on Which Father Resides.—A child in possession of land formerly constituting a part of the tract on which his father resides, under a valid deed therefor from his father, holds in his own right under the deed, and, as between them, no question of title by adverse possession arises. *Williamson v. Wayland Oil, etc., Co.*, 79 W. Va. 754, 92 S. E. 424.

2. Possession under Executory Contract of Sale.

a. In General.

Possession by a vendee under an executory contract of sale of part of a tract of land is the possession of the vendor. *State v. Harman*, 57 W. Va. 447, 448, 50 S. E. 828.

A vendee who enters under an executory contract, which leaves the legal title where it was, and contemplates a future conveyance, enters in subordination to it, holds under and relies upon it to protect his possession in the meantime. And in such case, a privity exists which precludes the idea of a hostile, tortious possession which could silently ripen into a title by adverse possession under the statute of limitations. *Thompson v. Camper*, 106 Va. 315, 317, 55 S. E. 674.

Where land is entered pursuant to an oral contract for the sale or gift thereof by the owner, title thereto can not subsequently be acquired by adverse possession, no matter how long continued, without the previous assertion of a hostile claim thereto and possession thereunder and notice thereof to the owner from whom possession was so acquired. *Bumpus v. Ohio Cities Gas Co.*, 86 W. Va. 227, 103 S. E. 62.

"In American and English Encyclopedia of Law and Practice, vol.

2, 461, it is said that as against persons other than the vendor, 'between whom and the vendee there is no privity, the possession of the vendee is deemed to be adverse; and it is well settled that the possession of a person who enters under an executory contract to purchase, and subsequently obtains his deed, in pursuance of the contract, is adverse from the time of his entry as to all the world except the vendor.' " *Lloyd v. Mills*, 68 W. Va. 241, 244, 69 S. E. 1094.

b. Purchase Money Paid.

"The possession of the purchaser (under an executory contract of sale) is not adverse to his vendor, although he has paid all the purchase money and used and occupied the land for his exclusive benefit; nevertheless his contract is a recognition of outstanding legal title in his vendor, and his holding will be regarded as in subordination thereto. *Core v. Faupel*, 24 W. Va. 238; *Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744; *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813; *Pickens v. Stout*, 67 W. Va. 422, 68 S. E. 354." *James Sons Co. v. Hutchinson*, 79 W. Va. 389, 403, 90 S. E. 1047.

c. Disclaimer.

"Before the statute of limitations will commence to run, there must be an interruption of the privity of title between the purchaser and his vendor by the assertion of an adverse right. "The possession of an incomplete purchaser becomes adverse only when there has been a severance of the relation of vendor and vendee by a distinct avowal on the part of the vendee that he is holding adversely and not in subordination to the title of the vendor, and notice of such disclaimer is brought home to the vendor." *James Sons Co. v. Hutchinson*, 79 W. Va. 389, 402, 90 S. E. 1047. *Marbach v. Holmes*, 105 Va. 178, 52 S. E. 828; *James Sons Co. v. Hutchinson*, 79 W. Va. 389, 90 S. E. 1047.

d. Effect of Subsequent Grant to Third Party.

R. made a bond for the conveyance of land to W. Afterwards R. made a deed conveying land to K., said to take in part of the land included in the title bond. Possession under the title bond of the interlock would not be adverse to R. while holding the legal title, but would be adverse to K. from the date of R.'s deed to him. *King v. Thompson*, 58 W. Va. 455, 52 S. E. 487.

Where plaintiff claims under a deed which after describing by exterior boundaries the larger tract, and as a further description of the land granted, says, containing by actual survey and estimate twelve thousand six hundred and twenty-five (12,625) acres, exclusive of all prior sales and grants, and plaintiff fails to locate the preferred or excepted lands, proof of possession of a small tract within the exterior boundaries of the larger tract by one claiming under an executory contract from a previous owner or claimant of such large tract, will not, within the rule of *Core v. Faupel*, 24 W. Va. 238, and *State v. Harman*, 57 W. Va. 447, 50 S. E. 828, aid plaintiff's title, or excuse his omission to locate the tracts excepted or reserved in the grants and deeds under which he claims. *Rock House Fork Land Co. v. Gray*, 73 W. Va. 503, 80 S. E. 821.

2½. Possession under Deed or Contract of Sale Executed by a Co-tenant.

See post, JOINT TENANTS AND TENANTS IN COMMON.

F. TRUST ESTATES.

In the case of a cestui que trust, who holds under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession which could silently ripen into a title by adverse possession under the statute of limitations. *Thompson v. Camper*, 106 Va. 315, 317, 55 S. E. 674.

G. BETWEEN LIFE TENANT AND REMANDERMAN OR REVERSIONER.

The possession of a life tenant, as such, can not be adverse to the remainderman or reversioner, because the right of action of the latter does not accrue until the death of the tenant for life. *Duggins v. Woodson*, 117 Va. 299, 84 S. E. 652. *Custer v. Hall*, 71 W. Va. 119, 76 S. E. 183; *Lynch v. Brookover*, 72 W. Va. 211, 77 S. E. 983.

The possession of those claiming under the life tenant is not adverse to those entitled in remainder. *Lynch v. Brookover*, 72 W. Va. 211, 77 S. E. 983.

Where defendants' predecessor acquired possession as a tenant by curtesy, limitations do not begin to run against the remaindermen and in favor of defendants until their possession has become notoriously tortious and adverse. *Duggins v. Woodson*, 117 Va. 299, 84 S. E. 652. See also, *Lynch v. Brookover*, 72 W. Va. 211, 77 S. E. 983.

H. LANDLORD AND TENANT.

In the case of a lessee, who holds under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession could silently ripen into title by adverse possession under the statute of limitations. *Thompson v. Camper*, 106 Va. 315, 317, 55 S. E. 674.

Where possession is originally taken or held under the true owner, a clear, positive and continued disclaimer and disavowal of title and assertion of an adverse right, brought home to the knowledge of the party, are indispensable before any foundation can be laid for the operation of the statute of limitations. The statute does not begin to operate until the possession, before in privity with the title of the true owner, becomes tortious and wrongful by the disloyal acts of the occupying tenant, which must be

open, continuous and notorious, so as to preclude any doubt of the character of the holding or the fact of knowledge on the part of the owner. *Baber v. Baber*, 121 Va. 740, 94 S. E. 209. *Thompson v. Camper*, 106 Va. 315, 317, 55 S. E. 674.

Where the common lessee of two adjoining tracts enters and takes possession of a particular part of the leased lands, as lessee of one of the tracts, and puts down an oil well, and by a sign in large letters placed on the walking beam and plainly visible to persons passing on the railroad and other public roads in the vicinity of the well, gives notice thereby of the character of his holding, and under whose lease the well was drilled and is being operated, and connects such well with a tank on the land of such lessor into which the oil produced is run, and from which the oil is delivered into the pipe line of a common carrier, and for more than ten years the well is so operated, and the royalty oils paid to the lessor under whose lease such entry was made, he is not, after the statute of limitations has fully run, estopped to deny the title of the other lessor, although such well may in fact have been located on his lands. *Lockwood v. Carter Oil Co.*, 73 W. Va. 175, 80 S. E. 814. See post, LANDLORD AND TENANT.

Possession of Tenant of Ancestor Inures to Benefit Heirs and devisees.

—The possession of land by a tenant of an ancestor and true owner, continued without visible change after his death, inures to the benefit and protection of his heirs and devisees, and does not become adverse as to them without such notice thereof as in law effects an ouster. *Guthrie v. Beury*, 82 W. Va. 443, 96 S. E. 514.

Grantor Remaining in Possession after Execution of Conveyance.

—If the grantor in a deed, containing a covenant of general warranty, conveying away the title in fee simple,

remain in possession after the execution thereof, he is presumptively the tenant of the grantee, and can not set up an independent title in himself, without having shown some act of ouster of his landlord, or the equivalent thereof. *Blake v. O'Neal*, 63 W. Va. 483, 61 S. E. 410.

Estoppel to Deny Landlord's Title.—See post, LANDLORD AND TENANT.

I. PRINCIPAL AND AGENT.

An agent of a corporation was in possession of a tract of land so long as the corporation had anything to do with the land as its agent. After the corporation was placed in the hands of a receiver and ceased to have any connection with the land, the agent took a deed in his own name to a part of the land. From and after that date down to the bringing of an action of ejectment (more than 25 years), the agent and his grantees maintained possession of a part of the land, with claim to the whole, conveyed to him under his deed. Held: That such agent and his grantees, his codefendants in the action of ejectment, thereby acquired a complete and indefeasible title to the land, if they did not already have it by virtue of their title papers. *Rose v. Agee*, 128 Va. 502, 104 S. E. 827.

J. EASEMENT—POSSESSION BY OWNER OF SERVIENT ESTATE.

When a railroad right of way is only an easement, occupation by enclosure and cultivation of a part of it by the owner of the servient estate, until it is needed for the operation of the railroad, is presumed to be permissive and not adverse; and the statute of limitations will begin to run only from the time the railroad company has notice of the occupier's hostile claim. *Dulin v. Ohio River Co.*, 73 W. Va. 166, 80 S. E. 145.

V½. OFFER TO PURCHASE ADVERSE CLAIM.

An offer to purchase an adverse claim does not make the claim good. *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225.

VI. PROPERTY WHICH MAY BE HELD ADVERSELY.

A. REAL PROPERTY.

1. State and County Lands.

a. In General.

(1) In Virginia.

The statute of limitations does not run against the state, unless the statute expressly so provides, as to real estate held by it. This rule applies to all suits for the sole benefit of the state, although not brought in its name; and the courts will determine who is the real party in interest by reference not merely to the name in which the suit is brought, but to the facts as they appear in the record. The rule has no application to cases in which the state is not the real plaintiff, although the suit be brought in its name. *Eastern State Hospital v. Graves*, 105 Va. 151, 154, 52 S. E. 837.

(2) In West Virginia.

The statute of limitations under adversary possession runs against the state as to its land not used in governmental administration. *State v. Harman*, 57 W. Va. 447, 448, 50 S. E. 828.

As to its land owned as a proprietor, not used for governmental purposes, the state is an individual subject to the statute of limitations, for the reason that a statute says, "Every statute of limitations, unless otherwise provided, shall apply to the state." W. Va. Code 1906, chap. 35, § 20. Until the Code of 1868, going into effect 1st April, 1869, that was not the law, because until then the rule was, "Nullum tempus occurrit regi," no time runs against the king, and this applied to a state. But that statute changed the old rule

as to land not used for governmental administration. As to property so used, it is not under the statute. *Rifle v. Skinner*, 67 W. Va. 75, 90, 67 S. E. 1075.

The actual continuous possession under color or claim of title, and payment of taxes, required by § 3, Article XIII, of the Constitution, and § 6, of chapter 105, of the Code, to transfer the State's title to lands must be actual, visible, notorious and continuous, not uncertain and desultory, as by occasional trespasses, prevention of trespassing by others, cutting of timber, payment of taxes, etc. *State v. Moore*, 71 W. Va. 285, 76 S. E. 461.

"What is meant by actual continuous possession, within the meaning of the constitution and statute? Does the uncertain desultory kind of possession proven in this case answer the requirement? We think not. Our decisions say that surveys, cutting wood, occasional occupancy, with payment of taxes will not do. *Core v. Faupel*, 24 W. Va. 238; *Oney v. Clendenin*, 28 W. Va. 34. In *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409 it was said: 'A mere claim to possession accompanied by occasional cutting of timber, the prevention of trespasses, the payment of taxes and the assertion of title is not sufficient, but it must be such occupation, use or holding of the property or change in its character, as will make such claimant during such statutory period continuously subject to be treated as a trespasser.'" *State v. Moore*, 71 W. Va. 285, 76 S. E. 461.

b. Lands Forfeited for Nonentry and Nonpayment of Taxes.

As to acquisition of lands forfeited to the state for nonpayment of taxes under sec. 3, art. 13, of the Constitution of West Virginia, see post, TAXATION.

"As to lands forfeited to the state for nonentry and nonpayment of taxes, or acquired in any such manner as to make them transferrable un-

der the constitution and statute, there can be no such thing as adverse possession. *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073; *State v. Morgan*, 75 W. Va. 92, 83 S. E. 288; *State v. Harman*, 57 W. Va. 447, 50 S. E. 828; *State v. King*, 64 W. Va. 545, 63 S. E. 495; *Levasser v. Washburn*, 11 Gratt. (52 Va.) 572; *Staats v. Board*, 10 Gratt. (51 Va.) 400;" *State v. Haymond*, 84 W. Va. 292, 100 S. E. 81, 83.

The statute of limitations does not run against the statute so as to prevent forfeiture of land titles for non-entry for taxation, under § 6 of article thirteen of constitution of West Virginia or the transfer of forfeited titles under § 3 of said article. *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073.

c. Lands Granted by the State.

Neither actual nor constructive possession of her land can affect the rights of the commonwealth, and hence such possession can not affect the rights of her grantee. The estate of the commonwealth is divested by her grant and vested in the patentee. Such grant confers title and seisin upon the grantee and puts him constructively in possession, notwithstanding at the time of the grant there may have been actual possession of the premises by another person, for, since the commonwealth can not be disseised, such person's possession can not be adversary, and the grantee, being by the grant placed in constructive possession, can not be disseised or ousted except by an actual and palpable invasion of his boundary, and adverse possession continued for the period of limitation after the date of his grant. *Green v. Pennington*, 105 Va. 801, 802, 54 S. E. 877.

2. Public Highways and Streets.

Public highways belong to the state, and the statute of limitations does not run against the rights of the public therein. *Norfolk, etc., R. Co. v. Board*, 110 Va. 95, 65 S. E. 531. *Board v. Nor-*

folk, etc., *R. Co.*, 119 Va. 763, 91 S. E. 124.

No title by adverse possession can be acquired in a public street. *Bellenot v. Richmond*, 108 Va. 314, 61 S. E. 785.

However long continued, encroachments on a public street will not confer title, by adverse possession, to any part of the thoroughfare. *Elkins v. Donohoe*, 74 W. Va. 335, 81 S. E. 1130. See also, *Elkins v. Offhaus*, 74 W. Va. 339, 81 S. E. 1132.

However long continued, encroachments on a public road or street by an abutting lot owner, in this case steps leading to his property, will not confer title by adverse possession or prescriptive right thereto in any part of the thoroughfare; the right of the public to remove such encroachments being superior to that of the lot owner to maintain them. *Jones v. Clarksburg*, 84 W. Va. 257, 99 S. E. 484.

Where a road was constructed as a turnpike under authority of statute, and the right to take tolls was granted to a private or semi-private corporation, the turnpike, when established, is a public road, and when the dedication of the right of way for it was accepted, it became complete, and the rights of the public therein became fixed, and title to any part of such highway could not be acquired by adverse possession, as the statute of limitations does not run against the State, unless expressly mentioned. *Virginia Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S. E. 326.

3. Railroad Right of Way.

The doctrine of adversary possession is applicable to land acquired by a railroad company for its right of way. *Dulin v. Ohio River R. Co.*, 73 W. Va. 166, 170, 80 S. E. 145, wherein Williams, J., delivering the opinion of the court said: "The courts of the different states are in direct conflict on this question; and the members of this court are also divided in opinion on it."

B. EASEMENTS.

5. Right in a Cemetery Lot.

While the right which one acquires in a cemetery lot is rather in the nature of a perpetual easement subject to be controlled by the state in the exercise of its police power, it is such a valuable right as a court of equity will protect, and the same character of adverse possession that will confer title to real estate will suffice to confer such right. *Sherrard v. Henry* (W. Va.), 106 S. E. 705.

Where a parcel of land has been set apart by the owner thereof as a place for the burial of the dead those who, with the consent and acquiescence of such owner, use the same for the purpose for which it has been dedicated, selecting and appropriating plots or squares for the burial of their dead therein free of charge, may acquire a right to such plots or squares so appropriated by adverse possession. *Sherrard v. Henry* (W. Va.), 106 S. E. 705.

C. PERSONALTY.

See post, LIMITATION OF ACTIONS.

VII. EFFECT OF ADVERSE POSSESSION.

A. IN GENERAL.

1. Doctrine Stated.

"The result of the statute of limitations is so absolute that the adversary possession operates as a transfer of the legal title, hence a disseizin the holder of the better title." *Calvert v. Murphy*, 73 W. Va. 731, 733, 81 S. E. 403.

A title to land, acquired by adverse possession, is respected in courts of equity as well as in courts of law. *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740.

The statutes prescribing a limitation to actions for the recovery of lands have the effect of vesting in an adverse occupant who comes within

their terms a new, independent and indefeasible title—one paramount to and good against that of all other persons, no matter how or when such other title may have been derived or in what form or forum it may be asserted or sought to be made effective. Less than this would not accomplish the purpose of the legislation. *McClanahan v. Norfolk, etc., R. Co.*, 122 Va. 705, 715, 96 S. E. 453.

"The better reason and the clear and unmistakable result of the authorities is to the effect that a true adverse possession for the statutory period confers upon the occupant a new, independent, unincumbered, indefeasible title, a weapon of defense and offense, good alike at law and in equity in all proceedings which call in question its validity or endanger its security. In short, such a title, though not derived from the former owner, is as good as it would be possible to acquire by deed from a former owner of a perfect title, or by a grant from the commonwealth." *McClanahan v. Norfolk, etc., R. Co.*, 122 Va. 705, 717, 96 S. E. 453.

Actual, open, notorious, exclusive and continuous adverse possession of land for more than ten years, confers good legal title, enabling the owner to maintain an action for unlawful entry and detainer against one who enters unlawfully. *Harman v. Alt*, 69 W. Va. 287, 71 S. E. 709. *Riffle v. Skinner*, 67 W. Va. 75, 67 S. E. 1075.

"Adverse possession of land for the period of the statutory bar to real actions is a source of title upon which one may recover in ejectment. Plaintiff need only trace his title to such source." *Riffle v. Skinner*, 67 W. Va. 75, 83, 67 S. E. 1075. See post, EJECTMENT.

The adverse occupant who has held for the statutory period does not stand in the position of a grantee from the former true owner, but his occupancy has, by authority of the state speaking through the statute, extinguished all

other titles, and has vested in him an absolute and exclusive right to the possession. His title is not in any sense in privity with that of the former owner, and can not be questioned either by such former owner or by any one claiming through him. *McClanahan v. Norfolk, etc., R. Co.*, 122 Va. 705, 715, 96 S. E. 453.

Some expressions are to be found in the text books and decisions on this subject which, standing alone, might seem to indicate that the adverse occupant merely takes over the title of the former owner. It will usually, if not always, be found, however, that such expressions occur only in a connection which assumes a perfect title in the former owner, and are used only as a means of conveying the idea that adverse possession confers a title complete and perfect for all purposes. *McClanahan v. Norfolk, etc., R. Co.*, 122 Va. 705, 716, 96 S. E. 453.

The rule that acquiescence or admissions by a landowner, made under a mistake as to his rights, will not estop him from subsequently enlarging his possession to the limits of his deed, does not apply as against one who has acquired good title by adverse possession. *Harman v. Alt*, 69 W. Va. 287, 71 S. E. 709.

2. Doctrine Illustrated.

Rights Acquired by Owners of Junior Patent.—Where a junior patentee and his successors in title hold during many years continuous and uninterrupted possession of the land granted by the patent, with the knowledge and acquiescence of the owner and the successive grantees of a senior patent of a larger acreage, including the land of the junior patent, the owners of the junior patent thereby acquire proprietary rights superior to those of the owners of the senior patent. *Ahner v. Young*, 84 W. Va. 336, 99 S. E. 552.

Defects in Title Cured.—Defects in a person's title to land are cured by

lapse of time, where he has been in the uninterrupted, honest, and adverse possession of the land under color of title for over 25 years. *Bryan v. Augusta Perpetual Bldg., etc., Co.*, 104 Va. 611, 52 S. E. 357.

Lien of Judgments against Former Owner Barred.—In a creditor's suit the commissioner to whom the cause was referred reported numerous judgments as alive and subsisting liens on the real estate of the judgment debtor. He also reported numerous parcels of real estate liable to the lien of said judgments, and a lot which had been conveyed to the judgment debtor and which had never been conveyed to anyone by him, in the possession of a railway company, which claimed the same by the most notorious acts of adverse possession, exercised by itself and those under whom it claimed. The claim of the railway company to title by adverse possession was decisively supported by all the essential elements of such a title. Its predecessors entered into possession, before the recovery of the judgments referred to, under a color and claim distinctly adverse to, and in no wise in privity with, the title of the judgment debtor, and this possession, in most emphatic manner, had continued exclusively, uninterruptedly, visibly, notoriously, and in hostility to all other titles, for more than twenty-three years before the instant suit was brought, and for nearly thirty years before the judgment creditors asserted any claim of lien upon the property, or attempted by amended pleadings to make the railway company a party. During these decades, the adverse occupants had expended many thousands of dollars in permanent improvements on the premises. Held: That any title to the property claimed by the railway company which could be acquired by virtue of the lien of the judgments asserted in the instant suit would be a title held under the judgment debtor; that the

right of action to assert such title would be in terms barred by section 2915 of the Code of 1904 (Code 1919, sec. 5805); and that the effect of this section can not be avoided by resorting to a chancery suit. *McClanahan v. Norfolk, etc., R. Co.*, 122 Va. 705, 96 S. E. 453, distinguishing *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, and *Pratt v. Pratt*, 96 U. S. 704, 24 L. Ed. 805.

In the case at bar the appellants contended that the instant case was one to enforce the lien of a judgment, not an action to recover land, and, therefor, section 2915 of the Code of 1904 (Code 1919, sec. 5805), did not apply; and that under sections 3567 and 3571, Code of 1904 (Code 1919, secs. 6470 6473), their lien was valid and enforceable. It is true that under section 3571 of the Code the lien of a judgment may be indefinitely continued against the land of the judgment debtor in his possession, or of others holding titles derived from and in privity with him. But obviously the same rule can not be applied to strangers who have acquired a perfect legal title not in privity with but adversely to the title of the judgment debtor. In other words, the life of a judgment may be indefinitely prolonged as to any property upon which it can operate, but whenever the right of the judgment debtor to make an entry on or bring an action to recover any land held adversely is tolled by section 2915, the right of his judgment creditor to subject such land to the satisfaction of his judgment also ceases. The lien is a vested right, but not more so than the title to which the lien attaches, and when the statute destroys the latter it necessarily destroys the former. *McClanahan v. Norfolk, etc., R. Co.*, 122 Va. 705, 96 S. E. 453. See post, JUDGMENTS AND DECREES.

Theoretically and technically, a suit to enforce a lien is not a suit to recover land, but a practical and rational ap-

plication of section 2915 of the Code (Code 1919, sec. 5805), in the light of its object and purpose, neither requires nor permits a holding that a lien (which is a mere right to sell a title for debt) stops the statute from running in favor of an adverse occupant and enables the lienor, by a judicial sale, to infuse life into a title which the statute has annihilated. *McClanahan v. Norfolk, etc., R. Co.*, 122 Va. 705, 96 S. E. 453.

Assuming, but not deciding, that one who has secured title to property through adverse possession is a proper party in a creditor's suit to enforce the lien of judgments against a former owner of the property, and that the question of title between a judgment debtor and an adverse claimant can be tried in a suit to enforce the judgment lien, then the statute of limitations (section 2915, Code of 1904; sec. 5805, Code 1919) must be held to protect the adverse claimant if he shows sufficient facts as to the character and duration of his possession. If a legal right would be barred in a suit to enforce it in a court of law, it or an analogous equitable right will be likewise barred in a suit to enforce it in the equitable forum. *McClanahan v. Norfolk, etc., R. Co.*, 122 Va. 705, 96 S. E. 453. See post, CREDITORS SUITS.

Effect of Adverse Possession by Church Trustees. — "The authorities say that church trustees can acquire title by adverse possession, and that the title thus acquired is not encumbered by any equitable trust which may have been in force prior to the date on which the adverse possession began. 24 Am. & Eng. Ency L. 362, and the cases cited in note 9." *Deepwater R. Co. v. Honaker*, 66 W. Va. 136, 147, 66 S. E. 104.

B. AS PRESUMPTION OF GRANT.

"A presumption of grant and title when there has been adverse posses-

sion for the statutory period sufficient to bar recovery, operating to support plaintiff's title in actions of ejectment, has long been recognized in the law of the Virginias." *Riffe v. Skinner*, 67 W. Va. 75, 81, 67 S. E. 1075.

"Where the origin of the possession is not accounted for, and would be unlawful unless there had been a grant, length of possession is *prima facie* evidence, but only *prima facie*, from which a jury might or might not have presumed a conveyance. 2 Minor on Real Property, section 1035." *McCaulley v. Grim*, 115 Va. 610, 616, 79 S. E. 1041.

The plaintiff, by the showing of adverse possession for a length of time which under the law vests one with title, sufficiently negatives all outstanding title and raises in his favor the presumption of a grant. He makes a *prima facie* case. It remains for the defendant to overthrow it. "Where an adverse possession is shown, the burden is on the true owner to show why it should not be operative against him, such as that he was within some exception contained in the statute, or that during a necessary period of the possession the title to the land was in the government." 2 Enc. L. & P., 576. *Riffe v. Skinner*, 67 W. Va. 75, 79, 67 S. E. 1075.

VIII. EVIDENCE.

B. ADMISSIBILITY AND COMPETENCY.

Evidence Admissible to Show Possession.—Statements by a person cutting timber on land or cultivating it, that he is so doing under authority of a certain person as owner, made while so doing, are admissible when the question of possession by such owner is involved. *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1026.

Evidence tending to show that the predecessor in title of the defendant in ejectment claimed the land now in controversy, exercised acts of owner-

ship over the same, or portions thereof, by cutting, using and selling timber from it, clearing and cultivating portions of it, with the knowledge of and without objection on the part of the predecessor in title of the plaintiff, is clearly competent as tending to show where the predecessors in title of both the plaintiff and the defendant regarded the line between them, and also as tending to show adversary possession on the part of the predecessor in title of the defendant, and those who claim under him, even though the acts mentioned were not sufficient to show title by adversary possession. *Smith v. Stanley*, 114 Va. 117, 118, 75 S. E. 742.

Evidence Admissible to Show Possession Was Not Adverse.—In ejectment where the defense was adverse possession, the record of a suit for specific performance brought three years before the commencement of the ejectment action by defendant against his alleged vendor, under whom plaintiff claimed, in which suit the bill was dismissed, was admissible to show that defendant's possession was not adverse at that time. *Marbach v. Holmes*, 105 Va. 178, 52 S. E. 828.

Deed Admissible as Color of Title.—A deed from a special commissioner purporting to be made under authority of a decree is admissible in evidence to give color of title for adverse possession, though such decree is not shown. *Wade v. McDougale*, 59 W. Va. 113, 52 S. E. 1026.

Record of Condemnation Proceedings Admissible to Show Color of Title.—The record of condemnation proceedings, though defective, may, after final judgment therein, be introduced in evidence in an action of ejectment for the purpose of showing color of title, to be followed by proof that the defendant and those under whom he claims have been in the actual and adversary possession of the premises for the period pre-

scribed by law. It is immaterial that neither the plaintiff nor those under whom he claims were parties to the condemnation proceedings. *Knight v. Grimm*, 110 Va. 400, 66 S. E. 42. See post, EJECTMENT.

When Evidence of Junior Claimants Possession Outside Interlock Not Admissible.—If a portion of the land, claimed under the older and better title, interlocks with a junior grant, and there has been actual adverse possession, for the statutory period, within such interlock, it is error to admit evidence of the junior claimant's possession, within the boundaries claimed by him, outside of the interlock. *Pardee v. Johnston*, 70 W. Va. 347, 74 S. E. 721.

Deed Joining Plaintiff with Title Acquired by Adverse Possession.—In ejectment, a deed can not properly be excluded which joins plaintiff with good title acquired by adverse possession as against defendant, proved by the evidence to have been in the grantor. *McDermitt v. Forbes*, 73 W. Va. 240, 80 S. E. 356.

VIII½. QUESTIONS OF LAW AND FACT.

The question of what is actual possession, as well as the question of its continuity and notoriety, are usually questions for the jury; but this is not true where there has been no act whatever indicating any taking of the possession of the land itself. *Craig-Giles Iron Co. v. Wickline* 126 Va. 223, 101 S. E. 225.

IX. HOW LOST.

Although title by adverse possession be complete, it will be destroyed by the re-entry of the party having the paper title into actual possession, and holding the same by virtue of the paper title for the statutory period. *Marbury v. Jones*, 112 Va. 389, 71 S. E. 1124.

XI. PRESERVATION OF RIGHT OF ACTION.

Right Not Saved by Claim. — No continual or other claim upon or near any land shall preserve any right of

making an entry or bringing an action. Va. Code 1919, sec. 5806.

The West Virginia statutes contain an exactly similar provision. Barnes Code, W. Va., p. 1044, ch. 104, sec. 2.

ADVERTISEMENTS.—See post, JUDICIAL SALES; SERVICE OF PROCESS; TAXATION. As to advertising scheme, see post, SALES. As to contest relating to advertising scheme, see *Brenard Mfg. Co. v. Brown*, 120 Va. 757, 92 S. E. 850.

Advertisements Concerning Venereal Diseases.—Va. Acts 1918, p. 561, Pollard's Code 1920, p. 533; W. Va. Acts 1919, p. 278.

Unauthorized Use of Name for Advertising Purposes.—Va. Code 1919, § 5782.

ADVICE OF COUNSEL.—See post, MALICIOUS PROSECUTION.

AFFIDAVIT OF DEFENSE.—See post, ASSUMPSIT.

AFFIDAVITS.**III. Authority to Administer.**

- A. In General.
- B. Clerks of Court.
- C. Judge.
- D. Justices of the Peace.
- E. Notary Public.
- F. Without the State.

IV. Who May Make.**V. Formal Requisites.**

- B. Authentication.
- D. Venue.

VI. Amendment.**VIII. Use in Evidence.**

- A. Pendency of Suit and Notice.
 - 2. Necessity for Notice.
- E. Affidavits as Part of Record.

CROSS REFERENCES.

See the title AFFIDAVITS, vol. 1, p. 227, and references there given. In addition, see ante, ACCOUNTS AND ACCOUNTING; ACKNOWLEDGMENTS; ADULTERATION; post, AMENDMENTS; ANIMALS; ANSWERS; ASSUMPSIT; ATTACHMENT AND GARNISHMENT; ATTORNEY AND CLIENT; BOUNDARIES; CREDITORS' SUITS; CROPS; DETINUE AND REPLEVIN; DRAINS AND SEWERS; ELECTIONS; EXECUTORS AND ADMINISTRATORS; FIRE INSURANCE; GUARDIAN AND WARD; INSURANCE; JUDGMENTS AND DECREES; JURY; LICENSES; LIFE INSURANCE; OYSTERS; PARTNERSHIP; PENSIONS; PHYSICIANS AND SURGEONS; PILOTS; PLEADING; PRODUCTION OF DOCUMENTS; PUBLIC LANDS; SET-OFF, RECOUP-

MENT AND COUNTERCLAIM; SUMMONS AND PROCESS; SURETYSHIP; TAXATION, and other specific titles. As to affidavit of defense, see post, ASSUMPSIT. As to affidavits in attachment, see post, ATTACHMENT AND GARNISHMENT. As to affidavit of president of corporation to plea, see post, CORPORATIONS. As to affidavit to support mechanics' lien, see post, MECHANICS' LIENS. As to affidavit filed in support of motion for new trial, see post, NEW TRIALS. As to omission of name of member of firm from affidavit, see post, PARTNERSHIP.

III. AUTHORITY TO ADMINISTER.

A. IN GENERAL.

See post, "Justice of the Peace," III, D; "Notary Public," III, E; "Without the State," III, F; and see Va. Code 1919, § 274; Barnes Code, ch. 130, §§ 31, 31a, 32, W. Va. Supp. 1918, § 4887, Acts 1917.

Officer of Another State or County.—Va. Code, 1919, § 275; Barnes Code ch. 130, § 33, ch. 51, § 13.

To Purchaser of Fuel, Provisions, or Other Thing.—Va. Acts 1918, p. 266.

B. CLERKS OF COURT.

See ante, "In General," III, A.

C. JUDGE.

Barnes Code 1918, ch. 39, § 3a (1); Va. Code 1919, § 274.

D. JUSTICES OF THE PEACE.

Va. Code 1919, § 274; Barnes Code, ch. 50, § 4.

Affidavit of Defense—Partition of Personality.—Va. Acts 1918, p. 468.

Search Warrant.—Va. Acts 1920, p. 516.

E. NOTARY PUBLIC.

See ante, "In General," III, A; post, "Without the State," III, F.

Being the cashier of a bank does not disqualify a notary public from taking an affidavit to be used in an attachment suit brought to collect a debt due his bank. There is no statute forbidding a notary public, who is an officer in a bank, from taking the affidavit of a person upon a matter in which his bank is interested, and we perceive no good reason in law why he should be disqualified from doing so. The rule which has been held to disqualify a notary public, inter-

ested as grantee or beneficiary in a deed, from taking and certifying the grantor's acknowledgment, does not apply here. Taking an acknowledgment to a deed or other writing is a quasi judicial act. First Nat. Bank v. Cootes, 74 W. Va. 112, 81 S. E. 844.

F. WITHOUT THE STATE.

See ante, "In General," III, A.

Sufficiency of Authentication When Made out of State.—The certificate of the clerk of a court of record of the State of Tennessee, appended to an affidavit which verifies a mechanic's lien, to the effect that the officer taking said affidavit and administering said oath was at said time a notary public, duly commissioned and qualified as such, and that his signature thereto is genuine, is a sufficient authentication of such affidavit, it being judicially known that a notary public in the State of Tennessee is authorized to administer an oath. Appalachian Marble Co. v. Masonic Temple Ass'n, 79 W. Va. 471, 91 S. E. 403.

Authority of Foreign Officer—Authentication.—An affidavit purporting to have been made before a notary of another state, to which there is not annexed a certificate authenticating the genuineness of the notary's signature and his power to administer oaths, as required by Code 1913, Ch. 130, § 31, is insufficient to perfect a claim of mechanics' lien. Hill Clutch Co. v. Independent Steel Co., 74 W. Va. 353, 82 S. E. 223.

IV. WHO MAY MAKE.

See ante, "In General," III, A; "Justices of the Peace," III, D.

Corporations and Agents.—Va. Code,

1919, § 276. See also post, CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

V. FORMAL REQUISITES.

B. AUTHENTICATION.

See ante, "In General," III, A; "Justices of the Peace," III, D; "Without the State," III, F; post, "Venue," V, D; "Amendment," VI.

Omission of Signature.—"In the absence of the signature of any person to the jurat, can we say, as argued, that the omission amounts to a mere irregularity, cured by the statute? Without being certified as required, how can we say the oath was in fact taken? Would such a paper support a prosecution for perjury or false swearing? Is it any oath at all? We think it clear it can not be so regarded. The absence of the signature of the officer to the jurat destroys the evidential quality of the affidavit and return, and renders the latter, *prima facie* at least, invalid." *Wilkinson v. Linkous*, 64 W. Va. 205, 207, 61 S. E. 152.

D. VENUE.

If the affidavit in any way indicates with reasonable certainty the jurisdiction of the officers, it is sufficient, though wanting that formality generally required in good pleading showing venue. If made in good faith and reasonably sufficient, the affidavit should be held good. *Lewis v. Blankenship*, 75 W. Va. 598, 84 S. E. 500.

An affidavit which, after the title of the case, has the venue, "State of West Virginia, Tucker county, to wit," sufficiently shows that the notary is a notary of Tucker county and administered the oath in that county. *Hansford v. Snyder*, 63 W. Va. 198, 59 S. E. 975.

An affidavit filed with a declaration, pursuant to and in compliance with section 46, chapter 125, West Virginia Code, bearing the caption, "State of West Virginia, Monroe County, to wit, in the

circuit court thereof—G. H. Lewis, plaintiff," and concluding with the words, "Taken sworn to and subscribed to before me this 14th day of September, 1912—C. H. Doss, Justice of the Peace, Sweet Spring District," sufficiently shows the venue of the authentication thereof. *Lewis v. Blankenship*, 75 W. Va. 598, 84 S. E. 500.

VI. AMENDMENT.

Subsequent Correction of Affidavit.—"When the affidavit of the officers relates to a delinquent tax return, which the law requires shall be recorded, the omission of the affidavit, or of the jurat or the signature thereto of the officer, renders the return absolutely void, and the omission can not be supplied or the record subsequently corrected." *Wilkinson v. Linkous*, 64 W. Va. 205, 208, 61 S. E. 152.

VIII. USE IN EVIDENCE.

A. PENDENCY OF SUIT AND NOTICE.

2. Necessity for Notice.

An *ex parte* affidavit offered by one party cannot, over the objection of the adverse party, be considered by the court upon the hearing of a chancery cause upon its merits, in the determination of the issues raised by the pleadings, where there has been no previous consent that such affidavits may be so considered, and no consent to, or waiver of notice of, the taking of such affidavit. *Herold v. Craig*, 59 W. Va. 353, 53 S. E. 466.

E. AFFIDAVITS AS PART OF RECORD.

Affidavits, in no way a part of the record, as to what occurred at the time of, or before or after, the entering of a final decree, appealed from, for the purpose of impeaching the same, can not be considered by appellate court. *Townley Bros. v. Crickenberger*, 64 W. Va. 379, 63 S. E. 320.

AFFIRMATION.—See post, OATH

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See the title AFFRAY, vol. 1, p. 238, and references there given. See, also, post, HOMICIDE; Barnes W. Va. Code, p. 1261, ch. 153, §§ 9, 10.

AFFREIGHTMENT, CONTRACTS OF.—See post, CARRIERS.

AFTER.—The words “after the passage of this act,” when used in a statute, refer to all future time from the passage of the act. *State v. Mathews*, 68 W. Va. 89, 102, 69 S. E. 644. See post, SINCE; STATUTES.

AFTER-ACQUIRED PROPERTY.—See post, ASSIGNMENTS; EASEMENTS; MORTGAGES; SALES; WILLS. As to equitable lien upon after-acquired property, see *Brown v. Ford*, 120 Va. 233, 91 S. E. 145. See also post, LIENS.

AFTER BORN CHILDREN.—See post, DESCENT AND DISTRIBUTION; WILLS.

AFTER DISCOVERED EVIDENCE.—See post, CONTINUANCES; NEW TRIALS.

AFTER LOSS—AFTER THE FIRE.—In *Hogl v. Aachen Ins. Co.*, 65 W. Va. 437, 438, 64 S. E. 441, it is said: “There is in the case a discussion as to difference between policies prescribing a time limit **after loss** and those fixing it **after the fire**. We see no difference.” See post, FIRE INSURANCE.

AFTER THEM.—See *Irvin v. Stover*, 67 W. Va. 356, 361, 67 S. E. 1119.

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See the title AGENCY, vol. 1, p. 240, and references there given. In addition, see ante, AFFIDAVITS; post, AGRICULTURE; ARCHITECTS; AUTOMOBILES; BAILMENTS; BENEFICIAL AND BENEVOLENT ASSOCIATIONS; BILLS, NOTES AND CHECKS; CARRIERS; CONTRACTS; DRUMMERS; FIDELITY AND GUARANTY INSURANCE; FIRE INSURANCE; FOOD; FOREIGN CORPORATIONS; FRAUDS, STATUTE OF; HUSBAND AND WIFE; INDEPENDENT CONTRACTORS; INSURANCE; INTOXICATING LIQUORS; JOINT TENANTS AND TENANTS IN COMMON; PARTNERSHIP; PAYMENT; POWERS; PUBLIC SERVICE AND CORPORATION COMMISSIONS; RAILROADS; SALES; SCHOOLS; STATE; STREETS AND HIGHWAYS; SUMMONS AND PROCESS; TRUSTS AND TRUSTEES; WITNESSES; WORKING CONTRACTS.

I. DEFINITIONS AND DISTINCTIONS.

Agent and Servant Distinguished.—

There is a well-defined distinction between an agent and a servant. Usually an agent represents his principal in the formation or discharge of contracts with third persons, while a servant performs mere operative or mechanical acts under the direction and control of the master which may result in imposing a liability on the master on account of an existing obligation resting upon the master. *Virginia Iron, etc., Co. v. Olde*, 128 Va. 280, 105 S. E. 107.

In *Taylor v. Sutherlin-Meade Tobacco Co.*, 107 Va. 787, 60 S. E. 132, the court, in drawing the distinction between the relation of principal and agent and that of master and servant, quotes Mechem on Agency, § 1, as follows: "The true distinction is to be found in the nature of the undertaking and the time and manner of its performance. Agency properly relates to transactions of business with third persons, and it implies more or less of discretion in the agent as to the time and manner of his performance. Service, on the other hand, has refer-

ence to actions upon or about things. It deals chiefly with manual or mechanical execution, in which the servant acts under the direction and control of the master."

"An agent is one employed and authorized to represent and act for another, and the distinguishing features of the agent are his representative character and his derivative authority." *Taylor v. Sutherlin-Meade Tobacco Co.*, 107 Va. 787, 790, 60 S. E. 132, citing *Cutis v. Miller*, 73 W. Va. 481, 80 S. E. 774, *Mechem on Agency* § 1.

A **special agent** is one who is authorized to do one or more specific acts in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done. *Bowles v. Rice*, 107 Va. 51, 57 S. E. 575.

Officer of Court Agent of Party to Action.—When a party to an action has the power to command an officer of the court and compel obedience to his orders, the latter is, for many purposes, the agent of the former. *Young v. Edwards*, 64 W. Va. 87, 60 S. E. 992.

Although a promoter is not strictly an agent of, or a trustee for, a company before its creation, the rules of principal and agent and of trustee and beneficiary have been extended to meet such cases, and a promoter of such a company is accountable to it as if the relation of principal and agent, or of trustee and beneficiary had actually existed. *Jordan v. Annex Corp.*, 109 Va. 625, 64 S. E. 1050. See post, CORPORATION; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

An **employee of a bank**, in the perpetration of a fraud upon a depositor, is not the agent of the bank. *Brown v. Lynchburg Nat. Bank*, 109 Va. 530, 537, 64 S. E. 950. See post, BANKS AND BANKING.

A **doctor employed by a coal company to attend its miners and paid by the company from a fund created by monthly deductions from the earnings**

of each miner, occupies neither the position of agent nor servant of the company, but rather that of an independent contractor. *Virginia Iron, etc., Co. v. Olde*, 128 Va. 280, 105 S. E. 107. See post, INDEPENDENT CONTRACTORS; MASTER AND SERVANT.

The **chairman of the board of county supervisors** is in no sense the agent of the board, but a public officer. *Leachman v. Board*, 124 Va. 616, 98 S. E. 656.

II. CREATION, EXISTENCE AND VALIDITY OF AGENCIES.

½A. IN GENERAL.

Agent to Conduct Mercantile Business.—Va. Code 1919, § 5223.

Payment of a money compensation for services is not essential to the existence of the relation of principal and agent. *Pardee v. Crane & Co.*, 74 W. Va. 359, 82 S. E. 340.

Existence of Relation as to Third Persons Only.—One person may be the agent of another as to third persons, although as between themselves, the relation of principal and agent does not in fact exist. The contract between the parties is not alone to determine the questions when the rights of third persons are concerned, but that is to be considered along with all the other facts and circumstances given in evidence which bear upon the question of agency. In the case at bar, the evidence was such as to warrant the trial court in giving an instruction to that effect, and to support the verdict of the jury establishing such an agency so far as the rights of the plaintiff were affected. *McIntyre v. Smyth*, 108 Va. 736, 62 S. E. 930.

A **son is not**, by reason of his kinship, the agent of his father in using the latter's automobile for his own purposes. *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876. See post, AUTOMOBILES; PARENT AND CHILD.

A. BETWEEN WHOM RELATION MAY EXIST.

See ante, "In General," II, ½A; post,

"Manner of Creating Agencies," II, B. In addition, see post, HUSBAND AND WIFE.

B. MANNER OF CREATING AGENCIES.

1. By Express or Implied Contract.

a. In General.

See post, "Evidence of Agency," II, C.

By Contract.—To create the relationship of principal and agent (broker) there must be a contract of employment, express or implied. *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845.

Agency may be implied from the conduct of the parties, and the nature and circumstances of the particular acts done by the principal. *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845; *Cassiday, etc., Lumber Co. v. Terry*, 69 W. Va. 572, 73 S. E. 278.

b. Form of Contract.

(1) In General.

Authority to Sell or Lease Land.—Numerous decisions of this and other courts unite in holding, that the authority of an agent to sell or lease land need not be in writing. *Armstrong v. Maryland Coal Co.*, 87 W. Va. 589, 69 S. E. 195; *Mustard v. Big Creek Develop. Co.*, 69 W. Va. 713, 72 S. E. 1021. See post, BROKERS.

Where the owner of the equitable title to land by an executory contract or title bond, authorizes his vendor, to renew a prior lease for oil and gas covering the large tract, of which his land is a part, he thereby constitutes his vendor his agent to contract for such lease. *Mustard v. Big Creek Develop. Co.*, 69 W. Va. 713, 72 S. E. 1021.

(2) Appointing Agents to Execute Sealed Instruments.

"Power can not be conferred on an agent to execute a deed conveying land, except by a writing of the same dignity." *Mustard v. Big Creek Develop.*

Co., 69 W. Va. 713, 717, 72 S. E. 1021. See post, POWERS.

c. Validity and Sufficiency of Contract.

See ante, "Form of Contract," II, B, 1, b.

If a written instrument (letters in this case) be relied on, in order that it may be held to create agency, it must also on its face, or when read in the light of surrounding circumstances, appear that such was the intention. *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845.

d. Construction of Contract.

See post, "Rights, Duties and Liabilities between Principal and Agent," VI.

Attorney in Fact.—An instrument executed by a mother to her son, William C. T. Hilliard, concluded as follows: "And I do hereby constitute and appoint William C. T. Hilliard my true and lawful attorney in my name, but at his own costs and charges, to take all legal measures which may be necessary to enforce the stipulations and agreement herein contained and to receive the moneys due or to grow due thereon now in the hands of the sheriff of Rockingham county, Virginia." Held: That, it was the intention of the mother, by the writing in question, to constitute her son her attorney in fact to represent her in the litigation, and not to invest him with her interest in the proceeds of the sale of her land under the order of court. *Hilliard v. Union Trust Co.*, 123 Va. 724, 97 S. E. 335.

C. EVIDENCE OF AGENCY.

See ante, "In General," II, ½A.

1. Presumptions and Burden of Proof.

Necessity of Proof.—In order for the agent to obtain rights himself, or establish liabilities to others, against his principal, the fact of his appointment must be made to appear, by an instrument in writing, by spoken words, or it may be implied from the conduct of the parties, and the nature and cir-

cumstances of the particular acts done by the principal. *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845.

Proof of an express contract of agency is not essential to the establishment of the relation. It may be inferred from facts and circumstances, including conduct. *Cassiday, etc., Lumber Co. v. Terry*, 69 W. Va. 572, 73 S. E. 278.

Agency may but need not be proved by direct and positive evidence; it may be shown by the habit and course of dealing between the parties, evincing either an original appointment or a subsequent and continued ratification of the acts done. *Fielder v. Camp Constr. Co.*, 63 W. Va. 459, 60 S. E. 402.

Presumptions.—"Where a person assumes to act as agent for another, it will be presumed as against him that the relation existed, so as to cast upon him the burden of proving that it did not exist, if he afterwards takes such position." *Clark & Skyles on Agency*, § 63. *Siers v. Wiseman*, 58 W. Va. 340, 52 S. E. 460.

Relationship alone does not make a father answerable for the acts of his minor child. The liability in such cases results, if at all, from the fact of agency, and this fact must be proved. No presumption of agency arises merely from the domestic relationship. *Blair v. Broadwater*, 121 Va. 301, 306, 93 S. E. 632, following *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876. See post, PARENT AND CHILD.

Inference of Agency—Ratification of Similar Acts.—Agency to do a particular act may be inferred from the adoption and ratification, by the principal, of acts of like kind performed for him by the agent. *Lowrance v. Johnson*, 75 W. Va. 784, 84 S. E. 937. See post, "Ratification of Agent's Unauthorized Acts," VIII.

Rebuttal.—When a prima facie case

in connection between the alleged principal and agent has been shown. Although the evidence of the agency may be slight the burden is cast upon the principal to rebut it. *Ramsay v. Harrison*, 119 Va. 682, 89 S. E. 977.

2. Admissibility.

Admissions and Declarations of Agent.—Admissions and declarations of a person claiming to be an agent of another are not admissible as evidence to prove such agency (to the prejudice of the principal). *State v. Tygart Valley Brewing Co.*, 74 W. Va. 232, 81 S. E. 974.

Agency may be established in favor of the principal by the admissions of the agent, or by proof of acts of the alleged agent, from which no inference, other than that of the relationship of principal and agent, can be consistently deduced. *Siers v. Wiseman*, 58 W. Va. 340, 52 S. E. 460.

While the declarations of an alleged agent are inadmissible to prove agency (to the prejudice of the principal), if the agency be otherwise prima facie proved, they become admissible in corroboration. *Lysle Milling Co. v. Holt & Co.*, 122 Va. 565, 95 S. E. 414.

Parol Evidence.—When it is possible to ascertain the essential terms of a contract from the writings of the parties, parol evidence is admissible to apply the contract to the parties, and show the agency of one of the parties signing the contract, memorandum, or note. *Radford Water Power Co. v. Dunlap*, 128 Va. 658, 105 S. E. 257.

Agent as Witness.—An alleged agent may be permitted to testify to his agency. *State v. Tygart Valley Brewing Co.*, 74 W. Va. 232, 235, 81 S. E. 974.

On an issue as to the authority of an agent, he is a competent witness and may testify to acts done on behalf of his principal and the latter's knowledge thereof, in favor of a third person, even

though such third person is not shown to have had knowledge thereof. *Union Bank, etc., Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 74 S. E. 674.

3. Degree and Sufficiency Proof.

See ante, "Presumptions and Burden of Proof," II, C, 1.

The mere fact that one assumes to act as agent of another is not alone sufficient to show such agency; but if the agent's acts are so open, apparent and notorious that it is evident that they must have been known to the principal they are evidence of agency. Circumstances may establish it, without proof of express appointment. *Black Lick Lumber Co. v. Camp Constr. Co.*, 63 W. Va. 477, 60 S. E. 409.

Paying Taxes.—Agency of one person for the purpose of paying taxes on the land of another is sufficiently shown by proof of his having paid the taxes on the land for a long period of time, without any claim of title or right in or to it in himself, allowed it to become delinquent for one year, purchased at the sale for such delinquency, failed to take a deed under such purchase, continued to pay taxes on the land in the name of the owner for another long period of time and until his death, and failed to take possession thereof at any time. *Siers v. Wiseman*, 58 W. Va. 340, 52 S. E. 460.

Abstract of Title Made by Attorney Employed by Borrower though Suggested by Lender.—The attorney was held the agent of the borrower. *Kirkpatrick v. Warden*, 118 Va. 382, 87 S. E. 561.

Suit to Hold Agent as Constructive Trustee of Land—Proof Required.—Where it is sought to establish that an agent to purchase land is a constructive trustee of his principal, the relationship of principal and agent should be established by clear and convincing proof. *Matney v. Yates*, 121 Va. 506, 93 S. E. 694.

III. MEASURE AND SCOPE OF AGENT'S AUTHORITY.

A. IN GENERAL.

See post, "Duty of Third Persons to Ascertain and Consider Agent's Authority," III, C.

Necessity for Being within Apparent Authority.—Whether or not a contract made by an agent for his principal, which was not expressly authorized nor subsequently ratified by the principal is binding on the principal is dependent upon whether or not it was within the apparent scope of the authority of the agent to make such contract. *Raven Red Ash Coal Co. v. Herron*, 114 Va. 103, 75 S. E. 752.

On the trial of an issue as to whether an act done by an agent was within the scope of his actual, or, within the meaning of the law, apparent authority, if the act is beyond the agent's authority, the relation of principal and agent does not exist as to it, and the rules applicable to such relationship do not apply. *Thompson v. Laboring-man's Mercantile, etc., Co.*, 60 W. Va. 42, 53 S. E. 908.

Naked power to do acts for another negatives all authority on the part of the agent to act in reference to the principal's business for the benefit of any one other than the principal. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880.

A general agent has implied power to bind his principal by such contracts and modifications thereof as are reasonably necessary in conducting the business of principal. *Producers Coal Co. v. Mifflin Coal Min. Co.*, 82 W. Va. 311, 95 S. E. 948.

Special Agent.—The powers of a special agent are to be strictly construed. He possesses no implied authority beyond what is indispensable to the exercise of the power expressly conferred, and must keep within the limits of his commission. All persons deal with such an agent at their own risk as to the

extent of his powers. *Bowles v. Rice*, 107 Va. 51, 57 S. E. 575.

A power to a special agent to sell for cash at any time within thirty days, does not authorize a sale on credit, even though the credit does not extend beyond the thirty days. A mere power to sell, without more, implies a cash sale. *Bowles v. Rice*, 107 Va. 51, 57, S. E. 575.

The terms of a power of attorney to a special agent, expressly prescribing a cash sale, must be rigidly observed. *Bowles v. Rice*, 107 Va. 51, 53, 57 S. E. 575.

B. DISTINCTION BETWEEN GENERAL AND SPECIAL AGENTS.

See ante, "In General," III, A; post, "Duty of Third Persons to Ascertain and Consider Agent's Authority," III, C.

C. DUTY OF THIRD PERSONS TO ASCERTAIN AND CONSIDER AGENT'S AUTHORITY.

See post, "Liability of Third Persons to Principal," VII, C.

Where a person deals with an agent it is his duty to ascertain the extent of his agency. He deals with him at his own risk. The law presumes him to know the extent of the agent's power, and if the agent exceeds his authority, the contract will not bind the principal, but only the agent. *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49, 49 S. E. 1005; *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845; *Howell v. McCarty*, 77 W. Va. 695, 88 S. E. 181, 183; *Toledo Scale Co. v. Bailey*, 78 W. Va. 797, 90 S. E. 345; *Smith v. Board*, 76 W. Va. 239, 85 S. E. 513.

General Agent.—"It is a general rule of law that a person dealing with an agent must take knowledge of the extent of the agent's authority. But this rule is qualified by another, which is also general, and that is, that a general agent having authority to transact certain business for his principal has

also the implied power to do what is customary and necessary in the exercise of his general powers." *Fruit Dispatch Co. v. Ellis*, 75 W. Va. 52, 83 S. E. 187.

Apparent Authority in Conflict with Real Authority.—While it is well settled that everyone who deals with an agent does so at his hazard, and is bound, at his peril, to take notice of the extent of, and the limitations upon, the authority of the agent, it is equally well settled that the principal is bound to the extent that he holds another out as having authority to act on his behalf. *Southern Amusement Co. v. Ferrell-Bledsoe Furniture Co.*, 125 Va. 429, 99 S. E. 716; *Lysle Milling Co. v. Holt & Co.*, 122 Va. 565, 95 S. E. 414.

Apparent Authority and Secret Instructions.—"Secret instructions to an agent, inconsistent with his apparent authority, are not binding upon third parties dealing with him. *Union Bank, etc., Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 74 S. E. 674; *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880; *Rohrbough v. United States Exp. Co.*, 50 W. Va. 148, 40 S. E. 398; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255; *DeWitt Shoe Co. v. Adkins*, 83 W. Va. 267, 269, 98 S. E. 209; *Lysle Milling Co. v. Holt, & Co.*, 122 Va. 565, 95 S. E. 414; *Stock & Sons v. Owen*, 129 Va. 256, 105 S. E. 587.

The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no obligation to inquire into the agent's actual authority. *Lysle Milling Co. v. Holt & Co.*, 122 Va. 565, 95 S. E. 414; *Fruit Dispatch Co. v. Ellis*, 75 W. Va. 52, 83 S. E. 187.

Written Authority.—It is well settled that a party dealing with an agent acting under a written authority must take notice of the extent and limits of that authority. He is to be regarded as dealing with the power before him;

and he must at his peril observe that the act done by the agent is legally identical with the act authorized by the power. *Bowles v. Rice*, 107 Va. 51, 53, 57 S. E. 575; *Finch v. Causey*, 107 Va. 124, 57 S. E. 562.

Special Agency or Circumstances Putting on Inquiry.—"It is a generally recognized rule of law that 'every person who undertakes to deal with an alleged agent is, by the mere fact of the agency, put upon inquiry, and must discover at his peril that it is in its nature and extent sufficient to permit the agent to do the proposed act, and that its source can be traced to the will of the alleged principal, particularly where he is dealing with an agent whose authority he knows to be special, or where it is his first transaction with the agent, or the circumstances connected with the agency are such as should put him on inquiry, as where it appears from the circumstances of the particular business that the interests of the agent and principal are necessarily adverse, or the authority is of an unusual, improbable or extraordinary nature. Such a person is to be regarded as dealing with the power before him, and must at his peril observe that the act done by the agent is legally identical with the act authorized by the power.' 2 C. J: 562; *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880;" *Howell v. McCarty*, 77 W. Va. 695, 88 S. E. 181, 183. See also *Smith v. Board*, 76 W. Va. 239, 85 S. E. 513.

A purchaser who has received a printed copy of conditions governing sales, before making his purchase by agents, is chargeable with notice thereof. His ignorance of the English language is not a legal excuse for his failure to inform himself respecting the contents of the writing. *Fruit Dispatch Co. v. Ellis*, 75 W. Va. 52, 83 S. E. 187.

Authority for Benefit of Principal.—

Every agency is subject to the legal limitation, that it cannot be used for the benefit of the agent himself or any person other than the principal, in the absence of an agreement that it may be so used; and, as this is matter of law and not of fact, all persons must take notice of it. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880.

Authority of Agent as to Negotiable Paper.—A bank discounting negotiable paper, with knowledge that the person from whom it is taken holds it as agent only, is bound to ascertain the extent of the authority of the agent; but, in the absence of knowledge of any limitation upon the authority apparently conferred by the principal, it may rely upon such apparent authority. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880. See post, **BANKS AND BANKING; BILLS, NOTES AND CHECKS.**

Same—Endorsed in Blank.—Absolute ownership of a thing and agency respecting it in the same person are incompatible, the latter being merged in the former. Hence, a negotiable note in the hands of an agent, indorsed in blank by the principal, cannot be regarded by a stranger, having notice of the agency, as both *prima facie* proof of title in the agent and a power of attorney, conferring upon the agent all the power and authority that are incident to ownership, but he may deal with the agent as such and rely upon the note as conferring apparent authority to sell it and receive payment on behalf of the principal. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880. See post, **BILLS, NOTES AND CHECKS.**

D. IMPLIED POWERS OF AGENTS.

See post, "Powers of Agents under Particular Authorities," III, E.

1. In General.

Authority vested in an agent to accomplish stated results, for and on be-

half of his principal, includes by implication power to do whatever is reasonably necessary to the effectuation thereof, in the usual and customary way. *Channell Bros. v. West Virginia Pulp, etc., Co.*, 77 W. Va. 494, 87 S. E. 876.

Supplies Furnished to Contractor.—

An agent who has authority to conduct a business of which the making of working contracts is an incident, has implied power to make an original promise to a stranger to pay for supplies furnished by him to contractors for the work, as a means of enabling them to perform their contracts. *Channell Bros. v. West Virginia Pulp, etc., Co.*, 77 W. Va. 494, 87 S. E. 876.

The superintendent of a coal mining operation in charge of the work impliedly has authority to employ and discharge workmen and to make contracts necessary to properly carry on the business of mining coal intrusted to him; but without specific authority he has no implied authority to make a contract to extend beyond a reasonable time, and necessary to the successful operation of the mine by him. *Rua v. Bowyer Smokeless Coal Co.*, 84 W. Va. 47, 99 S. E. 213.

2. To Execute Bills and Notes.

See post, **BILLS, NOTES AND CHECKS.**

E. POWERS OF AGENTS UNDER PARTICULAR AUTHORITIES.

See ante, "Implied Powers of Agents," III, D.

½. In general.

To Conduct Mercantile Business.— Va. Code, 1919, § 5223.

Marginal Release of Trust Deed under § 2498, Va. Code 1904 (§ 6456 Va. Code 1919).—A broker, who negotiated a loan secured by deed of trust and who received payment in full of the note evidencing the same but paid only part to

his principal, and who was not in possession of the note secured is not such an agent as can bind his principal by a marginal release under § 2498, Va. Code 1904 (§ 6456 Va. Code 1919), and such release can not affect the lien of the creditor whose money he loaned. *Brooking v. Nolde*, 11 Va. L. Reg. 217. See post, **BROKERS.**

Authority to an agent to procure a lease of ground carries implied power to agree with the landowner upon the terms of the lease. *Board v. Harvey*, 70 W. Va. 480, 74 S. E. 507.

1. Authority to Sell.

a. Authority to Sell Real Estate.

See post, **BROKERS.**

(1) In General.

State Land.—Va. Code 1919, §§ 2537, 2540, 2541.

b. Authority to Sell Personalty.

(1) In General.

See ante, "Duty of Third Persons to Ascertain and Consider Agent's Authority," III, C.

"An agent has implied authority to fix the price and terms of sale and agree upon such incidental matters as the time and place of delivery, provided he does not go beyond what is reasonable and usual, in the stipulations he makes respecting such things, and his principal is bound by what he does, within these limitations, even though he acts without authority, if the person who deals with him is not cognizant of his want of authority. A stipulation in a contract of sale of personal property, binding the principal to take back the property, if it proves to be unsatisfactory is held to be usual and reasonable, and therefore within the agent's apparent authority." *DeWitt Shoe Co. v. Adkins*, 83 W. Va. 267, 269, 98 S. E. 209.

Branch Office for Sale of Company's Products.—If, in the instant case, the branch office of defendant be treated as a mere agency with limited authority,

under the facts of the case, the apparent authority of the agent was its real authority. Plaintiffs were not bound by any secret instructions or restrictions given to or imposed upon the branch office of which they had no notice. *Stock & Sons v. Owen*, 129 Va. 256, 105 S. E. 587.

Place of Delivery.—The general power to sell goods will, if not restricted carry with it the implied power to contract respecting the place of delivery. But notwithstanding which implied authority, the principal may limit his agent in the exercise thereof, and thereby relieve himself from liabilities; providing those dealing with the agent have knowledge thereof. *Fruit Dispatch Co. v. Ellis*, 75 W. Va. 52, 83 S. E. 187.

An agent authorized to sell fruit in car load lots on certain prescribed conditions only, one of which is that all deliveries shall be made f. o. b. cars at the seaboard, can not bind his principal by contracting with a buyer, who has knowledge of the conditions, to deliver elsewhere. *Fruit Dispatch Co. v. Ellis*, 75 W. Va. 52, 83 S. E. 187.

Pledge of Principal's Goods for Agent's Debt.—An agent with power to sell has no power to bind his principal either by pledging or selling the principal's goods as security for, or in discharge of, his own debt. *Broad St. Bank v. Baker Motor Vehicle Co.*, 119 Va. 26, 89 S. E. 110.

(3) To Make Warranty of Quality.

See ante, "In General," III, E, 1, b, (1).

2. Authority to Collect.

See post, PAYMENT.

F. QUESTION IN FACT.

Whether or not a contract made by an agent for his principal, which was not expressly authorized nor subsequently ratified by the principal is binding on the principal, is dependent upon whether or not it was within the apparent scope of the authority of the

agent to make such contract, and where the evidence on this subject is conflicting it is a question of fact to be determined by the jury, under proper instructions from the court. *Raven Red Ash Coal Co. v. Herron*, 114 Va. 103, 75 S. E. 732.

G. EVIDENCE OF AUTHORITY.

See ante, "Evidence of Agency," II, C.

IV. MANNER OF EXECUTING AUTHORITY.

A. MANNER OF SIGNING.

"Numerous decisions of this and other courts unite in holding, that the authority of an agent to sell or lease land need not be in writing, and that the agent may bind his principal, either by signing his own name or that of the principal." *Mustard v. Big Creek Develop. Co.*, 69 W. Va. 713, 716, 72 S. E. 1021.

VI. RIGHTS, DUTIES AND LIABILITIES BETWEEN PRINCIPAL AND AGENT.

A. OF AGENT TO PRINCIPAL.

2. Diligence Required of Agents.

Money Lost.—Va. Code 1919, § 5406; Barnes Code ch. 119, § 10.

Liability of Gratuitous Agent.—An agent or a bailee, acting without compensation and solely for the accommodation of the principal or bailor, is liable only for gross neglect. The general rule held applicable to a case, where there was nothing in the evidence to remove the defendant's alleged agency from the general rule and bring it within the qualification thereof relating to agents who hold themselves out as possessing special and peculiar skill in the subject of the agency. *Yates v. Ley*, 121 Va. 265, 92 S. E. 837. See post, BAILMENTS.

3. Good Faith in Dealing with Principal.

a. Fiduciary Character of Relation.

See post, "Accounting," VI, A, 7.
Secret Profits or Advantages.—An

agent is not permitted to hold, against his principal, the fruits of the exercise of his representative powers. *Pardee v. Crane & Co.*, 74 W. Va. 359, 82 S. E. 340; *Heckscher v. Blanton*, 111 Va. 648, 656, 69 S. E. 1045.

In the conduct of his principal's business an agent is held to the utmost good faith, and will not be allowed to use his principal's property for his own advantage, or to drive secret profits or advantages to himself by reason of the relation of principal and agent existing between him and his principal. *Sutherland v. Guthrie*, 86 W. Va. 208, 103 S. E. 298.

Same—Contract Voidable.—If an agent, in dealing with his principal about the subject matter of the agency, obtains an advantage by the suppression of the information, concerning the same, acquired by means of the agency, or by misrepresentation, his contract is voidable. *Thorne v. Brown*, 63 W. Va. 603, 60 S. E. 614.

Profits Not Resulting from Agency.—It is not strictly true that all profits made by agents or trustees, belong to their principals, but only such profits as are thereby diverted from, and therefore made out of, funds belonging to their principals. They can not keep as their own what might rightly belong to their principals, but in order for such results to follow, the agency must be the proximate or direct, not the remote or indirect, cause of the profit—i. e., the profit must be traceable to the agency as its efficient cause, and not as its mere incidental occasion. *Heckscher v. Blanton*, 111 Va. 648, 659, 69 S. E. 1045.

b. Agent to Sell, Purchasing for Himself.

See post, **BROKERS; FACTORS AND COMMISSION MERCHANTS.**

"An agent cannot purchase his principal's property at his own sale thereof." *Catlett v. Bloyd*, 83 W. Va. 776, 781, 99 S. E. 81.

c. Agent to Buy, Purchasing for Himself.

See post, **BROKERS.**

Agent as Trustee.—An agent may not purchase land in his own name for the benefit of his principal and then refuse to convey the same in accordance with his contract, but in such case will be held as a constructive trustee. *Matney v. Yates*, 121 Va. 506, 93 S. E. 694. See post, **TRUSTS AND TRUSTEE.**

Where the principal has a present interest in the land, and only employed the agent to purchase an adverse or outstanding title for the purpose of bolstering up or protecting the principal's own title, irrespective of whether the outstanding title was good or bad, the agent has been held a constructive trustee when he purchased the title in his own name, paying therefor with his own money. *Matney v. Yates*, 121 Va. 506, 93 S. E. 694.

g. Dealings between Agent and Principal.

"Because of possible abuses of the confidence and trust reposed in the agent, and of his commanding influence over the principal, and of the natural conflict of duty and interest in dealings between the principal and the agent, the law views with suspicion, and scrutinizes closely, all dealings between them in the subject matter of the agency, in order to see that the agent has dealt with the utmost good faith and fairness, and that he has given the principal the benefit of all his knowledge and skill, and if it appears that the agent has been guilty of any concealment or unfairness, or if he has taken any advantage of his confidential relation, the transaction will not be allowed to stand." *Sperry v. Sperry*, 80 W. Va. 142, 154, 92 S. E. 574.

The general rule is that an agent is not permitted to enter into any transaction with his principal on his own behalf respecting the subject matter of the agency, unless he acts with entire good

faith, without any undue influence or imposition, and makes a full disclosure of all the facts and circumstances attending the transaction. *Sperry v. Sperry*, 80 W. Va. 142, 92 S. E. 574.

If an agent purchases the property of his principal without making such disclosure and acting in good faith, the principal may have the sale set aside, and compel the agent to reconvey the property to him upon repayment of the purchase money, or so much as has been paid, and account for the rents and profits received by him; and where the principal is infirm or of doubtful business capacity, very slight circumstances will suffice to cause the court to set aside the dealings between principal and agent. *Sperry v. Sperry*, 80 W. Va. 142, 92 S. E. 574.

4. Acting as Agent of Both Buyer and Seller, etc.

See post, **BROKERS**.

The law does not inhibit agency for both parties to a contract. *Cassidy, etc., Lumber Co. v. Terry*, 69 W. Va. 572, 73 S. E. 278; *Pardee v. Crane & Co.*, 74 W. Va. 359, 371, 82 S. E. 340.

Where Interest of Parties Are Antagonistic.—"The policy of the law does not permit an agent to act for two principals in relation to a matter wherein their interests are antagonistic, without the assent of both with full knowledge of all that affects their respective interests. A principal is entitled to his agent's best skill and judgment in the performance of his duties, and he can not render such service to two principals whose interests conflict. That a man can not serve two masters, is a principal as true in law as it is in morals." *Guthrie v. Huntington Chair Co.*, 71 W. Va. 383, 385, 76 S. E. 795.

An agent representing both parties to a transaction, with their knowledge and consent, can not by contract with one of them, without the consent of

the other, acquire an interest in the subject-matter of the agency, to the detriment of the non-consenting principal. *Pardee v. Crane & Co.*, 74 W. Va. 359, 82 S. E. 340.

If an agent acts in a dual capacity, without the knowledge or consent of the parties for whom he is acting, his acts are voidable at the election of either of the parties upon discovery of such double agency, without proof that the party disaffirming the acts has been injured thereby. *Truslow v. Parkersburg Bridge, etc., R. Co.*, 61 W. Va. 628, 57 S. E. 51; *Guthrie v. Huntington Chair Co.*, 71 W. Va. 383, 76 S. E. 795.

False Representations.—Where the purchaser of real estate is induced by the false representations of one whom he had employed as his agent to negotiate the purchase, but who was, without his knowledge, the paid agent of the vendor to make the sale, then the vendor is as much bound by the representations made by such agent as if they had been made by himself. It is immaterial that the agent was himself honestly deceived by the vendor. *Cerriglio v. Pettit*, 113 Va. 533, 75 S. E. 303.

An agent to sell land may, with propriety, transmit to his principal for his acceptance or rejection the offer of a proposed purchaser. This is not acting as agent for both parties in the purchase and sale of the land. *Croghan v. Worthington Hdw. Co.*, 115 Va. 497, 79 S. E. 1039.

7. Accounting.

See post, "Action by Principal against Agent or Third Person," X, A. In addition. see ante, **ACCOUNTS AND ACCOUNTING**.

A bill for an accounting filed by a principal against an agent whose duty it is to keep and render accounts to the plaintiff, alleging failure to keep and render correct accounts of money coming into his hands, or becoming due from him, and wrongful conduct on his part rendering it difficult or impossible for

the plaintiff to ascertain the true state of the account, sets up a good cause of action cognizable in equity. *Sperry v. Premier Pocahontas Collieries Co.*, 87 W. Va. 223, 104 S. E. 486. See post, EQUITY.

B. OF PRINCIPAL TO AGENT.

1. Compensation.

See post, "Action by Agent against Third Persons or Principal," X, B.

Implied Agency.—To entitle an agent to recover for services rendered, it is not necessary to show an express request a request may be implied from all the facts and circumstances of the case. *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899.

Ratification of Acts.—If a person acts as agent without authority, and his acts are ratified, he is entitled to compensation the same as though he had been duly authorized. *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899.

State's Agents.—The same rule, as to the agent's compensation, applies to agents appointed by a state as to those appointed by natural persons. *Green v. Marye*, 112 Va. 352, 71 S. E. 555.

A principal whose agent employs a subagent is liable for the compensation of such subagent if the employment is authorized and ratified on the part of the principal by his adopting the acts of the subagent. *Fisher v. Berwind*, 64 W. Va. 304, 61 S. E. 910.

Necessity for Performance.—Where an agent assumes to do a specified act, he has no right to compensation therefor, as a general rule, until the specified act has been substantially performed. *Green v. Marye*, 112 Va. 352, 71 S. E. 555.

Commissions.—Principal's attempt to collect notes received by his agent for fertilizer was not a breach of the agency contract entitling the agent to commissions on the sales of the fertilizer. *Ober & Sons Co. v. Smith*, 122 Va. 311, 94 S. E. 787.

Same—Sales Made by Principal.—Under a proper construction of

the contract in suit, the agent had the right to sell within certain specified territory, fifty per cent. of the total output of commercial coal mined by his principal, and if he made the sale, or if the principal sold any part of said fifty per cent. in said territory, the agent was entitled to a stipulated commission, but, the contract being silent as to any sales in excess of said fifty per cent. within said territory, the agent is not entitled to commission on sales made by the principal in excess of fifty per cent. within said territory. He was allowed, under conditions, to sell in excess of the fifty per cent. and if he made such sales he was entitled to the commission thereon, but not upon such sales made by the principal within said territory. *Davy Pocahontas Coal Co. v. Kaylor*, 118 Va. 296, 87 S. E. 549.

Right to Bonus.—Because of his failure to collect for the extra amount of fertilizer sold the agent in question was not entitled to a bonus. *Ober & Sons Co. v. Smith*, 122 Va. 311, 94 S. E. 787.

An agent guilty of bad faith to his principal forfeits all compensation for his services. *Harman v. Moss*, 121 Va. 399, 93 S. E. 609.

2. Reimbursement for Expenses, etc.

Advancements.—In the absence of an express agreement with his principal to the contrary, an agent's advancements of money for his principal's benefit, in the accomplishment of the purposes of the agency, are items, factors or elements in the amount between them, not loans or debts by express contract. *Flanagan v. Flanagan Coal Co.*, 77 W. Va. 778, 88 S. E. 400.

VII. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

A. LIABILITY OF AGENT TO THIRD PERSONS.

1. Private Agents.

a. On Contract.

Disclosed Principal.—The agent of a

disclosed principal is not liable in damages for the breach of a contract made by him on behalf of his principal, unless it be shown that he acted beyond the scope of his authority. *Hoon v. Hyman*, 87 W. Va. 659, 105 S. E. 925; *Hurricane Milling Co. v. Stell, etc., Co.*, 84 W. Va. 376, 379, 99 S. E. 490, citing *Johnson v. Welch*, 42 W. Va. 18, 24 S. E. 585.

An agent of a disclosed principal may bind both himself and the principal. *Lutz v. Williams*, 79 W. Va. 609, 91 S. E. 460, 462.

An agent of a disclosed and known principal, conducting a checking account in a bank, in his own name, creating an overdraft therein, and executing his own checks on another bank to make the overdraft good, makes himself individually liable to the bank. *Lutz v. Williams*, 79 W. Va. 609, 91 S. E. 460.

In such case, the doctrine of discharge of the agent by election to hold the principal for the debt does not apply, and subsequent acceptance by the bank of notes of the principal for the debt and collateral security therefor does not release the agent. *Lutz v. Williams*, 79 W. Va. 609, 91 S. E. 460.

Undisclosed Principal.—One who performs services at the request of an agent, who fails to disclose his principal for whom the request is made, may recover of the agent therefor. The agent is liable whether acting within his authority or not. *Curtis v. Miller*, 73 W. Va. 481, 80 S. E. 774.

If an agent would avoid liability, the duty is on him to disclose his principal, and not on the party with whom he deals to discover him. If he does not make such disclosure it will be presumed that he intended to bind himself personally. *Curtis v. Miller*, 73 W. Va. 481, 80 S. E. 774.

"The fact that the agent discloses the circumstance that he is acting as an agent for another does not relieve

him from liability if he does not disclose who that other is." *Curtis v. Miller*, 73 W. Va. 481, 484, 80 S. E. 774.

Election by Creditor to Hold Agent.

—Before a party can be held to have made an election to hold the agent rather than his undisclosed principal liable, it is necessary that he should have full knowledge of all the facts and of his rights in the case. The conduct relied upon, to be conclusive, should be such as to show a final and unequivocal election—such as would lead a reasonably prudent man, acting in good faith, to conclude that the party had elected to hold the agent only. To constitute an election, there must be something to indicate an intention, with full knowledge of the facts, to give sole credit to the agent, and abandon all claims against the principal. *Dameron v. Quick*, 116 Va. 614, 82 S. E. 709.

Merely filing a claim in bankruptcy against the estate of the insolvent agent of an undisclosed principal, while the foundation of the plaintiff's claim is in litigation between the agent and his principal, is not a conclusive election by the creditor to hold the agent. *Dameron v. Quick*, 116 Va. 614, 82 S. E. 709.

Personal Liability.—An agent may become liable on a contract contrary to his actual intention, but if he contracts in such form or under such circumstances as to make himself personally liable, he can not afterwards, whether his principal was or was not known at the time of the contract, relieve himself of that responsibility. *Leterman v. Charlottesville Lumber Co.*, 110 Va. 769, 67 S. E. 281.

Liability of Unauthorized Agent.—

A person who signs the name of another to a contract, as agent of the latter, without authority to do so, is not personally liable on the contract as promisor or covenantor, but is liable, in an action of assumpsit, upon the implied warranty of his authority, or in

trespass on the case, for fraud and deceit. *Haupt v. Vint*, 68 W. Va. 657, 70 S. E. 702.

B. LIABILITY OF PRINCIPAL TO THIRD PERSONS.

See ante, "Duty of Third Persons to Ascertain and Consider Agent's Authority," III, C; "Acting as Agent of Both Buyer and Seller," etc., VI, A, 4.

1. On Contract.

½a. In General.

Apparent Authority.—A third person may recover from a principal on a contract made by the agent, on proof of apparent authority in the latter, within the scope of which the act in question is included. *Union Bank, etc., Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 74 S. E. 674. See ante, "Duty of Third Persons to Ascertain and Consider Agent's Authority," III, C.

Contracts Subject to Approval.—A contract for the purchase of a machine, made with an agent authorized to make such contracts subject to approval only, is not binding on the principal until ratified. *Toledo Scale Co. v. Bailey*, 78 W. Va. 797, 90 S. E. 345.

Credit Extended to Agent Personally.—When an agent contracts with a third person for a known principal and credit is extended to the agent personally, the principal can not afterwards be held liable upon the contract, but in the case at bar there was evidence which the jury had the right to believe that the credit was not extended to the agent but to the principal. *Spangler v. Ashwell*, 116 Va. 992, 83 S. E. 930.

Unauthorized Provision in Promissory Notes.—Promissory notes executed by an agent pursuant to authority, but which contain a provision that the agent is not authorized to make, empowering any attorney-at-law to appear in any court of record, in the state where payable, and waive issuance and service of process and to confess

judgment are not void because of such unauthorized provision. *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400. See post, **BILLS, NOTES AND CHECKS.**

Duty to Notify Third Persons of Termination of Agency.—See post, "Termination of Agency," IX.

a. Disclosed Principals.

An agent of a disclosed principal may bind both himself and the principal. *Lutz v. Williams*, 79 W. Va. 609, 91 S. E. 460, 462.

Presumption as to Credit.—If an agent makes full disclosure of his principal to one with whom he is dealing, the legal presumption is that credit is given to the principal and not to the agent, unless it further appears that credit was expressly and exclusively given to the agent. *Lambert v. Phillips & Son*, 109 Va. 632, 64 S. E. 945; *Lambert v. Peters*, 109 Va. 638, 64 S. E. 1135.

Application of Commissions to Agent's Debt.—Where a principal is indebted to his agent a debtor of the principal may lawfully credit the agent and charge the principal with a part of the amount due from the principal to his agent. This is not paying the agent's debt with the principal's money, but lawfully applying the agent's money to the payment of his own debt, and is in no way prejudicial to the principal. *Broad St. Bank v. Baker Motor Vehicle Co.*, 119 Va. 26, 89 S. E. 110.

b. Undisclosed Principals.

Va. Code 1919, § 5224; Barnes Code, ch. 100, § 13.

See ante, "On Contract," VII, A, 1, a.

Where a person enters into a simple contract, oral or in writing, other than negotiable instrument, in his own name, when he is in fact acting as the agent of another and for his benefit, without disclosing his principal, the other party to the contract may, as a general rule, hold either the agent or his principal, when discovered, personally liable on the contract. But he can not hold both. 1 Min. Inst., pp. 236-7, and

cases cited; 3 Rob. Pr. (New), 50, and cases cited; *Clark v. Skyles on Agency*, §§ 457, 568. *Leterman v. Charlottesville Lumber Co.*, 110 Va. 769, 772, 67 S. E. 281; *Curtis v. Miller*, 73 W. Va. 481, 483, 80 S. E. 774.

Right to Set Off Claims against Agent.—Where a contract has been made by the agent of an undisclosed principal, and a defendant has dealt with such agent, supposing him to be the sole principal, if an action be brought in the name of the principal, the defendant has the right to be placed in the same position to all intents and purposes as if the agent were the principal, and to set off claims against such agent acquired before knowledge of the fact that he was agent. *Dixon Livery Co. v. Bond*, 117 Va. 656, 86 S. E. 106.

2. For Torts.

See post, "Corruptly Influencing Agents, etc.," XII.

Law Relative to Pharmacy, etc.—Va. Code 1919, § 1665.

General Rule.—A principal is liable for wrongful acts of his agent, incidentally done in the exercise of the latter's authority and within the scope thereof, and working injury to a third party. *Johnson v. Norfolk, etc., R. Co.*, 82 W. Va. 692, 97 S. E. 189; *Weaver Mercantile Co. v. Thurmond*, 68 W. Va. 530, 536, 70 S. E. 128.

Scope of Employment—Libel by Partner.—The principal is liable for the tortious manner in which a transaction is conducted by his agent, entrusted by the former to the latter to be conducted for him in a nontortious manner. The same is true, of course, with respect to the liability of a partnership for a libel by an individual partner. *Myers & Co. v. Lewis*, 121 Va. 50, 92 S. E. 988. See post, PARTNERSHIP.

Under Civil Damage Act.—A liquor dealer is responsible for actionable injuries caused by sales of liquor made by his agents or servants within the general scope of their employment, though the particular sale in question was

made without his knowledge or consent, or even in disobedience to his general or specific orders. *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009; *Duckworth v. Stalnaker*, 68 W. Va. 197, 69 S. E. 850. See post, INTOXICATING LIQUORS.

Deceit through Agent.—Liability for a deceit exists whether accomplished by the deceiver in person or by agent, and whether communicated to the injured party directly or through his agent. *Lowance v. Johnson*, 75 W. Va. 784, 84 S. E. 937.

Arrest.—A railroad company is liable for an unlawful arrest directed or induced by its station agent, as a means of effecting his wrongful detention of a passenger's baggage. *Johnson v. Norfolk, etc., R. Co.*, 82 W. Va. 692, 97 S. E. 189. See post, CARRIERS

3. When Declarations or Admissions of Agent Bind Principal.

See post, DECLARATIONS AND ADMISSIONS.

4. Notice to Agent as Notice to Principal.

Notice to an agent in the course of his employment, in relation to a matter within the scope of his authority, is notice to his principal, whether he communicate his knowledge to his principal or not. *Buckeye Saw Mfg. Co. v. Rutherford*, 65 W. Va. 395, 64 S. E. 444; *Traders, etc., Bank v. Black*, 108 Va. 59, 65, 60 S. E. 743.

Time of Agent's Notice.—A principal is affected by notice to his agent respecting any matter distinctly within the scope of his agency when the notice is given before the transaction begins, or before it is so far completed as to render the notice nugatory. *Black & Sons v. Johnson & Son*, 65 W. Va. 518, 64 S. E. 626.

Knowledge Acquired Prior to Agency.—The correct principle is thus stated in 31 Cyc., p. 1593: "The more logical rule, however, and that which is supported by the greatest weight of recent

authority, is that knowledge of an agent acquired prior to the existence of the agency will be chargeable to the principal, if it be clearly shown that the agent, while acting for the principal in a transaction to which the information is material, has the information present in his mind." *Cabin Branch Min. Co. v. Hutchinson*, 112 Va. 37, 40, 70 S. E. 480.

Constructive Notice.—Notice to an agent of a party is constructive and not actual notice to the principal. But where one claims as purchaser for value without notice, it is immaterial whether the notice was actual or constructive. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684.

Warranty—Notice of Defects.—Notice of defect in article sold to agent is notice to principal. *Buckeye Saw Mfg. Co. v. Rutherford*, 65 W. Va. 395, 64 S. E. 444.

Incompetency of Employees under Agent's Charge.—Knowledge by the agent respecting the incompetency of employees over whom he has charge for the employer, is knowledge of the employer. *Hains v. Parkersburg, etc., R. Co.*, 75 W. Va. 613, 84 S. E. 923.

Mortgaged Automobile Exhibited for Sale.—Where a guaranty company acting through an agent took a chattel mortgage upon an automobile of a licensed dealer, the knowledge of the agent that the automobile was placed in the salesroom of the dealer for the purpose of sale is chargeable to the principal. *Boice v. Finance, etc., Corp.*, 127 Va. 563, 102 S. E. 591.

Right to Repudiate Contract—Misrepresentation.—In some cases the law of agency will conclusively impute to a principal the knowledge of his agent acquired by the latter under certain circumstances; but such constructive knowledge will not be imputed to a principal under circumstances which negate the possibility of actual knowledge on his part of the existence of a right of election to affirm or repudiate

a contract because of misrepresentation, and where no agent is authorized to exercise such right of election. The knowledge of the principal in such case must be actual to give rise to such duty of election. *Rhoades v. Banking, etc., Co.*, 125 Va. 320, 99 S. E. 673.

Scope of Authority.—On the trial of an issue as to whether an act done by an agent was within the scope of his actual, or, within the meaning of the law, apparent authority, notice to the agent of facts relating to or growing out of the act in question is not notice to the principal. *Thompson v. Laboringman's Mercantile, etc., Co.*, 60 W. Va. 42, 53 S. E. 908.

Agent for Both Parties.—Where a waiver is sought to be established in consequence of the imputed knowledge of an agent, and the same person is agent for two principals, knowledge acquired by him while acting as the agent of one, in order to be binding on the other, must have been present in the agent's mind at the time he did the act which it is claimed constituted a waiver by such other, and the burden is on the party relying upon the waiver to prove this. The proof, however, may consist of circumstances as well as direct evidence. *Foreman v. German Alliance Ins. Ass'n*, 104 Va. 694, 52 S. E. 337.

The agent of a railroad company to inspect and take up railroad cross ties and to whom the vendor thereof has also entrusted the duty of measuring, inspecting and taking up for and reporting said ties to him is so far the agent also of such vendor as to make notice to him obtained while engaged in measuring, inspecting and taking up such cross ties of the rights and claims of the true owner thereof, notice also to such vendor. *Black & Sons v. Johnson & Son*, 65 W. Va. 518, 64 S. E. 626. See ante, "Acting as Agent of Both Buyer and Seller, etc.," VI, A, 4.

Agent Acting Fraudulently.—The general rule that the knowledge of an

agent acquired in executing his agency is imputed to the principal and charges him with the liabilities which such knowledge imposes, has no application to an officer of a corporation who, in an independent transaction for his own benefit, seeks to perpetrate a fraud on the corporation as well as upon a third person. In such case it is presumed that the officer did not communicate his knowledge to the corporation, and the latter is not chargeable with constructive notice thereof. *Culpepper Nat. Bank v. Tidewater Improv. Co.*, 119 Va. 73, 89 S. E. 118; *Baker v. Berry Hill Mineral Spring Co.*, 112 Va. 280, 71 S. E. 626. See post, OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

The doctrine of constructive notice when properly limited, is a useful one, but to apply it to a case where the parties relying on the doctrine are the agents themselves and others who had expressly agreed that the facts in possession of the agents should not be communicated to the principal, would make it an instrument of fraud. *Traders, etc., Bank v. Black*, 108 Va. 59, 60 S. E. 743.

6. Liability for Unauthorized Acts of Agent.

See ante, "Measure and Scope of Agent's Authority," III.

A principal is not bound by any act of his agent which is not within the scope of the actual or apparent authority of the latter. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880.

C. LIABILITY OF THIRD PERSONS TO PRINCIPAL.

See ante, "Duty of Third Persons to Ascertain and Consider Agent's Authority," III, C.

Perversion of Agent's Powers.—By perverting his powers to his own personal ends and purposes, an agent acts in excess of his authority, and persons who knowingly participate in such act

of perversion, as by purchasing the principal's property, with knowledge that the agent intends to convert the proceeds to his own use, are not protected by the authority conferred upon the agent. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880.

Same—Misuse of Principal's Money.

—To make one liable by reason of participation in misuse of money of the principal by an agent, upon the ground that it was used to pay a private debt of the agent, it is necessary to show, not only that the party sought to be charged was aware that the money belonged to the principal, but also that he was aware that the debt paid by it was in fact a private debt of the agent, or such a debt that payment thereof could not lawfully be made out of such money. *Perry v. Oerman*, 63 W. Va. 566, 60 S. E. 604.

Where false representations are made to an agent, for the purpose of inducing him to act upon them in behalf of his principal, the latter has a right of action for the fraud. *Lowance v. Johnson*, 75 W. Va. 784, 84 S. E. 937.

VIII. RATIFICATION OF AGENT'S UNAUTHORIZED ACTS.

Accepting Benefits.—A principal may ratify the voidable acts of his agent, and such ratification may be express or implied. And where, after a discovery of such acts, the principal, with full knowledge of the facts, acts in such manner as to unmistakably indicate that he intends to avail himself of the benefits of the contract made by the agent, he will be deemed to have ratified such acts in their entirety. *Truslow v. Parkersburg Bridge, etc., R. Co.*, 61 W. Va. 628, 57 S. E. 51; *Southern Amusement Co. v. Ferrell-Bledsoe Furniture Co.*, 125 Va. 429, 99 S. E. 716.

A principal, benefited by an unauthorized act of his agent, can not deny the authority of the agent to do the act from which such benefit accrued, with-

out first having restored the property or other thing so acquired, or paid to the injured party the value thereof. *Union Bank, etc., Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 74 S. E. 674. See *Spangler v. Ashwell*, 116 Va. 992, 83 S. E. 930, citing S. C., 114 Va. 325, 76 S. E. 281.

The retention of the goods is evidence of a ratification by the defendant of the contract made on its behalf by its agent. *Southern Amusement Co. v. Ferrell-Bledsoe Furniture Co.*, 125 Va. 429, 99 S. E. 716.

If provisions and material for work in construction of a railroad are sold to the contractor through one assuming to be agent for the contractor, and they are used in his work to his benefit, such contractor is liable for them, though no proof of agency appears. *Black Lick Lumber Co. v. Camp Constr. Co.*, 63 W. Va. 477, 60 S. E. 409.

Where the owner of the equitable title to land by an executory contract or title bond, authorizes his vendor, to renew a prior lease for oil and gas covering the larger tract, of which his land is a part, he thereby constitutes his vendor his agent to contract for such lease, and by accepting, through his agent, his share of rental or commutation money, accruing under such lease, he thereby ratifies the same, concluding and estopping him from thereafter setting up title to his land in hostility to that of such lessee, and the statute of frauds, is no defense to the rights and claims of such lessee. *Mustard v. Big Creek Development Co.*, 69 W. Va. 713, 72 S. E. 1021.

Ratification by Silence.—Failure on the part of a principal to dissent from or repudiate an unauthorized act of his agent, within reasonable time, dependent upon the nature of the transaction and the situation and surroundings of the parties concerned, is evidence of ratification of the unauthorized act. *Thompson v. Laboringman's Mercan-*

tile, etc., Co., 60 W. Va. 42, 53 S. E. 908.

Lack of knowledge on the part of a principal, of any of the material facts connected with an unauthorized act of his agent, done on his behalf, will prevent the silence of the principal, or his failure to repudiate the act, from amounting to a ratification thereof. *Thompson v. Laboringman's Mercantile, etc., Co.*, 60 W. Va. 42, 53 S. E. 908.

Knowledge of Facts.—"In the absence of facts or circumstances sufficient to put a reasonably prudent man on inquiry, no duty rests upon the principal to make any effort to discover whether another is doing unauthorized acts in his name, and he has the right to assume, until otherwise advised, that his agent will act in the scope of this authority. Notice is not to be imputed to a principal by reason of the mere fact that he had reasonable opportunity to acquire knowledge." *Raven Red Ash Coal Co. v. Herron*, 114 Va. 103, 114, 75 S. E. 752.

Prompt Disavowal of Unauthorized Act.—If a principal knows that an agent has transcended his authority, he must promptly disavow the act, if he makes it his own. *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756; *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 579, 82 S. E. 614.

If the principal named in an indemnity bond would escape responsibility for the unauthorized act of his agent in signing and executing the bond on his behalf he must promptly repudiate the same before the rights of third persons intervene, else he will be held to have ratified the unauthorized act, and be estopped to deny the agent's authority. *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614.

Sale.—Where an agent authorized to sell goods for his principal in particular terms, violates those terms, and makes sale thereof on different terms,

and the principal with full knowledge of the facts and circumstances of the sale, afterwards elects to accept from the agent or his representatives notes and securities for the purchase money, he will be deemed to have ratified the unauthorized act of the agent and be bound by his contract. *Star Piano Co. v. Brockmeyer*, 78 W. Va. 780, 90 S. E. 338.

Ratification of Acts of Stranger.—

Where a stranger holds himself out as the agent of another and makes a contract or does an act for that other's use or benefit, the latter may ratify. But, although a stranger may falsely represent himself as the agent of another, yet if he makes a purchase in his own name, for his own benefit, and pays his own money therefor, there can be no ratification. Nor can the supposed principal, as against the alleged agent, claim the benefit of the purchase unless it was made under such circumstances as creates an estoppel, or the supposed principal has been deprived of some legal right, or been otherwise injured. *Virginia Poca-hontas Coal Co. v. Lambert*, 107 Va. 368, 58 S. E. 561; *Security Loan, etc., Co. v. Powell*, 119 Va. 231, 89 S. E. 91.

Same—Question for Jury.—Where there is no agency in fact, but an intermeddler or stranger, one not in privity with the principal, by authority duly given, has assumed to act as agent, and the question as to whether such unauthorized act has been ratified, it becomes one of intention on the part of the assumed principal, a fact for jury determination. *Uniontown Grocery Co. v. Dawson*, 68 W. Va. 332, 69 S. E. 845.

Ratification of Tort.—Mere ratification is not itself a test of liability of one for the tortious act of another much less is the receipt of a benefit from the tortious act such test, which, in itself does not extend beyond being a circumstance in evidence tending in part to show ratification. Ratification

is material as bearing upon the measure of damages, but is not a true test of original liability. The question still remains, was the tortious act committed by the servant or agent in the course of his service or employment? *Myers & Co. v. Lewis*, 121 Va. 50, 92 S. E. 988.

If a person, assuming to be agent of another, performs for him an act, which he afterwards ratifies by receiving the benefits derived from it, the principal thereby becomes liable for the torts committed by the agent, within the scope of his assumed authority, in performing the act. The principal can not accept the benefits, without also bearing the burdens, of the agent's acts. *Lowance v. Johnson*, 75 W. Va. 784, 84 S. E. 937.

Same—Act outside Relationship.—

In cases where the individual action of the general agent is so out of the ordinary course of the business of his principal that it is evident he acted individually, outside of the relationship of principal and agent, that the act was not done in the name of the principal or for his use, the act is regarded as that of the individual and not that of the principal, and upon principle, in such cases, the ratification of the tortious act by the principal, would not have rendered the latter liable therefor. *Myers & Co. v. Lewis*, 121 Va. 50, 74, 92 S. E. 988.

Ratifying Beneficial and Repudiating Detrimental Part.—It is a general principle which applies without regard to the mode of ratification that a voidable engagement, made by one assuming to act as agent, cannot be ratified in part, so far as it is beneficial to the principal, and repudiated so far as it is detrimental to him. *Third Nat. Bank v. Laboringman's Mercantile, etc., Co.*, 56 W. Va. 446, 49 S. E. 544.

Slight Evidence Sufficient.—An act of an agent from which he derives no personal benefit, but which is done in good faith for the benefit of his princi-

pal, and which was apparently necessary and would redound to his benefit, will be held to have been ratified and acquiesced in, and be thereby rendered valid upon slight evidence. *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756.

IX. TERMINATION OF AGENCY.

½A. PRESUMPTION AS TO CONTINUANCE OF AGENCY.

An agency once established will be presumed to continue, in the absence of evidence to the contrary. *White v. American Nat. Life Ins. Co.*, 115 Va. 305, 78 S. E. 582.

A. MODE OF TERMINATION.

2. Revocation of Agent's Authority.

Agency Uncoupled with Interest.—

If no term of service has been agreed upon, the principal may at any time revoke the authority of his agent, so far as it relates to things to be done and remaining unexecuted, unless the authority is coupled with an interest or conferred for a valuable consideration to the principal. *Casey v. Walker*, 122 Va. 465, 95 S. E. 434; *Barnard v. Gardner Invest. Corp.*, 129 Va. 346, 106 S. E. 346.

When an agency is not such as to constitute what in legal parlance is called a power coupled with an interest, and no third party's rights are involved, the agency, so long as it remains unexecuted, may be effectually revoked at the will of the principal, but a wrongful revocation will nevertheless render him liable in damages to his agent. In other words, the agency may always be revoked, but the contract of employment will not necessarily be thereby rescinded. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684; *Alexander v. Sherwood Co.*, 72 W. Va. 195, 199, 77 S. E. 1027.

A contract by a landowner with a real estate agent, giving the agent an exclusive right to sell the landowner's

property during a certain period, may be terminated by the principal at will, on giving notice, in good faith, before the agent finds a purchaser. *Barnard v. Gardner Invest. Corp.*, 129 Va. 346, 106 S. E. 346.

To constitute a power coupled with an interest, a property in the thing which is the subject of the agency or power, must be vested in the person to whom the agency, or power, is given so that he may deal with it in his own name; such that, in the event of the principal's death, the authority could be exercised in the name of the agent. There must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the authority. So an interest arising from commissions or the proceeds of a transaction is not an interest which will prevent revocation. *Casey v. Walker*, 122 Va. 465, 95 S. E. 434; *Alexander v. Sherwood Co.*, 72 W. Va. 195, 199, 77 S. E. 1027.

The words, "coupled with an interest," as used in the rule that a real estate agent's contract is terminable at the will of his principal unless "coupled with an interest," mean, an interest in the land itself, as distinguished from an interest in the proceeds of sale. *Barnard v. Gardner Invest. Corp.*, 129 Va. 346, 106 S. E. 346.

Mutual Agreement Based upon Valuable Consideration.—In the instant case the brokerage company's agreement to furnish the money for the development and subdivision of the land, and for the expenses of the sales, was a valuable consideration for the agreement that the brokerage company should have the exclusive right of sale for a year. And, while the agency was not coupled with such interest as to make it irrevocable, the contract which created it was a mutual agreement between competent parties for a lawful purpose and upon a valuable consideration, with the result that neither party could violate it without

becoming responsible to the other for the breach. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

Necessity for Agent's Assent.—The principal has no right as a matter of law to terminate the contract of agency, as long as the obligations of the parties under the contract continue, without the assent of the agent. The parties to a contract may terminate it by mutual consent. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

Disposal of Principal's Interest.—An agency is effectually revoked when the principal disposes of his interest in the subject-matter of the agency in a manner inconsistent with the authority conferred, as by assignment, conveyance, contract of sale, or otherwise. This is a familiar and settled proposition of the law of agency; but it by no means follows that such a revocation can be made by the principal as a matter of right and without liability to his agent. The latter question depends upon the character and terms of the agent's contract. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

B. EFFECT OF TERMINATION.

Duty to Give Notice of Termination.—"The duty of the principal to notify third persons of the termination of the agency is of the same character and requires the same degree of certainty as that which the law imposes upon the members of a copartnership in the case of dissolution, as a measure of protection from liability by reason of subsequent acts of the former members of the dissolved firm. *Clafin v. Lenheim*, 66 N. Y. 301; *Gragg v. Home Ins. Co.*, 107 S. W. 321. In all such cases, persons who have dealt with the principal through the agent will be protected in continuing to do so, unless and until they have in some way obtained actual notice of the ter-

mination of the relation, and, as to them, mere publication of notice in a newspaper and local notoriety of the fact are not sufficient." *Union Bank, etc., Co. v. Long Pole Lumber Co.*, 70 W. Va. 558, 74 S. E. 674.

X. ACTIONS.

A. ACTION BY PRINCIPAL AGAINST AGENT OR THIRD PERSON.

1. Action against Agent.

Illegal Contracts.—If money has been paid to an agent for the use of his principal, the legality of the action of which it is the fruit or with which it was connected does not affect the right of the principal to recover it. *Cheuvront v. Horner*, 62 W. Va. 476, 59 S. E. 964.

Principal's Obligation.—"As between the principal and the agent, the more modern cases hold that it is competent for the agent to show that what appears to be the agent's obligation is in fact the principal's." *Clarke v. Talbott*, 72 W. Va. 46, 49, 77 S. E. 523.

Custom.—Evidence of a custom in contravention of the common law is not admissible to change the legal rights pertaining to the relation of principal and agent. *National Fire Ins. Co. v. Catlin*, 8 Va. L. Reg. 127.

Acquiescence by an agent in statements of the account between them rendered by his principal, and his failure to object to the same in any manner, supplemented by evidence showing the relation of principal and agent and a course of business between them, are sufficient evidence of liability, in the absence of opposing evidence, to call for a verdict against him, and the verdict of the jury ignoring such evidence should be set aside. *Indiana, etc., Ins. Co. v. Bowman*, 72 W. Va. 704, 79 S. E. 651.

Negligence of Agent—Evidence Supporting Verdict for Defendant.—On the question whether the defendant trustee was the mortgagee's agent in

negotiating and placing the loan in question the evidence was sufficient to support a verdict for defendant. *Yates v. Ley*, 121 Va. 265, 92 S. E. 837.

2. Action against Third Person.

Parties.—Where one of the parties to a contract for the sale of real estate is acting by an agent and the memorandum of the contract is signed by the agent as a party, without disclosing his principal, there is a sufficient designation of the parties, and the principal may sue and be sued upon the contract. *Donahue v. Rafferty*, 82 W. Va. 535, 96 S. E. 935.

Same—Suit on Contract Where Principal Undisclosed.—Either the agent or his principal may sue when a nonnegotiable simple contract is entered into between an agent of an undisclosed principal and a third person; the defendant, when the principal sues upon it, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party. If the agent is sued, the plaintiff recovers such damages as have resulted from the breach of the contract by him. If the agent sues, he is entitled to recover (unless his principal interferes in the suit) the full measure of damages in the same manner as though the action had been brought by the principal. *Leterman v. Charlottesville Lumber Co.*, 110 Va. 769, 67 S. E. 281.

Where an agent is contracted with by deed in his own name, his principal can not sue upon it. But where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. *Oliver Refin. Co. v. Portsmouth, etc., Refin. Corp.*, 109 Va. 513, 64 S. E. 56.

A declaration, in an action on a contract, that alleges in the first count, one of the parties named herein was acting for the plaintiff, that the contract was afterwards approved by the stockholders of the defendant com-

pany as a contract with the plaintiff; that it (the plaintiff) furnished the whole consideration to the defendant provided for by contract, and that the defendant conveyed and transferred all the property mentioned in it to the plaintiff, sufficiently alleges that the party who made the contract acted as the agent of the plaintiff. *Oliver Refin. Co. v. Portsmouth, etc., Refin. Corp.*, 109 Va. 513, 64 S. E. 56.

Burden of Proof.—In a suit by an undisclosed principal for specific performance of a contract for the sale of real estate, the burden is upon him to show the existence of the agency at the time the contract was entered into before he can invoke the doctrine of undisclosed agency. The mere adoption of a contract, not actually, nor purporting to have been made on his behalf is not sufficient to enable him to maintain the suit. *Security Loan, etc., Co. v. Powell*, 119 Va. 231, 89 S. E. 91.

B. ACTION BY AGENT AGAINST THIRD PERSONS OR PRINCIPALS.

1. Action against Third Person.

Parties—Undisclosed Principal.—An undisclosed principal is not a necessary party to a suit against the one with whom a contract is made to rescind the contract and recover the property the subject of the contract or the value thereof. *Poole v. Camden*, 79 W. Va. 310, 92 S. E. 454.

Same—Action in Agent's Own Name.

—In the instant case, the action was brought in the name of the agent with whom and in whose name the contract in writing was made and who had an interest therein. While there can, of course, be only one satisfaction of the debt, it is clear that such an agent has the right to sue upon the contract in his own name. *White & Co. v. Jordan*, 124 Va. 465, 98 S. E. 24.

2. Action against Principal.

a. Defenses.

Reasonableness of Commissions.—

In an action by an agent for commissions, there was no evidence upon the reasonableness, or unreasonableness, of the commissions agreed upon. Both parties anticipated profit from the arrangement, and if the result was more profitable to one party than to the other, that fact furnished no reason for avoiding the contract in whole or in part. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

Performance of Contract Rendered Impossible by Principal.—A principal cannot, after having made a valid contract with an agent for the exclusive right to sell, render performance on the part of the agent impossible by making the sale himself, and then successfully defend an action for breach of the contract by claiming that the agent might not have made the sale. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

b. Burden of Proof.

Action for Commissions.—In an action by an agent for commissions, the burden of proving his case is upon the plaintiff, and he must prove it by a preponderance of evidence in order to entitle him to recover. *Smyth Bros., etc., v. Beresford*, 128 Va. 137, 104 S. E. 371.

c. Admissibility of Evidence.

Evidence of a custom in contravention of the common law is not admissible to change the legal rights pertaining to the relation of principal and agent. *National Fire Ins. Co. v. Catlin*, 8 Va. L. Reg. 127.

d. Damages.

The measure of damages for breach of contract for the exclusive right of sale of automobiles in a certain territory is the amount of discount to be allowed plaintiff on sales under the contract. *Eastern Motor Sales Corp. v. Apperson-Lee Motor Co.*, 117 Va. 495, 85 S. E. 479.

e. Instructions.

Whether Warranted by Evidence—

Authority of Agent.—In the instant case it was held that there was ample evidence to support an instruction that if the jury believed that plaintiff purchased for defendant certain apples after he had fully disclosed to the defendant the quality of the apples to be purchased, and had been fully instructed so to do by it, and the defendant sustained damages as a result thereof, the damages could not be imputed to plaintiff, and he was entitled to proper compensation for his labor, and to be reimbursed for the money laid out by him in the purchase. *Winn Bros. v. Lipscomb*, 127 Va. 554, 103 S. E. 623.

Same—Fraud.—The evidence was held sufficient to sustain the instruction that, if the jury believed that the defendant canceled his contract with plaintiff solely for the purpose of depriving the plaintiff of his compensation in fulfilling the contract, this constituted fraud on the part of the defendant, and they shall find for the plaintiff. *Eastern Motor Sales Corp. v. Apperson-Lee Motor Co.*, 117 Va. 495, 85 S. E. 479.

Same—Right of Sub-Agent to Compensation on Sale Made by His Employer.

—A sub-agent who lawfully has the exclusive sale of the goods of a manufacturer, within a designated territory, and for which he is to receive a stated compensation, is entitled to his compensation on sales within such territory, which were induced by him or whether such sales were made by his employer or the manufacturer; and, in an action by such sub-agent against his employer to recover compensation for such a sale, an instruction that the plaintiff is entitled to recover if the jury believe that the defendant made such sale within the territory allotted to the plaintiff and that the plaintiff was the procuring cause thereof, is sufficiently sustained by proof of such

sale by the manufacturer and not by such employer. *Eastern Motor Sales Corp. v. Apperson-Lee Motor Co.*, 117 Va. 495, 85 S. E. 479.

Same—Commissions.—In an action by an agent for his commissions on a sale of horses, it was held that there was not sufficient record evidence to warrant an instruction that the jury should find for the defendants, provided they ascertained from the evidence that the contract stipulated that the plaintiff for a contingent compensation, should exercise his personal influence with an inspector, or inspectors, of the French or Belgian governments, to secure the acceptance by them of the artillery and cavalry horses which it was contemplated should be offered for sale to said governments by the defendants for war purposes. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

Same—Illegality of Split Commissions.—In an action by an agent for commissions, it is not error to refuse an instruction upon the illegality of split commissions, where there was no evidence in the case to support such an instruction. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

Same—Plaintiff's Version.—In an action by an agent against his principal for commissions, an instruction which accurately states the law with respect to the principles of the plaintiff's recovery in the event the jury gives credence to his version of the contract, is not erroneous. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

An instruction in an action for commissions, that if the jury believed the defendant's version of the contract between the parties, the agreement was an "entire one," and not severable, and that, if the plaintiff failed to discharge his undertakings under this contract, unless he was hindered in such discharge, or relieved from such discharge, by the defendants, they should

find for the defendants, was not erroneous under the circumstances of the case. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

Liability of Principal Preventing Performance of Contract by Agent.—

In an action by an agent for commissions on horses sold by his principal to a customer obtained by him, an instruction correctly stated the law of the hypothetical situation which it presented. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

Instructions Ignoring Defendant's Theory.—In an action by an agent for commissions on horses sold, the jury having been instructed that they could find the \$1 contract, if they believed that the evidence was to that effect, and that they should apply the law enunciated by the court in the instructions, to their conclusions, the jury very naturally would have applied the same principles, *mutatis mutandis*, to a verdict ascertaining a commission of \$1 per horse sold that they had been directed to apply to a verdict finding a commission of \$5 per horse, and the instructions given are therefore not subject to the criticism that they ignored defendant's theory. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

Abandonment of Contract Caused by Defendants.—

In an action by an agent for commissions, an instruction as tendered relieved the defendants from liability in case of abandonment of the contract and failure to render the agreed services, whatever might have been the justification of the plaintiff for such abandonment and nonperformance. Held: That an amendment of the instruction by the court excepting from such consequences of relief an abandonment and failure due either to the obstruction of the defendants, or to their assent excusing the plaintiff from performance, was proper. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

Time of Consummation of Sale.—

Under a contract by an agent to pay a sub-agent an agreed compensation on the sale of certain described automobiles, if a contract of sale is effected and the automobiles are subsequently delivered to and paid for by the purchaser, in an action by the sub-agent to recover such compensation from his employer, it is not prejudicial to the employer to instruct the jury that, as between such employer and his sub-agent, the sale took place when the automobiles were delivered by the manufacturer to the carrier, although the title was not to pass from the manufacturer until the price of the automobiles was paid. *Eastern Motor Sales Corp. v. Apperson-Lee Motor Co.*, 117 Va. 495, 85 S. E. 479.

Designation of Character of Compensation.—Although an agency within the meaning of the automobile trade consists in giving the agent the exclusive right to purchase for cash from the manufacturer machines, at a discount from the list price, and retail them to purchasers at the full list price, where the compensation of the person making the sale is fixed by a percentage of the price obtained for a machine, it is wholly immaterial whether such compensation be called a discount or a commission, and it is not reversible error for the trial court to designate it a commission in an instruction given in an action to recover such compensation. *Eastern Motor Sales Corp. v. Apperson-Lee Motor Co.*, 117 Va. 495, 85 S. E. 479.

Pro-vice of Jury.—In an action by an agent for commissions, the following instruction was held proper: "The jury are to find from all the evidence, oral and written, whether or not a contract was made between the plaintiff and the defendants and what the terms of the agreement were; whether any compensation agreed to be paid the plaintiff was modified by the mutual consent of the parties; whether any contract they may find to have been made or modi-

fied was ended or its further execution abandoned by mutual consent of the parties; and the jury should apply the law as enunciated in the instructions of the court to their conclusions upon these and all other disputed matters arising upon the evidence." *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

Contract Erroneously Stated.—An instruction in an action by an agent for commissions in which the contract is erroneously stated, should be refused. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

Jury Given Indefinite Authority to Avoid Contract.—In an action by an agent for commissions, an instruction giving the jury sweeping and indefinite authority to avoid the agreement of the parties, on the ground that it was "excessive, extortionate, and unconscionable, by reason of the disproportion of the value of the services to the agreed compensation," "or for any other reason," is objectionable. *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371.

C. ACTION BY THIRD PERSONS AGAINST PRINCIPAL.

1. Parties.

Where one of the parties to a contract for the sale of real estate is acting by an agent and the memorandum of the contract is signed by the agent as a party, without disclosing his principal, there is a sufficient designation of the parties, and the principal may sue and be sued upon the contract. *Donahue v. Rafferty*, 82 W. Va. 535, 96 S. E. 935.

1½. Pleading.

How Contract Declared on.—In an action against a principal on a contract made through his agent, the contract may be declared on either as made by the principal, or by him through his agent. *Black Lick Lumber Co. v. Camp. Constr. Co.*, 63 W. Va. 477, 60 S. E. 409.

Count Presenting Good Cause of Action.—In a count the plaintiff averred that Z. so represented himself to the plaintiff that at the special request Z. the plaintiff agreed to sell unto the defendant, for the sum of \$1,000 cash, which Z. acting on behalf of the defendant, promised that defendant would pay to the plaintiff, certain mineral rights in the plaintiff's tract of land; that the defendant, by his agent, did pay unto the plaintiff a part of the purchase price, whereupon the plaintiff did make and deliver to Z. a deed of bargain and sale conveying said mineral rights in fee simple to defendant, etc. Held the count presents a good cause of action for the price. *Spangler v. Ashwell*, 116 Va. 992, 83 S. E. 930, 931.

2. Evidence.

See ante, "Evidence of Agency," II, C.

a. Admissibility.

Fraudulent Representations — Parol Evidence.—Parol evidence is admissible to prove that a contract of sale was induced by the fraudulent representations of seller's agent, notwithstanding a clause limiting the authority of the selling agent, and exempting the seller from liability for representations of its agent at variance with the written contract. *White Sewing Mach. Co. v. Gilmore Furniture Co.*, 128 Va. 630, 105 S. E. 134.

Declarations of Plaintiff.—In an action against a contractor to recover damages for breach of contract to do work in a particular manner, the plaintiff may testify that, while the work was being done, he complained to the subcontractor, who as the agent of the defendant was doing the work, of the unsatisfactory character of the work. *Lambert v. Jenkins*, 112 Va. 376, 71 S. E. 718.

Reception of Money by Principal.—Proof of a loan made to an agent on behalf of his principal is not evidence of the reception of the money by the

principal, if the agent had no authority to borrow money on behalf of his principal. Nor is the agent's admission or representation as to the purpose for which he borrowed the money evidence against his principal. *Thompson v. Laboringman's Mercantile, etc., Co.*, 60 W. Va. 42, 53 S. E. 908.

Mere rumor or common belief, that an agent has power to do a particular act on behalf of his principal, is not, of itself, evidence of such authority. *Thompson v. Laboringman's Mercantile, etc., Co.*, 60 W. Va. 42, 53 S. E. 908.

b. Sufficiency.

Liability on Contract.—In an action against a principal on a contract made in its name by its agent with plaintiff for the purchase of furniture for a theatre, defendant's testimony tended to show, and the agent testified, that he had no authority to act as the agent for his principal in making the contract in controversy. The agent was manager and in charge of defendant's theatre and it appeared from the testimony that he had very broad power. He had made similar contracts with plaintiff before, which had been paid without question by the defendant. Held: From this and other evidence of like character tending to show the apparent scope of the agent's authority, that defendant was liable upon the contract in controversy. *Southern Amusement Co. v. Ferrell-Bledsoe Furniture Co.*, 125 Va. 429, 99 S. E. 716.

Instigation of Arrest.—Words and conduct on the part of the agent fairly tending to prove co-operation with the officer in the making of the arrest or encouragement thereof, justify a finding of instigation of the arrest, on his part. *Johnson v. Norfolk, etc., R. Co.*, 82 W. Va. 692, 97 S. E. 189.

3. Trial.

The order in which evidence is introduced is a matter within the discretion of the trial court. It is more reg-

ular, perhaps, to establish an agency first, and then introduce evidence as to the liability of the principal by reason of the agent's acts but if the agency and the liability of the principal for his acts be in fact established, the order in which the evidence was introduced to establish these facts is not reversible error. The question is not so much as to the order of proof, but its sufficiency. *McIntyre v. Smyth*, 108 Va. 736, 62 S. E. 930. See post, ORDER OF PROOF.

D. ACTION BY THIRD PERSON AGAINST AGENT.

1. Remedies.

How Agent Exceeding Authority Proceeded against.—Where an agent exceeds his authority in making a contract for his principal, he is not personally bound on the contract, unless it contains apt words to charge him, but must be proceeded against either by an action for deceit or by an action for the breach of his warrant of authority. *Lancaster v. Stokes*, 119 Va. 149, 89 S. E. 85.

2. Limitation of Actions.

See post, LIMITATION OF ACTIONS.

As a general rule, when there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run until the termination of the undertaking or agency. The facts in this case do not take it from under the influence of the general rule. The agency was continuous for 17 years; the transactions

were numerous, involving a long and complicated account, the details of which were known only to the agent, and the principal was a nonresident and compelled to rely upon the agent for a faithful discharge of his trust. *Wilson v. Miller*, 104 Va. 446, 51 S. E. 837.

3. Evidence.

Whether Obligation of Principal or Agent.—If a note on its face is the undertaking of the agent only, no reference being made to his representative character, parol evidence will not be allowed to exonerate the agent whether the principal was known or unknown at the time the note was executed; but if the note bears on its face appellation indicating that it was signed in a representative capacity, parol evidence is admissible, as against an immediate party or a holder with notice, to show that the obligation is that of a principal only, and that it was so understood when the note was executed. *Clark v. Talbott*, 72 W. Va. 46, 77 S. E. 523.

"Where the paper on its face is the undertaking of the agent only, no reference being made on its face to representative capacity, and where the paper on its face is unmistakably the principal's, parol evidence will not be received, in the one case to exonerate, and in the other to charge the agent." *Clarke v. Talbott*, 72 W. Va. 46, 48, 77 S. E. 523.

XII. CORRUPTLY INFLUENCING AGENTS, ETC.

See Va. Code 1919 § 4712.

AGENCY DIRECTOR.—See *Long v. United Sav., etc., Co.*, 76 W. Va. 313, 84 S. E. 1053. See also post, CORPORATIONS.

AGGRAVATION OF DAMAGES.—See post, EXEMPLARY DAMAGES; DAMAGES.

AGREED CASE.

CROSS REFERENCES.

See the title AGREED CASE, vol. 1, p. 283, and references there given.

Definition.—A case agreed, being a substitute for a special verdict, is subject to like rules. *McGhee & Co. v. Cox*, 116 Va. 718, 82 S. E. 701.

Effect of Agreement—Right to Benefit of Agreed Statement of Fact at Variance with Party's Pleading.—There is no rule of pleading or any reason or authority that denies one litigant the benefit of a fact germane to the gist of his suit or action, even though at variance with some incidental allegation in his pleading, when such fact has been solemnly admitted to be true by his adversary, and agreed, without exception, to be considered as part of the evidence in the case. *Zimmerman Co. v. Dey*, 121 Va. 709, 93 S. E. 597.

Where an action of ejectment is brought and submitted upon an agreed statement of facts, and before the decision thereof the defendants move to withdraw such agreed statement of facts, and file a bill in equity setting up a matter of equity not cognizable

in such action, and praying for an injunction restraining the prosecution of the action of ejectment, such agreed statement of facts will not estop them from setting up such equity and enjoining the prosecution of such action. *Gentry v. Poteet*, 59 W. Va. 408, 53 S. E. 787.

Power of Court.—In considering a special verdict, no inference whatever as to a matter of fact, but only inferences of law and of legal construction, are allowable. *McGhee & Co. v. Cox*, 116 Va. 718, 82 S. E. 701.

Review of Proceedings.—Where a cause has been tried on an agreed statement of facts by the court in lieu of a jury, and judgment rendered for the plaintiff, upon writ of error the evidence will be considered as though the defendant was a demurrant thereto, and if insufficient to warrant the judgment, reversal and judgment *nil capiat* must follow. *Hatfield v. Cabell County Court*, 75 W. Va. 595, 84 S. E. 335.

AGREEMENT.—See post, CONTRACTS.

AGRICULTURE.

CROSS REFERENCES.

See the title AGRICULTURE, vol. 1, p. 288, and references there given. In addition, see post, ANIMALS; CROPS; FERTILIZER; FOOD; WEIGHTS AND MEASURES. As to teaching agriculture, see post, COLLEGES AND UNIVERSITIES; SCHOOLS. As to taking or damaging crops, see post, CROPS.

Department of Agriculture. — Va. Const. §§ 143-146; Va. Code 1919, §§ 1099-1109, 3441; Barnes W. Va. Code, pp. 148, 149, ch. 15D, §§ 1-8.

State Entomologist—Insects and Diseases of Plants and Trees—Nursery Stock.—Va. Code 1919, §§ 870-905, 1287; Acts 1918, p. 302, Pollard's Code, p. 401; Barnes W. Va. Code, pp. 892-900,

ch. 62A, §§ 1-23; W. Va. Acts 1917, Reg. Sess., ch. 17; W. Va. Code Suppl. 1918, §§ 3534a-3534v.

Cedar Rust Law.—Va. Code 1919, § 885, et seq.

Same—Validity and Constitutionality.—Acts 1914, p. 49, et seq. (Va. Code 1919, §§ 885, et seq.), commonly known as the cedar rust law, providing for

the destruction of red cedar trees which are or may be the source, harbor or host plant for the communicable plant disease commonly known as "orange" or "cedar rust" of the apple, is a valid exercise of the police power of the state and does not violate the constitutional guarantees of due process of law and the equal protection of the laws. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141.

The cedar rust law is not invalid because of its "local option" feature contained in § 9. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141.

The cedar rust law is not invalid under § 52, Constitution of 1902, which provides that no law shall embrace more than one object, which shall be expressed in its title. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141.

Nuisances.—The cedar trees which fall within the condemnation of the cedar rust law would not have constituted either a public or a private nuisance at common law. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141.

Evidence as to Menace of Cedar Trees.—Evidence showing the circumstances which in fact existed in the immediate locality in question and in other adjacent localities in the valley and Piedmont sections of Virginia, which rendered the red cedar trees involved in the proceedings a real menace to the apple orchard industry held admissible. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141.

Provision for Assessment of Owners of Apple Orchards.—In proceedings on appeal to the circuit court by the owners of cedar trees, as provided by the cedar rust law, the question of the constitutionality of § 8 of the cedar rust law, providing for the annual assessment against owners of apple or-

chards, to provide a fund to reimburse the county for costs and damages paid out to the owners of red cedar trees destroyed under the statute, does not arise, as the owners are not dependent on these provisions for payment of the damages awarded them, the county and the orchard owners being alone concerned with the validity of these provisions. Moreover, in the instant case, certain persons had agreed to pay the damages in the event the statute was held to be valid, and the owners have accepted this agreement as a satisfactory guarantee to them. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141.

Agricultural Seed.—Va. Code 1919, §§ 1138-1154; W. Va. Acts 1919, Reg. Sess., ch. 103, p. 362, amending Barnes W. Va. Code, pp. 163-166, ch. 15D, §§ 43-56.

Agricultural Experiment Stations.—Va. Code 1919, § 869.

Acts 1920, p. 390, Pollard's Code 1920, pp. 749-751.

Barnes W. Va. Code, p. 600, ch. 45, § 176a, as amended by Acts 1919, p. 105, ch. 2, § 144.

County Agricultural Extension Work—Agricultural Agents.—Va. Code 1919, §§ 921-925; Barnes W. Va. Code, p. 464, ch. 39, § 28, as amended by Acts 1921, p. 457.

Amount Board of Supervisors May Expend to Promote Agriculture.—Va. Code of 1919, § 2734.

Inspection and Statutory Provisions Concerning Tobacco.—Va. Code 1919, §§ 1348-1361, 1366-1399; Va. Code 1919, §§ 1362-1365, as amended by Pollard's Code 1920, p. 64.

Analysis of Soil.—Va. Code 1919, § 1280.

Grading Apples.—W. Va. Acts 1917, Reg. Sess., ch. 24; W. Va. Code Suppl. 1918, §§ 3412½-3412¾k.

Demonstration Community Packing House.—W. Va. Acts 1919, p. 148.

Hemp—How Labeled.—Va. Code 1919, § 1427.

Bureau of Markets.—W. Va. Acts

1917, Reg. Sess., ch. 10; W. Va. Code Suppl. 1918, §§ 428a-428j.

Sale of Farm Produce.—Va. Code 1919, §§ 1250-1256; §§ 1257-1265 as amended by Acts 1920, p. 331; Pollard's Code 1920, pp. 60-63.

Collection of Specimens of Natural History.—Va. Code 1919, § 1282.

Geodetic and Geological Survey.—Barnes W. Va. Code, pp. 146, 147, ch. 15c, §§ 1-9.

Agricultural Associations.—W. Va. Acts 1921, Reg. Sess., ch. 121, pp. 458-465.

Incorporation of Agricultural Societies.—Barnes W. Va. Code, p. 740, ch. 54, § 2, ch. 5.

Corporation Chartered for Agricultural Purposes Exempt from License Tax.—Barnes W. Va. Code, p. 394, ch. 32, § 138.

Agricultural Fairs.—W. Va. Acts 1921, Reg. Sess., ch. 122, pp. 465-467; Barnes W. Va. Code, p. 1223, ch. 149, §§ 22a (1); 22a (4).

As to amusement privileges at fairs, see post, THEATERS AND SHOWS.

Diseases among Honey Bees.—W. Va. Code Suppl. 1918, §§ 440a-440q, as amended by Acts 1921, p. 468.

Digging or Prospecting for Ginseng or Other Medical Roots on Lands of Another.—Barnes Code, ch. 145, § 28b.

AID.—"Though the word 'aid' does not necessarily embrace or imply guilty knowledge or wrongful purpose, yet when supplemented by 'abet', as both are used in the statute and indictments, they jointly indicate such knowledge and purpose and the intention to encourage the commission of the offense." *State v. Ankrom*, 86 W. Va. 570, 574, 103 S. E. 925.

AIDER AND ABETTOR.—See ante, ACCOMPLICES AND ACCESSORIES.

AIDER BY VERDICT.—See post, AMENDMENTS; APPEAL AND ERROR.

ALCOHOL.—"The words alcohol and whiskey would likely import intoxicating drink, without allegation or proof." *State v. Lett*, 63 W. Va. 665, 667, 60 S. E. 782. See post, INTOXICATING LIQUORS.

ALIAS WRITS.—See post, ATTACHMENT AND GARNISHMENT; EXECUTIONS; LIMITATION OF ACTIONS; SUMMONS AND PROCESS.

ALIBI.

CROSS REFERENCES.

See the title ALIBI, vol. 1, p. 290, and references there given.

Effect of Failure of Alibi.—Where circumstantial evidence tends strongly to prove that the prisoner is guilty of the murder of which he is accused, his effort to prove, by unsatisfactory evidence, an alibi, or that he was not the

owner of the gun with which the murder was committed, at the time of its commission, leaves him in a worse condition than if he had not made the effort. *Hardy v. Commonwealth*, 110 Va. 910, 67 S. E. 522.

ALIENS.

II. What Determines Relation.

A. Birth.

III. Rights, Powers and Liabilities.

½A. In General.

A. In Regard to Person.

3. Suing and Being Sued.

B. In Regard to Real Property.

1. Right to Acquire.

½a. In General.

b. Modes of Acquisition.

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VI. Pleading and Practice.

CROSS REFERENCES.

See the title ALIENS, vol. 1, p. 291, and references there given. In addition, see post, PENSIONS. As to alien enemies, see generally, post, WAR. As to status of resident aliens of belligerent nations, see 3 Va. Law Reg., N. S., 81. As to rights as litigants, see 3 Va. Law Reg., N. S., 93. As to disposition of non-resident aliens' share in estate, see 3 Va. Law Reg., N. S., 853.

II. WHAT DETERMINES RELATION.

A. BIRTH.

"The fact admitted, that plaintiff was born in Austria, does not prove alienage." *Barna v. Gleason Coal Co.*, 83 W. Va. 216, 225, 98 S. E. 158.

III. RIGHTS, POWERS AND LIABILITIES.

½A. IN GENERAL.

Naturalization.—Va. Code, 1919, § 62; W. Va. Const., Art. 2, §§ 3, 5. See post, CITIZENSHIP.

Escheated Lands.—Va. Code 1919, §§ 506, 514; Barnes Code, ch. 69, §§ 16, 24. See post, ESCHEAT.

Hunting License.—Va. Code 1919, § 3331. See post, GAME AND GAME LAWS; LICENSES.

May Not Own Dog.—W. Va. Supp. 1918, § 3467c.

Inheritance.—Va. Code 1919, § 5267; Barnes Code, ch. 70, §§ 1, 2. See post, DESCENT AND DISTRIBUTION.

In General.—"At common law, an alien domiciled in a country is entitled

to the protection of its laws, and in return therefor owes temporary allegiance to the country of his adoption during the period of his residence. He is subject to the law, as well as entitled to its protection, and is liable to be tried and punished for crime; and may sue and be impleaded in the proper courts to the same extent as a citizen. The general doctrine is stated thus: 'While the rights of aliens depend entirely upon the municipal law of the state or nation, or the rights which are given aliens by international law, in the United States, except as to certain political and municipal rights to which citizens only are entitled, resident alien friends have practically all and the same rights and privileges as citizens. These rights and privileges include both personal rights—such as the right to dwell safely in the country and the rights of protection to person, reputation and other relative rights—and property rights.' 2 Cyc. 89, and authorities cited." *Pocahontas Collieries Co. v. Rukas*, 104 Va. 278, 282, 51 S. E. 449.

A. IN REGARD TO PERSON.

See ante, "In General," III, ½A.

3. Suing and Being Sued.

Right to Sue.—As a general rule, an alien, not an enemy, may maintain in the proper courts suits to vindicate his rights and redress his wrongs, including actions for personal injuries. *Squillache v. Tidewater Coal, etc., Co.*, 64 W. Va. 337, 62 S. E. 446; *Barna v. Gleason Coal Co.*, 83 W. Va. 216, 225, 98 S. E. 158.

Right of Action for Death by Wrongful Act.—Resident alien friends are entitled to the benefits and remedies afforded by §§ 2902 and 2904 of the Code of 1887 (§§ 5786, 5788, Va. Code 1919), giving a right of action for death by wrongful act or neglect, the policy of our laws is to extend rather than abridge the liberal policy of the common law under which an alien friend may sue and be impleaded to the same extent as a citizen. *Pocahontas Collieries Co. v. Rukas*, 104 Va. 278, 51 S. E. 449.

Aliens Resident in a Foreign Country.—The action for death by the wrongful act or neglect of another given by Code of 1887, § 2902 (§ 5786, Va. Code 1919), may be maintained for the benefit of alien relatives resident in a foreign country, although they are not expressly named in the statute. The language is general, and, on principle, includes nonresident aliens as well as citizens or residents. *Low Moor Iron Co. v. La Bianca*, 106 Va. 83, 55 S. E. 532.

B. IN REGARD TO REAL PROPERTY.**1. Right to Acquire.**

See post, "Power to Hold," III, B, 2.

½a. In General.

Aliens May Acquire, Hold and Transmit Real Estate.—Va. Code 1919, § 66; Barnes Code, ch. 70, §§ 1, 2.

ALIGNMENT.—The word alignment means an adjustment to a line, or the state of being so adjusted. *Harner v. Monoingalia County Court*, 80 W. Va. 626, 92 S. E. 781.

b. Modes of Acquisition.

See ante, "In General," III, B, 1, ½a. **Inheritance by Aliens.**—Va. Code 1919, § 5264; Barnes Code, ch. 70, §§ 1, 2; ch. 78 § 4 (alienage of ancestor).

By Purchase or Descent.—Alien friends are included in our statute of descents, and by § 43 of the Code (Va. Code 1919, § 66), are permitted to acquire by purchase or descent, and hold real estate in the same manner and to the same extent as a citizen. *Pocahontas Collieries Co. v. Rukas*, 104 Va. 278, 283, 51 S. E. 449; *Squillache v. Tidewater Coal, etc., Co.*, 64 W. Va. 337, 340, 62 S. E. 446.

2. Power to Hold.

See ante, "Modes of Acquisition," III, B, 1, b.

"An alien, not an enemy, may take and hold, by inheritance or purchase, real estate within this state. Such right is written in our constitution and statute law. Const., § 5, art. II; Code 1906, §§ 3018, 3019" (Barnes Code, ch. 70, §§ 1, 2); *Squillache v. Tidewater Coal, etc., Co.*, 64 W. Va. 337, 340, 62 S. E. 446.

3. Right to Convey.

Barnes Code ch. 70, § 2; Va. Code 1919, § 66.

Alien friends are permitted to transmit real estate in the same manner and to the same extent as a citizen. *Pocahontas Collieries Co. v. Rukas*, 104 Va. 278, 283, 51 S. E. 449.

VI. PLEADING AND PRACTICE.**Necessity for Pleading Alienage.**—

The fact appearing during the trial that the plaintiff, who has resided in this country for many years, was born in a country against which since suit brought this country has declared war, does not prove alienage. The fact that plaintiff is an alien enemy is defensive and ordinarily unavailing without timely plea. *Barna v. Gleason Coal Co.*, 83 W. Va. 216, 98 S. E. 158.

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CROSS REFERENCES.

See the title ALIMONY, vol. 1, p. 297, and references there given. In addition, see post, APPEAL AND ERROR; DIVORCE; DOWER; FORMER ADJUDICATION OR RES ADJUDICATA; HUSBAND AND WIFE; JUDGMENTS AND DECREES.

I. DEFINITION.

"Alimony in general is the sum allowed the wife in lieu of dower, and as compensation for the treatment she received," * * *. *Sperry v. Sperry*, 80 W. Va. 142, 156, 92 S. E. 574.

II. ORIGIN OF ALIMONY.

The power of courts of equity to decree alimony did not originate in any statute. It is a power inherent in them. It had its origin in the legal obligation of the husband, incident to the marriage state, to maintain his wife in a

manner suited to his means and social position. *Reynolds v. Reynolds*, 68 W. Va. 15, 24, 69 S. E. 381.

III. WHEN ALIMONY MAY BE RECOVERED.

½A. IN GENERAL.

A wife is not bound to go into the corpus of her estate to maintain herself or to prosecute or defend a suit for divorce. If she has ample income from her estate, to maintain herself and prosecute her suit, the court might within its discretion deny her tempo-

rary alimony and suit money; but where her income is inadequate for these purposes, the necessity which the statute contemplates is present. *Kittle v. Kittle*, 86 W. Va. 46, 55, 102 S. E. 799.

When a judicial decree of separation from bed and board has once been pronounced, the common-law obligation to support the wife, if not entirely abrogated, is greatly modified. Alimony then becomes the regular measure of the husband's obligations. *Chapman v. Parsons*, 66 W. Va. 307, 312, 66 S. E. 461.

A. MARRIAGE A PREREQUISITE.

Alimony is only cognizable as between parties united by a marital relation that imposes upon the husband the legal duty to support the wife. *Chapman v. Parsons*, 66 W. Va. 307, 66 S. E. 461.

B. ALIMONY MAY BE GRANTED INDEPENDENTLY OF SUIT FOR DIVORCE.

A wife who has been abandoned and denied support by her husband may have a decree for alimony without a divorce, and such relief may be granted her in a suit for divorce brought by a husband, on a prayer in her answer therefor as affirmative relief. *Huff v. Huff*, 73 W. Va. 330, 80 S. E. 846.

An independent suit for alimony lies in equity, and the court has jurisdiction to decree the same although there is no prayer in the bill for a divorce and no jurisdiction in the courts of this state to grant the complainant a divorce. *Jolliffe v. Jolliffe*, 10 Va. L. Reg. 1098.

A suit for divorce is a suit to end the marital relation in whole or in part. A suit for alimony proper is to enforce the obligations incident to the continuance of the relation, and although similar inquiries arise in both suits, it is neither in form or substance a suit for a divorce. *Jolliffe v. Jolliffe*, 10 Va. L. Reg. 1098.

An independent suit for alimony is not controlled by the statute applica-

ble to divorce suits as to residence of the parties. Equity has jurisdiction for the purposes of attachment and to set aside fraudulent conveyances, although neither party is a resident of this state, and the marriage and cohabitation was in another state and the breach of the marital duty is alleged to have occurred in another state. *Jolliffe v. Jolliffe*, 10 Va. L. Reg. 1098.

Suit for Alimony, Subsequent Suit for Divorce in Another State.—The jurisdiction of the court will not be ousted by the fact that subsequent to its institution the defendant filed in a California court his suit for divorce, and in her answer the plaintiff asked for alimony. *Jolliffe v. Jolliffe*, 10 Va. L. Reg. 1098.

C. WIFE MAY FORFEIT BY MISCONDUCT.

Adultery subsequently occurring is sufficient to cut off alimony. *Chapman v. Parsons*, 66 W. Va. 307, 66 S. E. 461.

A wife guilty of desertion is never entitled to alimony. The decree established the fact of her desertion. Until that decree is successfully assailed, she has no right to alimony. *Bishop on Mar., Div. and Sep.*, § 861. *Chapman v. Parsons*, 66 W. Va. 307, 310, 66 S. E. 461.

A wife who has voluntarily abandoned her husband should not have a decree for her separate maintenance, unless her abandonment of him was, without fault, rendered necessary for her safety and happiness, and was consistent with social order and public policy. *Haynor v. Haynor*, 112 Va. 123, 70 S. E. 531.

Previous Unchastity.—In a suit for divorce and alimony, the husband had had previous illicit relations with the wife. At the time of the marriage she was with child, and she alleged that the husband was the child's father. He claimed that he learned immediately after the ceremony of marriage, but before the marriage was consummated,

that the child was not his. Held: That the consummation of the marriage by the husband with knowledge condoned all the wife's previous lapses from virtue. *West v. West*, 126 Va. 696, 101 S. E. 876.

As a result of the marriage and condonation, as set out in the preceding paragraph, the husband incurred responsibilities from which he could not escape. Among these responsibilities were his duty, under Code of 1919, § 5107, to pay the sums necessary for the maintenance of the woman and to enable her to carry on her suit for divorce, and, under § 5111 of the Code of 1919, to pay such proper permanent alimony upon the dissolution of the marriage as the court might decree. *West v. West*, 126 Va. 696, 101 S. E. 876.

Indiscretions of the wife after desertion of her by the husband of a trivial character, or which would not entitle the husband to a decree of divorce from bed and board against her, will not justify the court, in a suit by her against him for divorce, in denying her temporary or permanent alimony and suit money. *Kittle v. Kittle*, 86 W. Va. 46, 102 S. E. 799.

E. COURT WILL NOT ALLOW ALIMONY WHERE WIFE IS WELL OFF.

See ante, "In General," III, ½A; post, "General Rule," IV, A.

The fact that the wife has real and personal estate, but practically no income therefrom, from which she can derive support, will not warrant the court, in a suit by her, in denying her temporary or permanent alimony or suit money. *Kittle v. Kittle*, 86 W. Va. 46, 102 S. E. 799.

F. HUSBAND'S POVERTY.

See post, "Enforcement," IX, B, 6.

It has been decided that when the suit is by the wife, the defendant's poverty may be pleaded in defense of her application for suit and alimony.

State v. Kittle, 86 W. Va. 587, 589, 164 S. E. 44.

"If the inability of the relator to pay the amount decreed against him or any part thereof can be clearly established, whether it existed at the date of the order or not, he may be entitled to a discharge from custody." Ex parte Beavers, 80 W. Va. 34, 37, 91 S. E. 1076.

IV. AMOUNT.

A. GENERAL RULE.

"As a general rule the basis for all decrees for alimony is the income of the husband, and the amount decreed should be in some just proportion to his ability to earn money and as will enable the wife to maintain herself comfortably in her station in life. *Reynolds v. Reynolds*, 68 W. Va. 15, 69 S. E. 381; *S. C.*, 72 W. Va. 349, 78 S. E. 360; *Henrie v. Henrie*, 71 W. Va. 131, 76 S. E. 837; *Goff v. Goff*, 60 W. Va. 9, 21, 53 S. E. 769; *Coger v. Coger*, 48 W. Va. 135, 35 S. E. 823; *Wass v. Wass*, 42 W. Va. 460, 464, 26 S. E. 440. Ordinarily the wife's estate and capacity to earn money, where the husband's income is ample and sufficient to make provisions for her, are not questions for consideration. *Sperry v. Sperry*, 80 W. Va. 142, 156, 92 S. E. 574; *Cralle v. Cralle*, 84 Va. 198, 200, 6 S. E. 12; *Miller v. Miller*, 92 Va. 196, 23 S. E. 232; *Harris v. Harris* (72 Va.), 31 Gratt. 13, 17; *McKinney v. McKinney*, 80 W. Va. 745, 93 S. E. 831; *Kittle v. Kittle*, 86 W. Va. 46, 54, 102 S. E. 799.

"Alimony in general is the sum allowed the wife in lieu of dower, and as compensation for the treatment she received, and the amount of the allowance should be reasonably proportionate to her loss." *Sperry v. Sperry*, 80 W. Va. 142, 156, 92 S. E. 574.

B. DISCRETION OF COURT.

See post, "Property of Husband Subject to Alimony," IV, C; "Alimony Pendente Lite," VI. And see Va. Code

1919, § 5111; Barnes Code, ch. 64, § 11.

The trial court has a very broad discretion in fixing the amount of alimony, and the appellate court will not interfere with such discretion unless it is clear that some injustice has been done. *Lovegrove v. Lovegrove*, 128 Va. 449, 104 S. E. 804; *Henrie v. Henrie*, 71 W. Va. 131, 76 S. E. 837; *Reynolds v. Reynolds*, 72 W. Va. 349, 352, 78 S. E. 360. As to review of discretion, see post, APPEAL AND ERROR.

Antenuptial and Postnuptial Contracts.—Even bona fide antenuptial and postnuptial contracts, valid in all other respects, can not bind the action of the court on the subject of alimony. The court will usually adopt such contract provisions, if just and reasonable; otherwise, it will not do so. *Cumming v. Cumming*, 127 Va. 16, 102 S. E. 572.

In decreeing to a wife for the support of herself and the children of herself and husband, one-half of the husband's salary income, a court does not abuse its discretion nor commit error, when it appears that the husband boards with his parents, that it is doubtful whether he pays them for his board, that, although indebted, he has been paying little or nothing on his debts out of his salary, that a part of his indebtedness is due the wife and that he makes liberal presents to relatives whose financial circumstances are exceptionally good. *McKinney v. McKinney*, 80 W. Va. 745, 93 S. E. 831.

C. PROPERTY OF HUSBAND SUBJECT TO ALIMONY.

See ante, "General Rule," IV, A; post, "Instances of Amount Allowed," IV, D.

Income.—The general rule is that the income of the husband, whether derived or to be derived from his personal exertions, or from permanent property, or from both, is the fund from which alimony is derived, and from which there should be a personal

decree, the amount to be determined by the circumstances of each particular case. *Reynolds v. Reynolds*, 68 W. Va. 15, 69 S. E. 381.

Specific Portions of Property.—

Without some special facts or circumstances calling for that relief it is not error on decreeing divorce to a wife not to set off to her as alimony a specific portion of the property of her husband. As a general rule alimony is payable out of the earnings of the husband or the income from his property. *Sperry v. Sperry*, 80 W. Va. 142, 92 S. E. 574.

Title to Real Estate.—It is error for a court, upon decreeing a divorce from bed and board, to vest the title to the husband's real estate in fee in the wife as permanent alimony, unless there be special circumstances calling for such decree. *Reynolds v. Reynolds*, 68 W. Va. 15, 69 S. E. 381.

The better rule, according to the authorities, is to give the wife an annual allowance, or life estate in the realty, instead of decreeing her the realty in fee. *Reynolds v. Reynolds*, 68 W. Va. 15, 23, 69 S. E. 381.

Specific Portions of Real Estate.—

The general rule is that a wife is not entitled to have any specific parcel of real estate assigned as her own. Alimony is usually an allowance in money out of the husband's estate, but not the estate itself. Although the decisions are not harmonious, the very great weight of authority is to the effect that unless there is express statutory authority therefor, the court possesses no power to vest in the wife title to a specific portion of the husband's real estate as alimony. *Lovegrove v. Lovegrove*, 128 Va. 449, 104 S. E. 804.

In the instant case the wife complained of the allowance of \$30 per month alimony, and urged that that portion of the decree should be reversed, and that she should be allowed to remain with her infant children in the residence of her husband. The

husband's property was not estimated to exceed \$5,000 in value and his earning capacity was \$2.50 per day. Held: That while not deciding that there could be no case in Virginia in which the trial court, in the exercise of its discretion, could permit a wife with her infant children to occupy a specific dwelling house owned by her husband, yet there was no reason, when all the circumstances were considered, for departing from the general rule, as to the right of a wife upon divorce in her husband's realty. *Lovegrove v. Lovegrove*, 128 Va. 449, 104 S. E. 604.

D. INSTANCES OF AMOUNT ALLOWED.

Defendant in this case being able-bodied and earning sixty-five dollars per month, and owning a house and lot and a vacant lot estimated to be worth at least three thousand dollars and some money, twenty-four dollars per month decreed to the plaintiff for alimony is not unreasonable. *Deusenberry v. Deusenberry*, 82 W. Va. 135, 95 S. E. 665.

In *Kiser v. Kiser*, 108 Va. 730, 62 S. E. 936, the court without deciding whether permanent alimony may be granted to a wife where the divorce prayed for is refused, a decree against the husband for \$350 for "permanent alimony" and for the value of the wife's contingent right of dower in a tract of land which the husband had sold for \$1,680, and which the wife is required to release, was not disturbed, where the record did not show the value of said contingent right of dower, nor disclose the facts upon which an accurate computation could be made and where the amount decreed perhaps would not have been excessive if the decree in her favor had been based wholly upon the value of her contingent right of dower.

Half of Salary.—A wife having a considerable income of her own, has no legal or just cause of complaint against a decree awarding to her, for the sup-

port of herself and children, practically one-half of her husband's moderate salary, he being indebted in an amount considerably in excess of the value of his estate. *McKinney v. McKinney*, 80 W. Va. 745, 93 S. E. 831.

Suit Money—Counsel Fees.—The allowance, in the case of judgment, to the wife, of the sum of \$225.00 payable in three monthly instalments for suit money, and of \$150.00 for counsel fees, is a reasonable allowance. *Craig v. Craig*, 118 Va. 294, 87 S. E. 731. See also, *Burton v. Burton*, 118 Va. 519, 88 S. E. 51.

E. ATTORNEYS' FEES.

See ante, "Instances of Amount Allowed," IV, D.

Disposition of Counsel Fees on Appeal.—On an appeal from a decree dismissing a bill for divorce, and also dismissing a cross-bill of the wife for alimony, this court, on affirming the decree, will not pass on an application for the allowance of counsel fees for services rendered the appellee in this court, but will remand the cause, with leave to counsel for the appellee to prosecute their claim for compensation before the trial court, which is in a better position than this court to inquire into and do what is right and just between the parties in the first instance, with the right of appeal to this court if a proper case shall be made for its exercise. *Craig v. Craig*, 115 Va. 764, 80 S. E. 507.

VI. ALIMONY PENDENTE LITE.

See ante, "Discretion of Court," IV, B. And see Va. Code 1919, § 5107; Barnes Code, ch. 64, § 9.

In a suit for divorce the uniform practice is to allow a wife who is without means of her own a reasonable sum to be paid by the husband, for her temporary support, counsel fees, and costs of litigation. Under the circumstances of this case one hundred and fifty dollars is not an excessive allowance for such purposes. *Kiser v. Kiser*, 108 Va. 730, 62 S. E. 936.

"Temporary alimony is incidental to a divorce suit. It is maintenance for the wife pending a suit which is to determine whether there is further duty upon the husband to maintain the wife. In our jurisprudence it is the creature of the statutes relating to divorce and divorce proceedings. * * *. The only provision justifying maintenance pending a suit is Code, chap. 64, § 9, wherein it is provided that it may be awarded pending a divorce suit." *Chapman v. Parsons*, 66 W. Va. 307, 311, 66 S. E. 461.

Suit to Set Aside Divorce.—There is no jurisdiction to award alimony as between parties divorced from bed and board, as incident to the pendency of an independent suit to set aside the decree of divorce for fraud, and before the decree is successfully assailed, *Chapman v. Parsons*, 66 W. Va. 307, 66 S. E. 461.

Effect of Failure to Pay.—A court has no power to strike out and disregard depositions filed by a defendant in defense of a suit for divorce, for failure to pay money required of him to enable his wife to prosecute her suit and for temporary alimony, and pass final decree of divorce against him. Such decree is not due process of law. *Trough v. Trough*, 59 W. Va. 464, 53 S. E. 630.

Jurisdiction.—"Our statute on divorce procedure vests jurisdiction in the circuit court to make orders for suit money and maintenance. Code 1906, chap. 64, § 9. * * *. The statute plainly contemplates that as long as the contest in relation to a divorce is being litigated, the circuit court shall have power to make proper orders for suit money and maintenance, even though the litigation is being continued on appeal." *Maxwell v. Maxwell*, 67 W. Va. 119, 67 S. E. 379.

VIII. VACATION.

See ante, "Alimony Pendente Lite," VI.

Proceedings in Vacation.—A judge

can in vacation make an order for temporary alimony under West Virginia Code, ch. 64, § 9; but the adverse party has right to defend a motion for temporary alimony. As he has right to defend the motion, it follows that he must have notice of a motion to be heard in vacation. *Keller v. Keller*, 58 W. Va. 325, 326, 52 S. E. 318.

IX. PROCEDURE.

See ante, "Alimony Pendente Lite," VI.

A. IN GENERAL.

Recovery against Convict.—Va. Code 1919, § 6042.

Maintenance — Overruling Motion as to Commissioner's Report.—The overruling of a motion to recommit the report of a commissioner, recommending an amount to be decreed, in a divorce suit, to the wife, for the maintenance of herself and children, based upon an affidavit that the husband's salary has been reduced, since the report was made up, is justified by a disclosure in the record that the employer so reducing the salary is a corporation of which the husband is the manager, and that his father owns a large portion of its capital stock and strongly sympathizes with the son in the litigation between him and his wife. *McKinney v. McKinney*, 80 W. Va. 745, 93 S. E. 831.

B. JUDGMENT OR DECREE.

1. In General.

Dower and Marital Rights.—Where a wife is decreed a divorce a mensa, the court pronouncing such decree can not lawfully deprive her of her dower or other marital rights in the husband's estate. So long as the bonds of matrimony remain unbroken, she can not be deprived of such marital rights in her husband's property. *Kittle v. Kittle*, 86 W. Va. 46, 102 S. E. 799.

Alimony in Lieu of Dower.—On decreeing divorce a vinculo to a wife the court may, under § 11, chapter

64, Code 1913, provide that the alimony decreed shall be in lieu of dower in the lands of the husband. *Sperry v. Sperry*, 80 W. Va. 142, 92 S. E. 574.

2. Validity.

A decree for alimony is erroneous where it provides that the acceptance by the wife of any portion of the alimony shall be an acquiescence "in the decree of divorce and bar and preclude her right to an appeal from it, and that an application for an appeal from the decree shall render the provision for alimony ineffectual, inoperative and void. The latter provisions are coercive in their operation and effect and unduly restrain the liberty and right of the appellant as a litigant." *Huff v. Huff*, 73 W. Va. 330, 335, 80 S. E. 846.

3. Time and Duration of Allowance of Alimony.

"The time of allowance (of alimony) like the question of amount, is in the discretion of the court, and may, according to some authorities, be made to relate back to the commencement of the suit." *Reynolds v. Reynolds*, 72 W. Va. 349, 351, 78 S. E. 360.

On an appeal by the husband from a decree granting the wife a divorce a mensa et thoro, and decreeing a conveyance to the wife of the husband's real estate, as permanent alimony, the decree, as to separation, was affirmed, but, in respect to taking lands for alimony, was reversed, and the cause remanded, with direction to the lower court to enter a "reasonable money decree" for alimony. Held: That the chancellor has discretion to allow alimony from the date of the decree of divorce. *Reynolds v. Reynolds*, 72 W. Va. 349, 78 S. E. 360.

It is error in decreeing a divorce a mensa et thoro, to decree payment of alimony "for and during the wife's life;" it should be during their joint lives, or until reconciliation. *Henrie v. Henrie*, 71 W. Va. 131, 76 S. E. 837.

Remarriage. — On decreeing divorce a vinculo to a wife the court may, un-

der § 11, chap. 64, Code 1913, limit the decree for alimony to such time as the wife may remarry. *Sperry v. Sperry*, 80 W. Va. 142, 92 S. E. 574.

4. Modification of Decree.

.Va. Code 1919, § 5111; Barnes Code, ch. 64, § 11.

A decree allowing alimony to a divorced wife is not a final and irrevocable settlement of her right to support for herself and infant children, as § 5111 of the Code of 1919 expressly provides that the court may from time to time revise and alter such decree concerning the care, custody, and maintenance of the children, and make a new decree concerning the same. *Lovegrove v. Lovegrove*, 128 Va. 449, 104 S. E. 804.

West Virginia Code.—"Our statutes virtually direct that alimony be litigated in the divorce suit. Code, chap. 64, §§ 9, 11. It is contemplated by our law that, during a suit for divorce and at the time a decree of divorce of any character is made therein, all questions of maintenance shall be settled. And as then settled they are final, except that adultery subsequently occurring is sufficient cause to cut off alimony. * * *. The statute provides for no future change as to the permanent alimony decree, or as to the silence of the decree in this regard. Yet the very section that deals with this subject of maintenance provides for future change as to the custody of children. 'The expression of the one is the exclusion of the other.' A change in the other particular is impliedly prohibited." *Chapman v. Parsons*, 66 W. Va. 307, 310, 66 S. E. 461. See, also, post, **FORMER ADJUDICATION OR RES ADJUDICATA.**

Reservation of Power to Change Alimony.—Upon decreeing divorce the court should reserve the power to subsequently change the amount of alimony, and omitting to do so the error may be corrected on appeal. *Sperry v. Sperry*, 80 W. Va. 142, 92 S. E. 574.

In decreeing a divorce a mensa et thoro, and for the payment of alimony, the chancellor has the power to reserve the right to make such changes in the amount, as the changed circumstances of the parties, and the principles of justice may require. *Henrie v. Henrie*, 71 W. Va. 131, 76 S. E. 837.

A decree dismissing the wife's petition praying for an increase of alimony, without stating the reason why it was dismissed, is not an adjudication upon the right reserved in a former decree to make changes in the amount. *Henrie v. Henrie*, 71 W. Va. 131, 76 S. E. 837.

To obtain a modification of a decree of divorce, respecting the alimony or custody of the children, awarded by it, the petitioner must set forth in his pleading such facts and circumstances as will, if established by proof, entitle him to the relief he desires. Mere claims and conclusions stated in general terms are insufficient. *Boger v. Boger*, 86 W. Va. 590, 104 S. E. 49.

5. Lien.

A decree for alimony constitutes a lien on the real estate of the party against whom it is pronounced. *Smith v. Smith*, 81 W. Va. 761, 95 S. E. 199.

A decree for alimony payable in monthly instalments during the lifetime of the beneficiary constitutes a lien in her favor upon all of the husband's real estate from the date of such decree, not only for the instalments presently due, but for those that shall fall due under such decree in the future; and where a temporary decree for alimony is subsequently made permanent, the lien for the whole amount dates from the date of the temporary decree, and takes priority over subsequent judgments against the husband or liens created by him. *Isaacs v. Isaacs*, 117 Va. 730, 86 S. E. 105.

Permanent alimony decreed in a fixed annual sum, the defendant appearing in the case or served with process, is a personal decree and a lien on his land, though such alimony be payable in in-

stalments in the future. *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769.

Quære, can a court, in a divorce case, declare alimony a lien on specific land brought before the court in case the defendant is a nonresident, so that no personal decrees can be had, under § 11, ch. 64, West Virginia Code of 1899. *Goff v. Goff*, 60 W. Va. 9, 53 S. E. 769.

Same—Effect of Judgment of Another State on Rights of Property Established by Decree of This State.—A decree for alimony rendered by a court of this State, having full jurisdiction over the parties and the subject matter of the suit, in so far as it affects the rights of property established by said decree, can not in any wise be affected by a decree rendered by a court of another State in a suit between the same parties. *Isaacs v. Isaacs*, 115 Va. 562, 79 S. E. 1072.

6. Enforcement.

Imprisonment for Non-Payment of.—While the remedy of imprisonment for failure to pay alimony is severe and harsh, and therefore should not be enforced except where it appears that the defendant is contumacious, still where this does appear there should be no hesitation in imposing the penalty. *West v. West*, 126 Va. 696, 101 S. E. 876.

Same.—Notwithstanding the abolishment of imprisonment for debt, a court of equity can commit to jail for failure to pay alimony. *West v. West*, 126 Va. 696, 101 S. E. 876.

Same—Decree for Alimony Distinguished from Judgment for Debt.—A decree for alimony is essentially different from an ordinary debt or judgment for money. It is an allowance in the nature of a partition of the husband's property, of which the wife is entitled to a reasonable share for her maintenance. The imprisonment is not ordered simply to enforce the payment of the money, but to punish for

the wilful disobedience of a proper order of a court of competent jurisdiction. *West v. West*, 126 Va. 696, 101 S. E. 876.

Though a decree for alimony constitutes a lien on the real estate of the party against whom it is pronounced and may be enforced by execution, it is a decree not merely for the payment of money, but for the payment of money in discharge of the high marital duty of maintenance, wherefore it may be enforced by attachment for contempt also. *Smith v. Smith*, 81 W. Va. 761, 95 S. E. 199.

Same—Temporary Alimony. — Instance in which a decree ordering the husband's imprisonment was justified. *West v. West*, 126 Va. 696, 101 S. E. 876.

Necessity for Purging of Contempt. — To obtain his liberty on the ground of his inability to satisfy a decree for alimony, made in a suit for divorce, in which the court entering it had full and complete jurisdiction, a party committed on an attachment for his contumacious refusal to pay the amount so decreed against him, must purge himself of the contempt, as far as possible, and make his application for such relief in the court in which he was

committed. *Ex parte Beavers*, 80 W. Va. 34, 91 S. E. 1076.

Habeas Corpus. — Without having done so, and clearly and fully proved his inability to satisfy the decree, he is not entitled to a discharge on a writ of habeas corpus. *Ex parte Beavers*, 80 W. Va. 34, 91 S. E. 1076.

Lack of a recital in the order of commitment for such contempt, of a finding of the defendant's ability to pay the amount decreed against him, does not vitiate the order, nor rebut the presumption in favor of the correctness thereof. *Ex parte Beavers*, 80 W. Va. 34, 91 S. E. 1076.

Lack of a limitation upon the period of imprisonment adjudged by way of execution, to compel satisfaction of a decree for the payment of alimony, does not make it a decree of perpetual imprisonment, nor render the punishment incident thereto cruel or unusual within the meaning of constitutional provisions inhibiting such punishment. *Ex parte Beavers*, 80 W. Va. 34, 91 S. E. 1076.

A writ of error does not lie to a judgment of contempt for disobedience of a decree requiring payment of alimony. *Smith v. Smith*, 81 W. Va. 761, 95 S. E. 199.

ALL.—See post, ANY; AVENUES; FOR; MALE CITIZENS; WILLS.

"The word **all** is without doubt one of very comprehensive meaning, but the meaning to be given to it in any particular case must be determined by its context. It may have its broadest signification, or it may be limited in its meaning to all of a particular kind or class. *Willis v. Kalmbach*, 109 Va. 475, 485, 64 S. E. 342.

"**All** personal property of every description," includes **all** kinds of personal property, whether tangible or intangible. *West v. Newport News*, 104 Va. 21, 26, 51 S. E. 206.

In *State v. Harden*, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394, it was contended by counsel that the broad terms "license of **all** kinds" used in a statute might be restrained and limited by construction so as to apply to municipal license of owner, not to include state licenses, but the court said that, "**all** kinds' means **all** classes as well as individuals of each class."

In the statute of West Virginia requiring all railroad companies to provide and keep for the accommodation of travelers suitable water-closets "at **all** stations," the words "**all** stations" literally include flag stations, but the words used by the legislature must be interpreted in the light of the nature of the subject matter of the statute and the conditions and circumstances, suggested

respectively by the term "station" on the one hand, and the words "flag station" on the other. *State v. Baltimore, etc.*, R. Co., 61 W. Va. 367, 368, 56 S. E. 518. See post, RAILROADS.

As to meaning of **all** in will postponing distribution of bequests to children until **all** reach their majority, see *Davis Trust Co. v. Price*, 77 W. Va. 678, 88 S. E. 111. See also post, WILLS.

All Elections.—See *Willis v. Kalmbach*, 109 Va. 475, 485, 64 S. E. 342. See, also, post, ELECTIONS.

All Lots Remaining Unsold.—See *McNamara v. Boyd*, 112 Va. 145, 148, 70 S. E. 694.

All Such Right, Title and Interest, etc.—See *State v. Mathews*, 68 W. Va. 89, 95, 69 S. E. 644. See, also, post, TAXATION.

All the Coal.—"The right of subjacent support is not waived by the sale of **all the coal** with the right to mine and remove it, or the sale of the surface reserving the coal with the right to mine and remove it. * * *. A conveyance or the reservation of **all the coal** with the right to mine it, is, as was said, in the dissenting opinion in *Griffin v. Coal Co.*, 59 W. Va. 480, 53 S. E. 24, 2 L. R. A., N. S., 1115, one and the same thing. 'No talismanic influence is to be attributed to the word **all**. The coal under a tract of land is precisely the same as **all the coal**, and to attribute to the word **all** any intensive force is a mere verbal criticism without effect, weight or influence. It is the sticking in the bark which always misses the marrow'" *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271, 292, 89 S. E. 305. See post, MINES AND MINERALS.

All the Timber.—See *Darnell v. Wilmoth*, 69 W. Va. 704, 708, 72 S. E. 1023.

ALLEY.—The words **alley** way have the same meaning as the word **alley**. An **alley** may be public or private. When used in a plat or statute concerning towns or cities, it will be taken to mean a public way, unless the word "private" is prefixed or the context requires a different meaning. When used in a deed between private parties, it may mean a private **alley**, if that clearly appears to be the intention. An **alley** is a narrow passage or way in a city, as distinguished from a public street. If the grant were of a public **alley** way or **alley**, it would certainly imply an open and unobstructed **alley** way or **alley**. From the use of the same word or words, by parties in relation to land in a city, although by the context it appears to be a private **alley** way, it seems to be a fair inference to say that they mean the same as to the character and condition of the **alley** way, so far as future obstructions are concerned, as they would mean were it a public **alley** or **alley** way. In other words, the difference between a public and private **alley** way is not so much in the character or condition of the **alley** way as in the use and control of it. *Flaherty v. Fleming*, 58 W. Va. 669, 673, 52 S. E. 857. See post, MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS. Also, see post, FOR AN ALLEY WAY.

ALLOWED.—Where the condition of a policy was that it should be void if "there be kept, used or **allowed** gasoline" on the premises, it was held that the word **allowed** was to be construed as meaning "**allowed** to be kept or used," and that the condition was not violated by permitting gasoline to be carried through the building on the premises. *Westchester Fire Ins. Co. v. Ocean View Pleasure Pier Co.*, 106 Va. 633, 643, 56 S. E. 584, citing *London, etc., Ins. Co. v. Fisher*, 92 Fed. 500, in which the opinion was delivered by Judge Taft. See, generally, post, FIRE INSURANCE.

ALONG.—See post, **BOUNDARIES**.

Where an injunction restrains the defendant from interfering with the complainants in the erection, construction and maintenance of a telephone line or lines, telegraph line or lines, **along** the public highway which passes through the farm of the defendant, the expression "**along** the public highway," in this connection, means in, on or over the public highway and not in, on or over defendant's land. *Lowther v. Bridgeman*, 57 W. Va. 308, 312, 50 S. E. 410. See, generally, post, **TELEGRAPHS AND TELEPHONES**.

ALTERATION.—As to alteration of grade of street, see post, **STREETS AND HIGHWAYS**.

The **alteration** of a county road or highway embraces and requires: (1) A new location, (2) constructing thereon a roadway as good as the present one, (3) the discontinuance of the present road; and these three things constitute the **alteration** authorized by the statute, § 1294b of the Virginia Code of 1904. *Carolina, etc., Railway v. Board*, 109 Va. 34, 39, 63 S. E. 412. See post, **RAILROADS; STREETS AND HIGHWAYS**.

ALTERATION OF INSTRUMENTS.

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CROSS REFERENCES.

See the title **ALTERATION OF INSTRUMENTS**, vol. 1, p. 307, and references there given. In addition, see post, **CONTRACTS; ELECTIONS; LOST INSTRUMENTS AND RECORDS; RECORDS; RESCISSION, CANCELLATION AND REFORMATION; WILLS**. As to alteration of plot, see post, **MUNICIPAL CORPORATIONS**.

II. **MATERIAL AND IMMATERIAL ALTERATIONS.**

A. **WHAT CONSTITUTES MATERIAL OR IMMATERIAL ALTERATION, GENERALLY.**

Va. Code 1919, § 5687; Barnes Code, ch. 98A, § 125. See post, **BILLS, NOTES AND CHECKS**.

B. **INSTANCES OF MATERIAL ALTERATION.**

See ante, "What Constitutes Material or Immaterial Alteration Generally," II, A; post, "Effect of Material Alteration," II, D.

C. **INSTANCES OF IMMATERIAL ALTERATION.**

See post, "Effect of Immaterial Alterations," II, E.

D. EFFECT OF MATERIAL ALTERATION.

Warehouse Receipt.—Va. Code 1919, § 1302; Barnes Code 1918, ch. 62F, § 13.

Negotiable Instruments. — Va Code 1919, § 5686; Barnes Code, ch. 98b, § 124.

The addition of the words "payable with interest" to a negotiable note, in the same handwriting as the body of the note, written on a blank space after the words "value received," at the most appropriate place on the note on which it could be written without interlining them (in the absence of anything on the face of the note to show that it had been altered or to awaken suspicion) does not render the note incomplete or irregular on its face within the meaning of the Negotiable Instruments Act. *American Bank v. McComb*, 105 Va. 473, 54 S. E. 14.

If a written agreement not under seal be altered by the party claiming under it in a material part, he can never recover upon the agreement so altered, nor can he avail himself of the contract in its original and true form. *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515.

Where an agreement is prepared between adjoining landowners for a private way through their lands, and signed by all but one of the parties, and, in order to obtain his signature, one who had signed the agreement procured the same to be materially changed as to the route of the proposed road through the lands of the party not signing, the agreement is of no effect as to one who had signed it, but did not know of, or consent to, the change. *Hershman v. Stafford*, 58 W. Va. 459, 52 S. E. 533.

Effect of Alteration of Deed.—If, after execution, a deed for land be altered by the grantee or by his privy so as to make it describe land not granted thereby, its operation as an executed contract is not affected, and the title vested by it is not disturbed.

The effect of such unauthorized alteration is to deprive the party making it of all future benefits of an executory nature or obligation which he might have derived under the deed. *Waldron v. Waller*, 65 W. Va. 605, 64 S. E. 964.

Such unauthorized alteration of a deed will not entitle the grantor by a suit in equity to set aside his deed and be reinvested with the title to the land conveyed. *Waldron v. Waller*, 65 W. Va. 605, 64 S. E. 964.

E. EFFECT OF IMMATERIAL ALTERATION.

Erasure of Memorandum from Margin of Note.—A negotiable instrument constituting an unconditional promise to pay a certain sum of money is not rendered invalid in the hands of the purchaser thereof in due course without notice by the erasure from the margin of the memorandum, "This note is to fulfill an agreement of a certain date," or "This note is to fulfill a certain agreement," or "This note is to fulfill a contract dated July 7th, 1915." The instrument being unconditional such a memorandum constitutes merely a statement of the transaction which gave rise to the instrument, and being immaterial its erasure does not vitiate the paper in the hands of a holder in due course. It is protested by § 3, chapter 98A, Barnes Code. *Mason v. Shaffer*, 82 W. Va. 632, 96 S. E. 1023.

III. CONSENT RULE.

Deed.—No erasure or alteration in a conveyance, nor even the cancellation thereof by mutual consent of the parties, can divest an estate already vested by operation of the deed; for that would be in conflict with the statute of conveyances, which declares that no estate of inheritance or freehold, or for a term of more than five years in lands, shall be conveyed unless by deed or will. Code of 1904, § 2413. *Brooks v. Clintsman*, 124 Va. 736, 98 S. E. 742, 100 S. E. 394.

Failure to Object.—If the maker of

a negotiable note disclosing on its face, an alteration thereof respecting its amount, prejudicial to the payee and holder and advantageous to the former, makes no objection to it on the trial of an action thereon, on the ground of such alteration, admits the signature thereto, after inspection, and defends upon a wholly different ground, a jury would be warranted in finding the alteration was made, authorized or assented to by him, wherefore the court, on a demurrer to the evidence, should find the law as to the validity of the note, to be for the plaintiff. *Harper v. Clear Fork Coal, etc., Co.*, 80 W. Va. 246, 92 S. E. 565.

IV½. JURISDICTION.

Where a deed conveying a tract of land to a person for life, with a remainder to her children, was altered after its execution and before it was admitted to record by striking, or blotting out so much as referred to the children, a court of equity has jurisdiction to grant the relief prayed for by plaintiffs (to decree such remainder to the children). *Dickenson v. Ramsey*, 115 Va. 521, 79 S. E. 1025.

V. EVIDENCE.

A. BURDEN OF PROOF AND PRESUMPTIONS.

Presumptions. — In the absence of explanation tending to show the alteration was made under circumstances rendering it lawful, the alteration will be presumed to have been made by the party producing the agreement, or with his privity and fraudulently so far as legal fraud attaches to a willful change of an agreement by a party thereto. *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 190, 52 S. E. 515.

Burden of Proof.—Where a material alteration is shown to have been made after the execution of the agreement, the burden is on the party producing and relying upon the agreement to explain the alteration by showing that it was made under circumstances rendering it lawful. *Philip Carey Mfg.*

Co. v. Watson, 58 W. Va. 189, 52 S. E. 515.

A½. PAROL EVIDENCE.

Section 1511, Elliott on Evidence, is as follows: "The rule which forbids the admission of parol evidence to vary a written contract has no application to evidence offered to show a fraudulent or unauthorized alteration in a written instrument, and relevant parol evidence is admissible to impeach such an instrument on that ground." *Burnette v. Young*, 107 Va. 184, 187, 57 S. E. 641.

Parol evidence is admissible to show that, after an unsealed paper had been executed, delivered and recorded, a scroll, by way of a seal, was affixed to the name of the maker, both on the original paper and on the record, without the knowledge or consent of the maker. *Burnette v. Young*, 107 Va. 184, 57 S. E. 641.

B. QUESTIONS OF LAW AND FACT.

The materiality of the alteration is a question of law for the court upon the admissibility of the altered instrument in evidence; and the alteration being shown, nothing remains for the jury to pass upon. *State v. Lotono*, 62 W. Va. 310, 58 S. E. 621; *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515.

"As the alleged alteration was not of a material part of the instrument and not sufficient to vitiate it in the hands of the plaintiff, the question of its materiality was one for the court, and the court properly instructed the jury. *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515." *Mason v. Shaffer*, 82 W. Va. 632, 636, 96 S. E. 1023.

D. WEIGHT AND SUFFICIENCY OF EVIDENCE.

Deed.—Clear, cogent, and convincing proof is required to establish allegations that a deed conveying a tract

of land to a person for life, with a remainder to her children, was altered after its execution and before it was admitted to record by striking or blotting out so much as referred to the children. *Dickenson v. Ramsey*, 115 Va. 521, 79 S. E. 1025.

In *Dickenson v. Ramsey*, 115 Va. 521, 79 S. E. 1025, the court held that the testimony in the case in judgment

falls far short of the degree of proof which the law requires.

Oil and Gas Lease.—The case at bar is one involving the application of well settled principles, in which the evidence is held to be sufficient to prove a fraudulent alteration in the material terms of an oil and gas lease. *Southern v. South Penn Oil Co.*, 74 W. Va. 213, 81 S. E. 981.

ALTERNATION.—**Alternation** means the occurrence or action of two things in turn, first one and then the other, as of day and night. *Norfolk, etc., R. Co. v. Simmons*, 127 Va. 419, 103 S. E. 609.

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CROSS REFERENCES.

See the title AMENDMENTS, vol. 1, p. 316, and references there given. In

addition, see ante, ACCOUNTS AND ACCOUNTING; post, APPEAL AND ERROR; BILLS, NOTES AND CHECKS; CONSTITUTIONAL LAW; CONTINUANCES; CORPORATIONS; DEMURRERS; EQUITY; FIRE INSURANCE; INSURANCE; LIS PENDENS; MECHANICS' LIENS; PARTITION; PLEADING; PROFERT AND OYER; SUMMONS AND PROCESS. As to amendment of attachments, see post, ATTACHMENT AND GARNISHMENT. As to constitutional amendments, see post, CONSTITUTIONAL LAW. As to amendment of execution issued on judgment for costs, see post, COSTS. As to amendment of demurrer to the evidence, see post, DEMURRER TO THE EVIDENCE. As to amendments of returns on executions, see post, EXECUTIONS. As to amendment of indictments, informations and presentments, see post, INDICTMENTS, INFORMATIONS AND PRESENTMENTS. As to effect of amendments to pleadings in relation to the statute of limitations, see post, LIMITATION OF ACTIONS. As to amendment where a bill is multifarious, see post, MULTIFARIOUSNESS. As to amendment of orders of court, see post, ORDERS OF COURT. As to amendment of records, see post, RECORDS. As to amendment of writ of scire facias, see post, SCIRE FACIAS. As to statutory amendments, see post, STATUTES.

I. CONSTRUCTION OF STATUTES.

Liberal Construction.—Code of 1901, § 3384 (Code 1919, § 6250) and act of March 27, 1914 (Acts 1914, ch. 331, p. 641), are remedial and must be liberally construed to advance the remedy and avoid the evils which they seek to cure. *Standard Paint Co. v. Victor & Co.*, 120 Va. 595, 91 S. E. 752; *Conrad v. Ellison-Harvey Co.*, 120 Va. 458, 91 S. E. 763. See post, "Amendments to Conform to Proof—Variance," II, C.

II. OF PLEADINGS.

A. IN GENERAL.

The authority of the court to permit amendments exists independently of statute. *National Bank v. Lynch*, 69 W. Va. 333, 334, 71 S. E. 389; *Staats v. Insurance Co.*, 57 W. Va. 571, 573, 50 S. E. 815.

Courts may allow pleadings to be amended whenever justice will be promoted thereby. *Staats v. Insurance Co.*, 57 W. Va. 571, 573, 50 S. E. 815.

It is the settled policy of our law to allow amendments in pleadings and to disregard defects in procedure which do not operate to the prejudice of the substantial rights of the opposite party.

Carpenter v. Meredith, 122 Va. 446, 96 S. E. 635.

Amendments are freely allowed, and are to be favored when they promote the ends of justice. It would be a reproach to the administration of justice to permit a substantial right to be sacrificed to a mere form which did not affect the rights of the parties, or the mode of procedure, and which could be readily changed without injury or injustice to any one. The ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97; *Du Pont, etc., Co. v. Snead*, 124 Va. 177, 97 S. E. 812.

But while great liberality is allowed in amending pleadings, both at law and in equity, when a party has had every opportunity afforded him to present his case for consideration and determination by the court, he will not be allowed, after he has ascertained what the decision of the court will be, to come forward and, by means of amendment of his pleadings, obtain another hearing of matters which he might have brought forward when the case was first submitted, but declined to present. An "amended and supple-

mental petition," which alleges no new matter, no after-discovered evidence, no misconduct or surprise, tenders no new proof and gives no excuse for failure to present it before, is properly refused. *Jackson v. Valley Tie, etc., Co.*, 108 Va. 714, 62 S. E. 964.

Plaintiff Must Ask Leave to Amend.

—The authorities hold that in order to amend a pleading the plaintiff must ask leave. *Blue v. Campbell*, 57 W. Va. 34, 37, 49 S. E. 909.

B. DISCRETION OF COURT.

Va. Code 1919, § 6140.

It is in the discretion of the trial court, at any time before verdict is rendered, to allow amendments of the pleadings which will operate in favor of justice. *Whitley v. Booker Brick Co.*, 113 Va. 434, 74 S. E. 160.

The rule is well recognized, that in granting leave to amend a pleading, the matter rests in the sound discretion of the court, and, where the defendants have no reasonable ground to object to the proposed amendments, an appellate court will not reverse the trial court for allowing pleadings to be amended, unless it appears that the discretion resting in the trial court has been abused. *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97. See post, APPEAL AND ERROR.

The act of March 27, 1914 (Acts 1914, p. 641; Code 1919, § 6104), providing that the trial court "may" at any time permit any proceeding or pleading to be amended, is not mandatory but permissive. The trial courts must always permit amendments in furtherance of justice, and upon refusal to do so, such action may be reviewed by the Supreme Court of Appeals; but such amendments are not matters of right, and should not be permitted to delay, impede or embarrass the administration of justice. *Richmond College v. Scott-Nuckols Co.*, 124 Va. 333, 98 S. E. 1; *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97. See post, "At What Stage of Proceedings—Laches,"

II, G, 2, v; "At What Stage of Proceedings," II, H, 4.

While courts are liberal in allowing amendments of pleadings, there must be an end of litigation at some time, and the litigation cannot end as long as the pleading continues. Litigants cannot be permitted to unnecessarily protract litigation by presenting their cases by piece meal. After they have had fair and ample opportunity of presenting their cases in the pleadings, whether or not amendments shall be allowed must rest in the discretion of the court in view of the circumstances of the particular case, and regulated by the established and recognized rules of practice in such cases. *Davis v. Alderson*, 125 Va. 681, 100 S. E. 541.

B½. AMENDMENT INTRODUCING A NEW CAUSE OF ACTION.

See post, "Making New or Different Case," II, G, 2, s; "Introducing New Cause of Action," II, H, 1, h.

A substantive cause of action, or a new cause different from that declared on in the original action, cannot be introduced by amendment. The plaintiff will not be permitted to abandon the entire case made by his pleading, and make a new and different case by way of amendment. *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

"But as Judge Burks says in *Hurt v. Jones*, 75 Va. 341, 'it may be difficult under the adjudications to state what is to be regarded as a new case within the meaning of the rule.' " *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

C. AMENDMENTS TO CONFORM TO PROOF—VARIANCE.

Va. Code 1919, § 6250.

Barnes Code W. Va., p. 1137, ch. 131, § 8.

Amendments may be made in case of variance. *Staats v. Insurance Co.*, 57 W. Va. 571, 573, 50 S. E. 815.

Section 6250, Code 1919, Construed.—Where there is a variance between the

allegations of the pleadings and the evidence, it is in conformity with § 3384 of the Code (Code 1919, § 6250) to allow the pleadings to be amended and the practice is to be commended as promotive of substantial justice. *Chesapeake, etc., R. Co. v. Swartz*, 115 Va., 723, 80 S. E. 568; *McKee v. Bunting, etc., Co.*, 114 Va. 639, 77 S. E. 515.

This section of the code is remedial and must be liberally construed to advance the remedy and avoid the evils which it seeks to cure. *Standard Paint Co. v. Victor & Co.*, 120 Va. 595, 91 S. E. 752; *McKee v. Bunting, etc., Co.*, 114 Va. 639, 77 S. E. 515; *Norfolk, etc., R. Co. v. Perdue*, 117 Va. 111, 83 S. E. 1058.

This is especially the case where the amendment will further the ends of justice and permit the controversy to be determined on its merits. *McKee v. Bunting, etc., Co.*, 114 Va. 639, 77 S. E. 515, citing *Langhorne v. Richmond City R. Co.*, 91 Va. 364, 22 S. E. 357. *Norfolk, etc., R. Co. v. Perdue* 117 Va. 111, 83 S. E. 1058.

The section applies as well to motions heard by the court as to jury trials. *McKee v. Bunting, etc., Co.*, 114 Va. 639, 77 S. E. 515.

D. TERMS AND CONDITIONS.

The Court May Impose These Terms.—Va. Code 1919, §§ 6104, 6250.

E. OF SWORN PLEADINGS.

When a statute requires all pleadings to be verified by the party in whose name they are filed (§ 8, ch. 64, Code), an amendment of a pleading, especially if material and necessary to confer jurisdiction, must be verified, and if not verified will be disregarded. *Jennings v. McDougle*, 83 W. Va. 186, 98 S. E. 162. See post, PLEADINGS.

"To hold otherwise would enable a party by amendment to incorporate in a bill already sworn to certain facts essential to his case to which he may not be willing to give the sanction of an oath. Thus the whole purpose of

verification could be defeated. *Jennings v. McDougle*, 83 W. Va. 186, 191, 98 S. E. 162.

E $\frac{1}{4}$. WHERE ACTION BROUGHT ON WRONG SIDE OF COURT.

Va. Code 1919, § 6084.

E $\frac{1}{2}$. WHERE ACTION REVIVED IN NAME OF NEW PARTY.

Va. Code 1919, § 6168.

F. OF PLEADINGS IN JUSTICE'S COURT AND ON APPEAL FROM SUCH COURT.

1. In Virginia.

Va Code 1919, § 4989.

Warrant Cannot Be Changed Pending Appeal.—Where a prisoner convicted by a police justice of the violation of a city ordinance against houses of ill fame, appeals to the corporation court, neither the attorney for the commonwealth nor the police justice can, pending the appeal, change the warrant so as to charge an offense under § 3790 of the Code. There having been no conviction of any offense under the statute, the provisions of § 4107 of the Code (Code 1919, § 4989) as to amendments and changes of the warrant have no application, and until such conviction, the corporation court has no jurisdiction, with or without the consent of the accused, to hear and determine a charge of misdemeanor under § 3790. *Eddy v. Commonwealth*, 119 Va. 823, 89 S. E. 899.

2. In West Virginia.

Barnes Code W. Va., p. 685, ch. 50, § 50, par. 7, p. 706, ch. 50, § 169.

Time of Amendment.—*Barnes Code, W. Va.*, p. 685, ch. 50, § 50, par. 10.

G. OF EQUITY PLEADINGS.

1. In General.

Amendments to pleadings to promote justice are always favored in equity. *Gay v. Gibson*, 85 W. Va. 226, 101 S. E. 365.

"As has been often held by this court,

the question of amending pleadings in chancery is largely in the discretion of the trial court." *Branch v. Buckley*, 109 Va. 784, 786, 65 S. E. 652.

"The court has sound discretion in permitting amendment or supplement to fit the developments of a suit in equity, and such discretion as to the propriety of the time of filing the same. *Hogg's Eq. Pro.*, §§ 172 et seq., 312 et seq. The rule demands that the identity of the cause of suit be preserved." *Dudley v. Niswander*, 65 W. Va. 461, 466, 64 S. E. 745.

It is impossible to lay down a rule with reference to the amendment of equitable pleadings, which shall govern all cases. The allowance of amendments to pleadings in equity must, at every stage of the proceedings, rest in the discretion of the court, and that discretion must depend largely on the circumstances of each case. *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

"This court has declared in *Standard Paint Co. v. Victor & Co.*, 120 Va. 595, 91 S. E. 752, that this section (§ 6104 Code 1919) should be liberally construed, and in *Tidball v. Shenandoah Nat. Bank*, 100 Va. 741, 42 S. E. 867, that 'The rule as to amendments is not less liberal in equity than at law.'" *Watson v. Brunner*, 128 Va. 600, 606, 105 S. E. 97. See ante, "Discretion of Court," II, B.

"The Virginia cases dealing with the amendment of pleadings in equity are numerous and instructive. Many of them will be found referred to in the opinions in *Belton v. Apperson*, 26 Gratt. (67 Va.) 207; *Hurt v. Jones*, 75 Va. 341; *Kinney v. Craig*, 103 Va. 158, 48 S. E. 864, * *. It is laid down in these cases that no fixed rule can be formulated that will govern all cases, but that each case must depend largely on its own special circumstances. It is also stated that, in consideration of the subject, the ends of justice should never be sacrificed to mere form, or too rigid an adherence to technical

rules of practice." *Watson v. Brunner*, 128 Va. 600, 607, 105 S. E. 97.

2. Of Bills.

½a. Discretion of Court.

While courts are liberal in allowing amendments of bills, and have discretion in the matter, still this discretion is in no sense arbitrary or capricious, but is, at all times, hedged about and governed by rules which have long been established and recognized as binding upon the courts. *Bowe v. Scott*, 113 Va. 499, 75 S. E. 123; *Alsop, etc., Co. v. Catlett*, 97 Va. 364, 34 S. E. 18; *Vashon v. Barrett*, 99 Va. 344, 38 S. E. 200; *Jackson v. Valley Tie, etc., Co.*, 108 Va. 714, 722, 62 S. E. 964.

a. Nature and Grounds.

"It is the practice of courts of equity to allow amendments to bills when the purposes of justice require it." *Blue v. Campbell*, 57 W. Va. 34, 36, 49 S. E. 909.

"An amendment of a bill will always be allowed when substantial justice will be thereby advanced." *Floyd v. Duffy*, 68 W. Va. 339, 353, 69 S. E. 993.

"It is the practice of this court, as well as of the circuit courts, and that practice is founded upon the principles of equity, that where it is obvious that the plaintiff may be able to so amend the allegations of his bill as to entitle him to relief upon the sustaining of the demurrer, to grant leave to so amend." *Blue v. Campbell*, 57 W. Va. 34, 36, 49 S. E. 909.

"It is not error to omit giving leave to amend upon dismissing a bill upon demurrer, where the record does not disclose that any amendment improving the bill can be made." *Blue v. Campbell*, 57 W. Va. 34, 36, 49 S. E. 909.

c. Where Defendant Sets Up New Matter in Answer.

When new matter is introduced in an answer, not as a basis for affirmative relief, but defensive only and calling

for a reply, such new matter should be met by an amended bill. *Gay v. Gibson*, 85 W. Va. 226, 101 S. E. 365.

If, upon a general bill for an account, the defendant relies upon and proves a prior settlement in pais of the matters in dispute, the complainant should be allowed to amend his bill, if desired, and to surcharge and falsify the stated or settled account by pointing out or indicating specifically any items of error, mistake or omission existing therein. *Branner v. Branner*, 108 Va. 660, 62 S. E. 952.

i. Amendments to Give Jurisdiction.

See ante, "Where Action Brought on Wrong Side of Court," II, E $\frac{1}{4}$.

m. Insufficient Allegations in Original Bill.

If the identity of the originally intended cause of suit is preserved, the particular allegations of a bill in equity may be changed by amendment in order to cure imperfections and mistakes in the manner of stating plaintiff's case. *Hall v. McGregor*, 65 W. Va. 74, 64 S. E. 736.

If a plaintiff misdescribes his contract in his original bill, or omits to mention a subsequent modification, or a re-execution of the contract sued on, the error or omission may be corrected by amendment before an answer is filed or evidence taken. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421. See post, "Amendment to Conform to Proof," II, G, 2, o.

o. Amendment to Conform to Proof.

If a good case, not sufficiently pleaded, be shown by the proof, the court should allow an amendment before dismissing plaintiff's bill. *Marshall v. Porter*, 73 W. Va. 258, 80 S. E. 350; *Hertzog v. Riley*, 71 W. Va. 651, 77 S. E. 138; *Ryan v. Nuce*, 67 W. Va. 485, 490, 68 S. E. 110. See, also, *Floyd v. Duffy*, 68 W. Va. 339, 353, 69 S. E. 993; *Whetsell v. Elkins*, 68 W. Va. 709, 70 S. E. 754.

But where there is a material vari-

ance between the allegations of the bill and the evidence, and the evidence fails to clearly show that the plaintiff is entitled to relief, the bill will be dismissed, and plaintiff will not be given leave to amend. *Caton v. Raber*, 56 W. Va. 244, 49 S. E. 147.

Misdescription of Contract Sued on.

—Even where the evidence discloses a misdescription of the contract sued on, the complainant may be permitted to amend his bill to conform to the proof. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

Variance Relating to False Statement in Writing.

—Where one partner has been induced to accept from another a given sum for his interest in the firm, by reason of a false statement in writing made by that other as to the state of accounts of the firm, and the former sues to set aside the sale, and charges in his bill that the false statement was on a separate paper, but it develops in the proof that it was in one of the books of the firm, he may amend his bill so as to conform to the facts, if indeed the variance is material. *Lasky v. Burrill*, 105 Va. 480, 54 S. E. 23.

Amended Bill Making Improper Parties Defendants Thereto.

—When filed to correct a mistake of fact charged in the original bill, an amended bill should not be dismissed on demurrer, though it make improper parties defendants thereto. *American Bank, etc., Co. v. Douglass*, 75 W. Va. 207, 83 S. E. 920.

q. Misjoinder and Nonjoinder of Parties.

Whenever during the progress of an equity suit it appears in any way that persons not parties to the cause are materially interested in the subject involved, or have rights that will be affected by the decree sought, they must be made parties by proper amendment and process. *Bragg v. United Thacker Coal Co.*, 70 W. Va. 655, 74 S. E. 946; *Rexroad v. Raines*, 63 W. Va. 511, 60 S. E. 495.

When a person not a party to a suit in equity has an interest in its subject matter, though it do not appear in the record, but is shown by a deed or otherwise, the court may require him to be made party by amended bill. There is no error in so doing. *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707.

A creditor's bill is amendable for the purpose of making the debtor's wife a party and attacking conveyances made by him to her, either voluntarily or fraudulently for the purpose of hindering, delaying and defrauding his creditors; provided always, such amendment be made with reasonable diligence. *Johnson Milling Co. v. Read*, 76 W. Va. 557, 85 S. E. 726.

Where a person files his petition asking to be admitted as a party defendant in a pending suit in equity, in which no allegation is made naming or referring to him in any way, and no relief is prayed against him, and he is admitted as a party defendant, he does not in fact become a party to the cause, until he has been made a party by some allegation in the bill as amended. *Freeman v. Egnor*, 72 W. Va. 830, 79 S. E. 824. See post, PARTIES.

r½. Misnomer.

If, in a suit to sell the real estate of a decedent for the satisfaction of indebtedness against it, the three infant heirs were all made parties to the bill, two by their proper names and the third by a wrong name, and a guardian ad litem duly appointed filed answers for them, the mistake as to the name is a mere misnomer, correctible by amendment, and the party so erroneously named is deemed to have come within the jurisdiction of the court. *Tomblin v. Peck*, 72 W. Va. 336, 80 S. E. 450.

a. Making New or Different Case.

"While great liberality is permitted in amendments, so long as the identity of the cause of action is preserved, we

do not understand that any authority goes so far as to hold that the whole object of the bill may be changed thereby, and a new cause of action, wholly disconnected with the original, substituted for it. 1 Hogg's Eq. Proc., §§ 326, 327; 1 Barton Ch. Pr. 346-7; 4 Minor's Inst. 1376." *Newton v. Kemper*, 66 W. Va. 130, 133, 66 S. E. 102. See, also, *Hall v. McGregor*, 65 W. Va. 74, 64 S. E. 736; *Dudley v. Niswander*, 65 W. Va. 461, 64 S. E. 745; *Floyd v. Duffy*, 68 W. Va. 339, 354, 69 S. E. 993; *Ellis v. Whiteacre*, 106 Va. 1, 54 S. E. 993.

"The plaintiff will not be permitted to abandon the entire case made by his bill, and make a new and different case by way of amendment." *Watson v. Brunner*, 128 Va. 600, 610, 105 S. E. 97.

"But this rule has been much trenched upon in Virginia and other states. If a plaintiff is not permitted to make a new case, he may by his amendments so alter the frame and structure of his bill as to obtain an entirely different relief from that asked originally. *Belton v. Apperson*, 26 Gratt (67 Va.) 207-8." *Watson v. Brunner*, 128 Va. 600, 610, 105 S. E. 97.

While an amended bill can not be allowed containing allegations inconsistent with the nature and purpose of the original bill or changing the cause of suit, yet, by its allegations it may be changed or modified and others added, provided the identity of the cause of suit be preserved. *Cox v. National Coal, etc., Co.*, 61 W. Va. 291, 56 S. E. 494.

Courts of equity in Virginia are liberal in allowing amendments of bills, and where the purpose of the amendment is not to introduce a substantive cause of action different from that stated in the original bill, but merely to set forth with greater particularity of averment matters arising out of the same transaction, and germane to the objects for which the original bill was

filed, the amendment should be allowed. *Kelly v. Gwatkin*, 108 Va. 6, 60 S. E. 749.

"The general rule on the subject is well stated in 16 Cyc. 338: "An amended bill must not be repugnant to the original, nor may it present an entirely new and essentially different case, entirely changing the purpose of the suit. This principle is clear; but difficulties arise in determining what constitutes an essentially different case. A different case is not made by averments setting out the case more specifically or fully, by adding new facts or grounds for relief consistent with those originally presented, although the relief demanded is thereby broadened or even changed, the main general object of the bill remaining the same. An amendment will not be permitted which changes the case as to all defendants and presents a new case against new defendants, nor may a plaintiff by amendment entirely change the grounds on which he seeks relief. Therefore, while a plaintiff may amend by alleging the same title as claimed in the original bill, but obtained in a somewhat different way, he may not in general assert a different title, and especially where the change entails a change in the capacity in which plaintiff sues. Where the grounds of the amended bill are repugnant to those of the original a new case is presented and the amendment will not be permitted.'" *Ellis v. Whitacre*, 106 Va. 1, 4, 54 S. E. 993.

New and Different Case Made.—A bill filed for the purpose of enforcing the lien of a judgment against real estate can not, upon ascertaining that the judgment debtor owns no such interest, be converted by amendment into a bill to enforce an entirely different lien upon a different subject-matter. *Huddleston v. Miller*, 81 W. Va. 357, 94 S. E. 538.

A trustee in a deed of trust to secure creditors filed a bill to enforce the

trust, and the property was sold under a decree in that suit. Afterwards he filed on amended bill to restrain the sale by another trustee of other property belonging to the same debtor conveyed by a separate deed. The property having been sold before the writ of injunction was served upon the defendants in the amended bill, certain judgment creditors of the debtor presented a petition in the suit upon the amended bill praying an annulment of the sale, and the trial court set the sale aside. Held, the trustee in the first deed, having administered his trust, became *functus officio*, and the amended bill by which he sought to litigate matters wholly separate and distinct from the purpose of the original suit, and to affect property rights with which he had no concern, should have been dismissed. *Ellis v. Whitacre*, 106 Va. 1, 54 S. E. 993.

New and Different Case Not Made.

—Where a bill is filed to subject the land of two defendants to the payment of judgments for which they are jointly liable, and it is subsequently discovered from the proof that one of them, after complainant's debt was contracted, had conveyed his land to the other for the purpose of defrauding his creditors, the complainant may so amend his bill as to put in issue the *bona fides* of the transaction, and enable the court to do complete justice in the cause. This is not a new case repugnant to that stated in the original bill. *Hobson v. Hobson*, 105 Va. 394, 53 S. E. 964.

v. At What Stage of Proceedings—Laches.

(1) In Virginia.

Va. Code 1919, §§ 6095, 6104.

Where an amended bill sets up facts practically identical with those contained in the original bill, and sets forth no new matter that was not known at the time of the argument of the demurrer to the original bill, the trial court may properly refuse to al-

low it to be filed. *Starke v. Storm*, 115 Va. 651, 79 S. E. 1057; *Bowe v. Scott*, 113 Va. 499, 75 S. E. 123.

Where a bill has been twice amended, the evidence taken, and the case fully heard and decided on its merits, further amendments, offered without explanation or excuse, are properly rejected. *Roller v. Murray*, 107 Va. 527, 528, 59 S. E. 421.

(8) In West Virginia.

Barnes W. Va. Code, p. 1111, ch. 125, § 12.

The same degree of diligence is required in amending a bill so as to introduce a new subject matter, as is required in bringing an original suit. *Johnson Milling Co. v. Read*, 76 W. Va. 557, 85 S. E. 726.

Sec. 12, Ch. 125, Code 1913, does not give a plaintiff an absolute right and unlimited time, after appearance by defendant, to amend his bill. The right to amend depends on whether substantial justice will be promoted thereby, a question which must be determined by the court. The statute does not preclude the defense of laches as a bar to the right. *Johnson Milling Co. v. Read*, 76 W. Va. 557, 85 S. E. 726.

Delay in making an amendment for eight years, without excuse therefor, constitutes laches, and justifies the court in rejecting it on demurrer. A court of equity responds only to conscience, good faith and reasonable diligence. *Johnson Milling Co. v. Read*, 76 W. Va. 557, 85 S. E. 726.

"The strict rule, imposing duty to set up all known facts in an answer, is not applied to bills, except in those instances in which an offer to amend comes after submission or decision. There the rule is somewhat strict, but this amendment was made before submission." *Floyd v. Duffy*, 68 W. Va. 339, 354, 69 S. E. 993.

x. Amended Bill Stops Running of Statute.

See post, LIMITATION OF ACTIONS.

x½. Effect of Amendment After Demurrer to Original Bill Is Sustained.

"Where a party, after a decree sustaining a demurrer to his bill, by leave of the court files an amended bill, he is considered to have acquiesced in the action of the court upon the demurrer and will not be permitted to assign such action as error in the appellate court. This is the rule in this state, and generally, it seems." *Davis v. Marshall*, 114 Va. 193, 198, 76 S. E. 316, citing *Fudge v. Payne*, 86 Va. 303, 308, 10 S. E. 7.

gg. Supplemental Bills.

"One of the chief offices of a supplemental bill is to bring into the case new events referring to, and supporting, or affecting rights and interests already mentioned, which have arisen subsequently to the filing of the original bill. *Story's Eq. Pl.*, § 336; 1 Bar. Chy. Pr. 165, 351." *Bibb v. American Coal, etc., Co.*, 109 Va. 261, 266, 64 S. E. 32.

Discretion in Court.—*Va. Code 1919*, 6104.

The original bill in the instant case alleged liability of defendant, a landowner, to discharge a debt due by a contractor to complainant for materials furnished by complainant for the construction of defendant's house. Complainant first sought to recover this amount in full from defendant landowner, by establishing either a personal liability claim against the latter, or by enforcing a mechanic's lien against the property. In conformity with the report of a commissioner, the trial court held that complainant had no mechanic's lien upon the property, and his demand was not a personal liability against defendant. Thereupon, complainant tendered a petition to the court, which he asked to be treated as an amended and supplemental bill in the cause, setting up an order from the contractor to the landowner to pay complainant \$750 for materials fur-

nished on defendant's house. This order was not referred to in the original bill. Held: That the court's action in overruling the objection of defendant to the filing of the petition and treating the same as an amended and supplemental bill, was not error. *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

Right to File Supplemental Bill in Vacation.—Va. Code 1919, § 6095. Barnes Code W. Va., p. 1111, ch. 125, § 12.

Supplemental Bill Not Changing Character of Suit.—The introduction of new parties plaintiff and defendant, by means of an amended and supplemental bill and bill of revivor filed in a suit for enforcement of judgment liens, after the death of the judgment debtor, does not change the character of the suit, nor make such amended bill a new or original one. *First Nat. Bank v. De Berriz*, 87 W. Va. 477, 105 S. E. 900.

3. Of Answers.

"As to when a defendant in an equity suit will be permitted to file an amended answer is largely discretionary with the trial court." *State v. Central Pocahontas Coal Co.*, 83 W. Va. 230, 98 S. E. 214, 219.

It is not error to allow a defendant to file an amended and supplemental answer, where the matter set up therein is of such character that it is necessary that the same should be before the court for a proper determination of the matters involved in the suit, and is not contradictory of the matter alleged in the original answer. *State v. Central Pocahontas Coal Co.*, 83 W. Va. 230, 98 S. E. 214.

But a supplemental answer setting up matters which have arisen since the issues were made and the cause submitted for decision, not responsive to the bill, is properly rejected. *Taylor v. Taylor*, 76 W. Va. 469, 85 S. E. 652. See also *Loar v. Wilfong*, 63 W. Va. 306, 61 S. E. 333.

The affidavit of the attorney who

prepared both answers for the defendant "that new matter appearing in the supplemental answer was not known to him (the attorney) at the time of the preparing of the original answer, that a full knowledge of the facts in the case were only revealed or made known to him after the filing of the original answer" is not sufficient to warrant the filing of such supplemental answer. *Loar v. Wilfong*, 63 W. Va. 306, 61 S. E. 333.

"Before a court should allow an amended answer to be filed, it ought to be satisfied that the reasons for it are cogent and satisfactory; that the mistakes to be corrected or facts to be added are made highly probable, if not certain; that they are material; that the party has not been guilty of negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was filed." *Miller v. Mitchell*, 58 W. Va. 431, 432, 58 S. E. 478.

An amended answer, though containing cross bill matter, must be filed with reasonable promptness, and where long delayed without excuse is properly rejected. *McSwegin v. Howard*, 70 W. Va. 783, 74 S. E. 948.

An amended answer offered five years after the filing of the original answer is properly rejected, no excuse or reason being given for delay. *McSwegin v. Howard*, 70 W. Va. 783, 74 S. E. 948.

Allowance of Amendment on Terms.—Va. Code 1919, § 6123.

H. OF COMMON LAW PLEADINGS.

1. Of Declarations.

a. In General.

Right to Amend.—A declaration may be amended, in form, or in substance, so long as the identity of the cause of action is preserved. *National Bank v. Lynch*, 69 W. Va. 333, 71 S. E. 389;

Mankin v. Jones, 68 W. Va. 422, 69 S. E. 981.

A trial court not only has the authority, but it is its duty, to permit an amendment to be made to a declaration at any time before trial, if substantial justice will be promoted thereby, and such amendment does not introduce a new cause of action. *Phenix Fire Ins. Co. v. Virginia-Western Power Co.*, 81 W. Va. 298, 94 S. E. 372. See post, "Introducing New Cause of Action," II, H, 1, h; "At What Stage of Proceedings," II, H, 4.

"This court has always been liberal in allowing amendments to be made to declarations, so long as there is an adherence to the original cause of action." *Bartley v. Western Maryland R. Co.*, 81 W. Va. 795, 95 S. E. 443, 444.

So long as the form of action is not changed, and the court can see that the identity of the originally intended cause of action is preserved, the particular allegations of the declaration may be changed by an amendment in order to cure imperfections and mistakes in the manner of stating plaintiff's case. *Hanson v. Blake*, 63 W. Va. 560, 60 S. E. 589.

A defendant is not prejudiced by an amendment of the plaintiff's declaration which does not make a new and different case, where trial is postponed for two months. *Southern R. Co. v. McMenamin*, 113 Va. 121, 73 S. E. 980.

Sufficiency of Amended Declaration.

—The sufficiency of an amended declaration, which does not refer to nor make the original declaration a part of it, must be determined by its own averments. *Norfolk, etc., R. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465.

b. In Actions of Ejectment.

See post, EJECTMENT.

c. Mandamus Nisi.

A clerical error in the date of the issuance of a mandamus nisi may be cured by an amendment. *State v. Ice*, 75 W. Va. 476, 84 S. E. 181.

d. Where Declaration Is Demurred to.

Barnes Code, W. Va., p. 1111, ch. 125, § 12.

Where a demurrer to a declaration, technically defective for failure to aver plaintiff's appointment and qualification as administrator in an action brought by him as such, is erroneously overruled, and plaintiff immediately and in the presence of counsel for defendant moves for leave to amend, and leave is granted without objection, and the declaration is amended by inserting the proper averment, such voluntary amendment after demurrer overruled is not equivalent to a demurrer sustained, and under such circumstances the informal notice is sufficient. *Suttle v. Hope Natural Gas Co.*, 82 W. Va. 729, 97 S. E. 429.

d½. Variances between Declaration and Summons.

Va. Code 1919, § 6103.

f. Omission of Parties.

—*Barnes Code* W. Va., p. 1113, ch. 125, § 58.

Amendment after Plea in Abatement.

—*Barnes Code* W. Va., p. 1113, ch. 125, § 19.

Insertion of Names of Additional Members of Defendant Firm.—It is not error for a trial court to permit a plaintiff to amend his declaration by the insertion of the names of additional members of a defendant firm discovered since the declaration was filed. *McIntyre v. Smyth*, 108 Va. 736, 62 S. E. 930.

g. Misnomer.

Va. Code 1919, § 6101; *Barnes Code*, W. Va., p. 1112, ch. 125, § 14.

Where a corporation defendant is misdescribed in the writ and declaration simply by the omission of the word "incorporated," and there is no other corporation of the name stated, the plaintiff should be permitted to insert the omitted word in the proper place in his declaration, and a plea setting

up the misdescription should be rejected. *Arminius Chemical Co. v. White*, 112 Va. 250, 71 S. E. 637. See post, CORPORATIONS.

A declaration and summons describing a defendant corporation by the name of "Western Maryland Railroad Company," whereas its true name is "the Western Maryland Railway Company," may be amended on motion by inserting therein the correct name, and such amendment does not introduce a new defendant or a new cause of action. *Corrick v. Western Maryland R. Co.*, 79 W. Va. 592, 91 S. E. 458. See post, "Introducing New Cause of Action," II, H, 1, h.

g½. Misjoinder of Causes of Action.

Where there is a misjoinder of causes of action in a declaration the plaintiff may amend so as to eliminate one or the other of the causes of action therein set forth. *Shafer v. Security Trust Co.*, 82 W. Va. 618, 97 S. E. 290.

h. Introducing New Cause of Action.

(1) Doctrine Stated.

At common law the courts had no power to allow an amendment to an existing pleading, introductive of a new and distinct cause of action. *Norfolk, etc., R. Co. v. Greenwich Corp.*, 122 Va. 631, 95 S. E. 389.

Though courts are extremely liberal in allowing amendments to pleadings, the amendment must not introduce a substantive cause of action different from that declared on in the original declaration. *Irvine v. Barrett*, 119 Va. 587, 591, 89 S. E. 904.

A declaration can not be so amended as to introduce a new cause of action, after the appearance of the defendant, if he objects to the filing thereof in proper time and manner. *Findley v. Coal, etc., R. Co.*, 76 W. Va. 747, 87 S. E. 198.

Allegations in a declaration may be changed and others added, provided the identity of the cause of action be preserved; but amendments are not al-

lowable which are inconsistent with the nature of the pleadings, or change the cause of action. *Brown v. Cook*, 77 W. Va. 356, 87 S. E. 454.

"The introduction of additional phases or circumstances of the same wrong complained of in the original declaration, if the identity of the action is preserved, is not a departure. *Hanson v. Blake*, 63 W. Va. 560, 60 S. E. 589; *Snyder v. Harper*, 24 W. Va. 206; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696; *Mulvay v. Hanes*, 76 W. Va. 721, 86 S. E. 758;" *Bartley v. Western Maryland R. Co.*, 81 W. Va. 795, 95 S. E. 443, 444.

If an amended declaration asserts rights or claims arising out of the same transaction act, agreement, or obligation as that upon which the original declaration is founded, it will not be regarded as for a new cause of action, however great may be the difference in the form of liability asserted in the two declarations. *Wise Terminal Co. v. McCormick*, 107 Va. 376, 58 S. E. 584; *Bowman v. First Nat. Bank*, 115 Va. 463; 80 S. E. 95; *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

The two declarations are regarded as alleging variations in the form of liability to meet the varying phases of the evidence as it may appear. *Bowman v. First Nat. Bank*, 115 Va. 463, 80 S. E. 95.

The amendment of a declaration which does not make a different case from that stated in the original declaration, but merely amplifies the original upon points as to which the further details therein were to the advantage, and not to the prejudice of the defendant, is proper. *Houston v. Lynchburg Tract, etc., Co.*, 119 Va. 136, 89 S. E. 114.

(2) Doctrine Illustrated.

(a) Amendments Introducing New Cause of Action.

Additional Claim.—If objection should be made to amending the declaration

in order to include an item constituting an additional claim, it could not be amended, because it would be a departure from the original cause of action and would introduce into the case a new substantive cause of action. *Mankin v. Jones*, 68 W. Va. 422, 430, 69 S. E. 981.

Substitution of New Plaintiff.—An entirely new plaintiff can not be substituted after it has become manifest that the original plaintiff could not maintain the action, the proper practice in such case would have been for the plaintiff to ask to be allowed to suffer a nonsuit before the jury retired, under § 3387 of the Code of 1904 (Code 1919, § 6256), and to have renewed the suit in the name of the proper plaintiff. *Norfolk, etc., R. Co. v. Greenwich Corp.*, 122 Va. 631, 95 S. E. 389. See post, DISMISSAL, DISCONTINUANCE AND NONSUIT.

Sections 3259, 3260, of the Code of 1904 (Code 1919, § 6103, 6105), and Acts 1914, page 641 plainly do not contemplate the substitution of entirely new plaintiffs, but are rather intended to apply to amendments involving amplified and supplemental statements of the original action, and in furtherance of its object. They were never intended to permit the substitution of a new cause of action. The circumstance that in the case at bar the substituted plaintiffs owned the stock of the original plaintiff, a corporation did not affect the question. The corporation was a separate entity from its stockholders, with power to sue and be sued; and, certainly in a legal forum, they stood in the same relation to each other as any other litigants. *Norfolk, etc. R. Co. v. Greenwich Corp.*, 122 Va. 631, 95 S. E. 389.

Amendment in Action under State Statute Claiming Right under Federal Employers' Liability Act.—An amendment to a declaration by a personal representative, under the state statute giving a right of action for damages

for the death of an employee occasioned by the wrongful or negligent act of the employer, setting forth a right of action under the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), states a new cause of action. *Findley v. Coal, etc., R. Co.*, 76 W. Va. 747, 87 S. E. 198.

(b) Amendments Not Introducing New Cause of Action.

Striking Out Erroneous Allegation as to State in Which Defendant Was Incorporated.—*Duty v. Chesapeake etc., R. Co.*, 70 W. Va. 14, 73 S. E. 331.

Addition of Precise Dates of Different Sales.—*Standard Paint Co. v. Victor & Co.*, 120 Va. 595, 91 S. E. 752.

Showing by Whom Promise Was Made.—The amendment of a declaration so as to show that the promise originally declared on as made jointly by two, was in fact made by four persons, two of whom died before the action was brought, is not a departure from the original cause of action. *Dempsey v. Poore*, 75 W. Va. 107, 83 S. E. 300.

Charging Negligence in Varying Form.—In the case at bar, the cause and form of action are the same in both declarations, and the amended declaration merely charges the negligence complained of in varying form to meet the different phases of the evidence. This is permissible. *Wise Terminal Co. v. McCormick*, 107 Va. 376, 58 S. E. 584.

An amended declaration, alleging the act of negligence complained of to consist of suddenly and violently starting the train after it had stopped, and before plaintiff had time to alight, thereby throwing him to the ground and injuring him, instead of, as alleged in the original declaration, failure to stop the train at the station, and thereby compelling plaintiff to alight while the train was in motion, does not state a new cause of action.

Bartley v. Western Maryland R. Co., 81 W. Va. 795, 95 S. E. 443.

Charging Additional Ground of Negligence.—In an action by a servant for the loss of an eye, caused by the breaking of the bit of a drill, plaintiff's declaration was amended charging an additional ground of negligence on the part of defendant, to wit, that the drill was out of repair and was too heavy to use with a one-fourth inch bit, which resulted in the injury complained of. Objection was made that the amendment stated a new cause of action which was barred by the statute of limitations. Held: That the amendment did not state a new cause of action. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Assumpsit—Adding Special Count Applicable to Item Provable under Common Count.—Amending a declaration in assumpsit, embracing the common counts only, by adding a special count applicable to a particular item in the bill of particulars, which is also provable under some of the common counts, is not a departure from the original cause of action if the amount of damages claimed in both the original and the amended declarations is the same. *Mankin v. Jones*, 68 W. Va. 422, 69 S. E. 981.

Original Declaration Declaring Liability as Endorser; Amended Declaration as Guarantor.—*Bowman v. First Nat. Bank*, 115 Va. 463, 80 S. E. 95.

Amendment, in Action on Renewal Note, Setting Up Original Note.—In an action upon a renewal note, unless accepted in absolute payment of the original by express agreement, the plaintiff may of right, upon the filing of a plea of non est factum by the defendant, accept such plea and so amend the pleadings as to set up the original note. *Ritchie County Bank v. Bee*, 62 W. Va. 457, 59 S. E. 181.

Amendment of a declaration in trespass by adding thereto additional counts, which aver with greater particularity and precision than was

done in the original declaration, the duty of defendant and the negligence causing the injury complained of, and increasing the damages, is no departure from the original cause of action. *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S. E. 112.

h¼. Variance between Declaration and Proof.

"Plaintiff is entitled to amend his declaration to make it conform to his proof, * * * provided, however, there is no objection to such amendment as constituting a departure from the original cause of action." *Mankin v. Jones*, 68 W. Va. 422, 430, 69 S. E. 981. See ante, "Introducing New Cause of Action," II, H, 1, h.

A declaration may be amended at the trial of an action, to make the allegation correspond to the proof offered, if substantial justice will be thereby promoted. *Adams v. Adams*, 79 W. Va. 546, 92 S. E. 463.

Upon a variance between a declaration and the proof, the plaintiff may amend by filing an additional count. *Maury & Co. v. Western Union Tel. Co.*, 10 Va. L. Reg. 991.

It is no abuse of judicial discretion for the trial judge, on excluding plaintiff's evidence because of a variance, to suggest the right of amending the declaration, and on his own motion to give opportunity therefor. *Savings, etc., Co. v. Ballentyne*, 71 W. Va. 672, 77 S. E. 282; *Hardman v. Brannon*, 70 W. Va. 726, 75 S. E. 74.

Code 1904, § 3384 (Code 1919, § 6250), authorizing amendments to conform to the proof, if substantial justice will be promoted and the adverse party not prejudiced, is to be liberally construed, and the court may allow plaintiff, suing a railroad company and a special police officer for unlawful arrest, to amend his declaration so as to state a cause of action on the theory that an employee of the company assisted the officer in making the arrest, while the

original declaration proceeded on the theory that the company was liable for the acts of the officer. *Norfolk, etc., R. Co. v. Perdue*, 117 Va. 111, 83 S. E. 1058. See ante, "Amendments to Conform to Proof—Variance," II, C.

h½. What Constitutes an Amended Declaration.

A reproduction of the original declaration with a new count added, entitled "amended declaration," and so designated and treated in the order of the court filing it, is deemed an amended declaration, not a new and independent one. *Lawson v. Williamson Coal, etc., Co.*, 61 W. Va. 669, 670, 57 S. E. 258.

j. Effect of Amendment on Running of Statute of Limitations.

See post, LIMITATION OF ACTIONS.

k. Amendment as Waiver of Error in Previous Rulings.

Where a demurrer to a bill for want of proper parties is sustained and the complainant amends his bill, he is deemed to have waived objection to the adverse ruling. *Helm v. Lynchburg Trust, etc., Bank*, 106 Va. 603, 56 S. E. 598.

l. Effect on Original Pleadings.

When Original Declaration Will Be Considered as Abandoned.—Where an amended declaration, complete in itself, does not refer to or in any manner adopt or make the original declaration a part of it, and the defendant joins issue thereon, the original declaration will be considered and treated as withdrawn and abandoned. *Kinder v. Boomer Coal, etc., Co.*, 82 W. Va. 32, 95 S. E. 580; *Shafer v. Security Trust Co.*, 82 W. Va. 618, 97 S. E. 290; *Bartley v. Western Maryland R. Co.*, 81 W. Va. 795, 95 S. E. 443, 446; *Roberts v. United Fuel Gas Co.*, 84 W. Va. 368, 99 S. E. 549.

"This rule forbids an examination of the sufficiency of the averments of the former basic pleading." *Shafer v. Se-*

curity Trust Co., 82 W. Va. 618, 97 S. E. 290, 291.

"It is apparent that this case was tried upon the amended declaration to which there was no demurrer, and which states a good cause of action. Therefore we need not notice the first assignment of error which concerns questions raised by the demurrer to the original declaration. *Virginia Cedar Works v. Delea*, 109 Va. 333, 64 S. E. 41." *Washington, etc., R. Co. v. Cheshire*, 109 Va. 741, 743, 65 S. E. 27.

Effect of Amendment on Plea of Non Est Factum.

—Although not technically a proper plea to a declaration in debt on an unsealed writing, a plea of non est factum, filed to such declaration, and not withdrawn when the declaration is thereafter amended so as to show the writing declared on to be sealed, becomes a plea to the declaration as amended. *Adams v. Adams*, 79 W. Va. 546, 92 S. E. 463.

1¾. Effect of Second Amended Declaration and the Withdrawal Thereof.

Plaintiff filed a declaration to which defendant demurred. Before the demurrer was passed upon, plaintiff filed an amended declaration to which defendant also demurred. Before this demurrer was passed upon, plaintiff filed a second amended declaration, which was overruled. There was a demurrer to this second amended declaration which was overruled. The third declaration was intended as a substitute for the other two, and the case was tried upon the third declaration. Under such circumstances, the case stood as though the first and second declarations had not been filed so far as it related to the mere statement of facts, and did not affect the question of making a new case or the statute of limitations, and plaintiff was not bound by the allegations as to how the accident happened

contained in the first two declarations. *Trotter v. DuPont De Nemours & Co.*, 124 Va. 680, 98 S. E. 621.

When a second amended declaration was withdrawn on the day on which it was filed, the cause stood practically as if the second amendment had never been filed. The filing and immediate withdrawal of the latter could not have prejudiced the defendant. *Carpenter v. Meredith*, 122 Va. 446, 96 S. E. 635.

1½. Waiver of Error in Allowing Amendment.

After the plaintiff had rested and the defendant had introduced one witness, the court allowed the plaintiff to amend the declaration by setting out the precise dates upon which various contracts and sales had been made, and the point was raised that the declaration as amended misjoined causes of action. The action was trespass on the case in tort and it was claimed that the third count in the declaration was in contract. Even if the point had merit, inasmuch as defendant had failed to specify this ground in its original demurrer, and had pleaded not guilty, it had been waived. *Standard Paint Co. v. Vietor & Co.*, 120 Va. 595, 91 S. E. 752.

m. Pleading to Amended Declaration.

A demurrer to an amended declaration, which makes no reference to the original, challenges only the sufficiency of the pleading, and does not raise the question whether the amendment introduces a new cause of action, which can be raised only by objection to the filing or motion to strike. *Roberts v. United Fuel Gas Co.*, 84 W. Va. 368, 99 S. E. 549. See post, DEMURRERS.

2. Of Pleas.

A motion to amend the statement of grounds of defense is addressed to the sound discretion of the court and should generally be allowed where any element of accident, surprise or mistake renders it advisable to amend a

pleading at trial, but it is properly refused where the new matter sought to be introduced has been known to the parties from the beginning of the action, and they simply neglected to insert it. Defenses not embraced in the statement, nor otherwise set out in the pleadings, can not be made. *Hurricane Lumber Co. v. Lowe*, 110 Va. 380, 66 S. E. 66.

Right of Defendant to Amend so as to Allege Was Entitled to a Credit.

—In a proceeding by motion, under Code, § 3211 (Code 1919, § 6046), to recover a specified sum, a part thereof was evidenced by an open account and the residue by a note, subject to a payment of a certain sum. The defendant admitted a part of the claim and pleaded nonassumpsit as to the residue. To sustain his part the defendant produced a written contract for building construction and proposed to prove the amount due upon it as a payment in part of the plaintiff's demand; objection was raised and sustained to its admissibility on the ground that it amounted to an off-set. Held, that the defendant should have been allowed to amend his defense so as to allege that he was entitled to a credit for building construction for the plaintiff in pursuance of the contract mentioned. *Whitley v. Booker Brick Co.*, 113 Va. 434, 74 S. E. 160, citing *Perkins v. Hawkins*, 9 Gratt. (50 Va.) 649, 653.

3½. Of Demurrers.

Va. Code 1919, § 6115.

4. At What Stage of Proceedings.

Va. Code 1919, §§ 6095, 6104; *Barnes* Code W. Va. p. 1111, ch. 125, § 12.

A very large discretion is vested in the trial courts as to the time of filing and perfecting pleadings, and the Supreme Court of Appeals will not reverse a case unless the action is clearly erroneous and harmful. *Dean v. Dean*, 122 Va. 513, 95 S. E. 431. See post, APPEAL AND ERROR.

"When no vested rights will be disturbed, nor the cause of action or defense substantially destroyed, or the theory of the case altered, amendments should be permitted at any time before or after trial if substantial justice will thereby be promoted. 21 R. C. L. 577; *Burk's Pleading and Practice*, § 312; *Ellinghouse v. Ajax Livestock Co.*, 51 Mont. 275, 152 Pac. 481, L. R. A. 1916D, 836, and elaborate note beginning on page 841." *Long v. Pocahontas Consol. Collieries Co.*, 83 W. Va. 380, 98 S. E. 289, 290.

"In the case of *Whitley v. Booker Brick Co.*, 113 Va. 434, 74 S. E. 160, this court decided that it is within the discretion of the trial court at any time before verdict was rendered to allow amendments of the pleadings which will operate in favor of justice, and that the rights of the opposite party can always be protected by a postponement of the case, or a continuance, as circumstances may require." *Dean v. Dean*, 122 Va. 513, 515, 95 S. E. 431. See post, CONTINUANCES.

The act of March 27, 1814 (Acts 1914, p. 641; Code 1919, § 6104), gives the right of amendment "at every stage of the proceeding." The object of the act, as its title imports, was to eliminate useless technicalities and to prevent vexatious delays. It was passed "in furtherance of justice," and was never intended to apply to a case where the effect of the amendment would be to encourage pleading by piecemeal and unnecessary delay in the termination of the litigation. Indeed, it may be well doubted if the statute is anything more than declaratory of the preexisting law. *Davis v. Alderson*, 125 Va. 681, 100 S. E. 541.

"Our statute, § 8, ch. 131, Code 1906, authorizes such amendments (of a declaration), even in the midst of the trial." *National Bank v. Lynch*, 69 W. Va. 333, 334, 71 S. E. 389.

Insertion of Name of Beneficial Plaintiff.—A plaintiff may, after ver-

dict in his favor, amend his declaration by inserting the name of a beneficial plaintiff after his own name. *Kain v. Angle*, 111 Va. 415, 69 S. E. 355.

Amendment of Declaration by Filling in Blanks.—A declaration may be amended, during the trial and before verdict, by filling in blanks, if substantial justice will thereby be promoted. *Shires v. Boggess*, 72 W. Va. 109, 77 S. E. 542.

Amendment to Conform to Proof.—Where on a trial objections are timely made to the introduction of evidence upon the ground of variance, or the question of such variance is otherwise seasonably presented, the pleader should not be permitted to amend his declaration or other pleading after verdict. *Long v. Pocahontas Consol. Collieries Co.*, 83 W. Va. 380, 98 S. E. 289.

As in this case no objection to the evidence for a variance was at any time interposed, nor any motion made to exclude on this or any other ground, the plaintiff was erroneously denied the right to amend his declaration as proposed, even after verdict. *Long v. Pocahontas Consol. Collieries Co.*, 83 W. Va. 380, 98 S. E. 289 291.

In an action for damages for fraud and breach of warranty in the sale of defective roofing, the dates of the several sales were each alleged in the declaration under a *videlicet*. The defendant knew the precise dates of each sale, and after one of its witnesses had supplied those dates the court permitted each count in the declaration to be amended by the insertion of the precise dates. Such amendments were not material, and if they were, were fully authorized by § 3384 of the Code (Code 1919, § 6250), and the Act of March 27, 1914 (Acts 1914, ch. 331, p. 641. [Code 1919, 6104]). *Standard Paint Co. v. Vietor & Co.*, 120 Va. 595, 91 S. E. 752. See ante, "Amendments to Conform to Proof—Variance," II, C;

"Variance between Declaration and Proof," II, H, 1, h¼.

When evidence to sustain a demand for rent has been admitted under a declaration containing no counts other than the indebitatus counts for goods, etc., sold and delivered, work and labor, money lent, advanced, etc., money had and received and an account stated, the errors committed and the variance occasioned by its admission may be cured by amending the declaration at any time before verdict, if the defendant waives the right to a continuance which the act of amendment gives him. *Lawson v. William-son Coal, etc., Co.*, 61 W. Va. 669, 670, 57 S. E. 258. See post, CONTINUANCES.

In the instant case an amendment had been suggested by the judge pending the introduction of the evidence, and he had further stated that the question would be certain to arise again when they came to consider the instructions. On argument certain instructions were objected to by defendant's counsel on the ground that the declaration was not broad enough to warrant them. The court took time to consider the instructions, and while considering the instructions the judge had a copy of the declaration in which he inserted in pencil the suggested amendments, and when he returned into court he called attention to what he had done, and counsel for the plaintiff accepted and adopted the amendment. The defendant did not claim that it was taken by surprise by the amendment, nor was any motion made to delay the trial, nor does it appear how, if at all, the defendant was injured thereby. Held: That there was no error in the ruling and action of the trial court in this matter. *Du Pont, etc., Co. v. Snead*, 124 Va. 177, 97 S. E. 812.

Amendment Presenting Essentially New Case.—In an action against a carrier for delay in delivery of potatoes

consigned to the carrier, the declaration alleged that defendant was bound to deliver the potatoes to the consignee at the point of destination "not later than the 19th of July, 1917," and the breach assigned is that it did not deliver the consignment until "the 20th day of July, 1917." Plaintiff thereupon proved a delivery on July 19th and rested. Subsequently, during the argument before court on a demurrer to the evidence and after the jury had returned its verdict and been discharged, counsel for plaintiff asked the court for leave to amend the declaration by substituting July 16th for July 19th. The record did not show that the dates were inserted in the declaration by inadvertence or mistake. Held: That it was then too late for the defendant to meet an essentially new case on an amended declaration by new evidence; and the court no longer possessed the power to control the situation. To such case the special enactment in respect to demurrers to the evidence applies. It empowers the court to permit "new evidence to be admitted, or a nonsuit to be taken until the jury retires from the box," but not afterwards. *Pollard's Supp.* 1916, p. 675. *Cooper v. Norfolk Southern R. Co.*, 125 Va. 73, 99 S. E. 606.

Trial courts are invested with broad powers in allowing amendments in the interest of justice, but they have no power to disregard the mandatory provision of *Pollard's Supp.*, 1916, p. 675. (Code 1919, § 6117). In the instant case, if plaintiff's request to amend had been granted to avoid a hardship of his own making, a more serious mischief would have been imposed upon the defendant, who was free from fault. The jury had returned its verdict on the demurrer to the evidence under pleadings and evidence that plainly entitled the defendant to a judgment; yet the proposed amendment, if allowed, might have called for

a different judgment in the then state of the case, when it was too late for the defendant to meet the new case by new evidence. The remedy of the plaintiff, on the other hand, was complete; he could have met a self-imposed dilemma of which he had timely notice either by motion to amend the pleadings or by suffering a non-suit before the jury retired. But he did neither, and by the express terms of the statute his motion came too late after the jury had retired. *Cooper v. Norfolk Southern R. Co.*, 125 Va. 73, 99 S. E. 606. See post, DEMURRER TO THE EVIDENCE; DISMISSAL, DISCONTINUANCE AND NON-SUIT.

Amendment to Special Plea of Set-Off.—In an action by a contractor for a balance due for work and labor done, defendant filed a special plea of set-off claiming damages for defective work done. After all the evidence in chief had been introduced on both sides, and during the examination of the witnesses put on by the plaintiff in rebuttal, the defendant moved for leave to amend its special plea of set-off by inserting an averment of the plaintiff's insolvency, and that plaintiff violated the contracts by doing its work under them in an unworkmanlike manner, and that plaintiff covered up and concealed from view such defective and faulty work, whereby defendant was misled. Held: That the court correctly exercised its discretion in refusing to allow the plea to be amended at that time. *Richmond College v. Scott-Nuckols Co.*, 124 Va. 333, 98 S. E. 1.

Amendment of Defendant's Affidavit to Conform to W. Va. Code, ch. 125, § 46.—When the form for verification of pleadings, prescribed by § 42, ch. 125, Code 1906, is insufficient as an affidavit by defendant under § 46 of the same chapter, the court properly refused after an adjournment of term, to permit it to be amended to conform to the requirements of such affidavit.

Woods v. Tetter, 72 W. Va. 668, 79 S. E. 658.

5. Refusal to Allow Amendment.

a. In General.

See ante, APPEAL AND ERROR.

b. Remand with Directions to Amend.

See post, APPEAL AND ERROR.

III. OF BILL OF PARTICULARS.

Barnes Code W. Va., p. 1120, ch. 125, § 66.

III½. OF WRITS IN GENERAL.

"Though by the common law, some writs were amendable, the power of amendment only existed as to slight and formal defects." *Fisher Sons & Co. v. Crowley*, 57 W. Va. 312, 316, 50 S. E. 422. As to amendment of summons and process, see post, "Summons and Process," VIII.

IV. OF SCIRE FACIAS.

See post, SCIRE FACIAS.

VII. OF ATTACHMENTS.

See post, ATTACHMENT AND GARNISHMENT.

VIII. OF SUMMONS AND PROCESS.

Statutory Authority Essential for Substantial Amendment of Summons.

—A summons, commencing an action in a court of record, can not be amended in any substantial particular, unless the statutes of amendment authorize it. *Fisher Sons & Co. v. Crowley*, 57 W. Va. 312, 313, 50 S. E. 422.

Barnes Code, W. Va. p. 1112, ch. 125, § 14; p. 681, ch. 50, § 28.

Misnomer.—By § 1979, ch. 50, § 28, Code 1906, it is provided that, "in any case in which a defendant shall be proceeded against by any other than his true name, it shall be the duty of the justice, when his true name is ascertained, to amend the summons by inserting the same therein, and thereafter to proceed against him by his true name." Stout,

v. Baltimore, etc., R. Co., 64 W. Va. 502, 504, 63 S. E. 317.

"A summons not signed by the clerk is so fatally defective that it can not be amended." *Fisher Sons & Co. v. Crowley*, 57 W. Va. 312, 316, 50 S. E. 422.

Variance from Declaration.—Va. Code 1919, § 6103; *Barnes W. Va. Code*, p. 1112, ch. 125, § 15.

Under § 15, ch. 125, Code 1913 (§ 4769), a summons served on a defendant may be amended so as to correct a variance between it and the declaration. *Shafer v. Security Trust Co.*, 82 W. Va. 618, 97 S. E. 290.

Amendment by Inserting "Amended Declaration" in Place of "Declaration."—When an action of assumpsit has been remanded to rules with leave to file an amended declaration, and summons issues requiring the defendant to appear and answer a declaration, and an amended declaration is filed, the court may permit the plaintiff to amend the writ at the bar of the court by inserting "amended declaration," in place of the word "declaration," without new process. *Brown v. Cook*, 77 W. Va. 356, 87 S. E. 454.

Amendment Proper and Description of Property Sufficient.—In *Bennett v. Hollinger*, 66 W. Va. 385, 386, 66 S. E. 502, an action of unlawful detainer, it is said: "The verdict and judgment were for the property described in the summons as amended. We think the amendment was proper and the description sufficient."

IX. OF RETURNS.

Va. Code 1919, § 6103.

When a summons has been returned and filed, the return of the officer becomes a matter of record, and cannot be amended except by leave of the court. This permission is not granted as a matter of course, but only in furtherance of justice and in the exercise

of an enlightened discretion after notice to the opposite party. The court, however, will not suffer a proposed amendment to be made without first being satisfied that it is true. For this purpose it may hear evidence, but if it is contradictory, or the court is left in doubt and uncertainty as to what the truth is, it will not permit the amendment. *Park Land, etc., Co. v. Lane*, 106 Va. 304, 55 S. E. 690.

Amendment on Motion to Quash Execution Issued on Default Judgment.

—An insufficient return of service on the summons to answer an action may be amended, on a motion to quash an execution issued on a default judgment therein, notwithstanding the defendant appeared specially in the action and unsuccessfully sought to quash the return. *Spencer v. Rickard*, 69 W. Va. 322, 71 S. E. 711.

Pending an appeal and supersedeas in the appellate court, the return of service of process commencing a suit may be amended in the lower court, upon proper application and notice to the opposite party. *Gauley Coal Land Ass'n v. Spies*, 61 W. Va. 19, 55 S. E. 903.

When an amendment is thus made, if it appears that it was properly made, and that the defective service is thereby cured, it will relate back to the time of service, and will obviate the error in that regard. *Gauley Coal Land Ass'n v. Spies*, 61 W. Va. 19, 55 S. E. 903.

"When the officer's return is amended it relates back to the date of the service. * * * and when such amendment is properly made in the circuit court after writ of error or appeal to this court and that fact made to appear here by supplemental record, the defect will thereby be cured." *Varney v. Hutchinson Lumber, etc., Co.*, 64 W. Va. 417, 420, 63 S. E. 203; *Spencer v. Rickard*, 69 W. Va. 322, 71 S. E. 711.

X. OF INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

See post. INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

XI. CURE BY VERDICT—STATUTE OF JEOfAILS.

B. DEFECTIVE OR IMPERFECT AVERMENTS.

Where a declaration contains a defective statement of a good cause of action, this is the class of error that the statute of jeofails is designed to cure. *Richmond v. McCormack*, 120 Va. 552, 91 S. E. 767.

A defect in a declaration which can not be regarded on demurrer is, by § 3, c. 134, Code 1913 (§ 4977), cured after verdict. *Grass v. Big Creek Develop. Co.*, 75 W. Va. 719, 84 S. E. 750. *Barnes W. Va. Code*, p. 1148, ch. 134, § 3.

Averment of the promise in a declaration in assumpsit by implication or intendment only is defective and would be insufficient on demurrer, but, in the absence of a demurrer, is cured by a verdict under the operation of the statute of jeofails. *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098.

Variance between Pleading and Proof.—If the evidence adduced on the trial by plaintiff or defendant shows a good cause of action or defense, a defect in the pleading should be regarded as cured by the evidence when after verdict either of the parties seek an advantage based on variance, and if no substantial rights of the parties will be injuriously affected thereby, the verdict or judgment should not be disturbed. *Long v. Pocahontas Consol. Collieries Co.*, 83 W. Va. 380, 98 S. E. 289.

C½. OMISSION OF SIMILITER.

To a plea concluding "to the contrary," a similiter only is proper, and its omission is cured after verdict or judgment. *Weekley v. Weekley*, 75 W. Va. 280, 83 S. E. 1005.

E. MISJOINDER AND NONJOIN- DER OF ISSUE.

In an action of assumpsit, a plea of "not guilty" presents a substantial issue, and such misleading and misjoinder of issue thereon will, after verdict, be cured by our statute. *Banister v. Victoria Coal, etc., Co.*, 63 W. Va. 502, 503, 61 S. E. 338.

In an action at law, the statute of jeofails does not cure the nonjoinder, or want of issue altogether, and no verdict or judgment can properly be rendered therein. *Norfolk, etc., R. Co. v. Coffey*, 104 Va. 665, 51 S. E. 729, 52 S. E. 367.

I. WHERE DECLARATION SETS FORTH NO CAUSE OF ACTION.

As malice is an essential element of an action for malicious prosecution, lack of an averment thereof in the declaration can not be disregarded on the demurrer, under the statute of jeofails, and is fatal. Such a defect in a declaration is not cured by verdict, when a demurrer to the declaration has been interposed and overruled. *Wright v. Ridgley*, 67 W. Va. 319, 67 S. E. 787.

I½. OMISSION OF MATTER OF SUBSTANCE.

Lack of an ad damnum clause in a declaration in trespass on the case is an omission of matter of substance and can not be disregarded on a demurrer to the declaration. When a demurrer has been interposed for such a defect, it is neither waived nor cured by the verdict. *McGlamery v. Jackson*, 67 W. Va. 417, 68 S. E. 105.

Amicus Curiae.

See the title *AMICUS CURIAE*, vol. 1, p. 371, and references there given.

AMNESTY.—See post, *PARDON*.

AMORTIZATION.—Authorizing valuation of securities by amortization method. *W. Va. Acts 1921*, p. 475.

AMOUNT IN CONTROVERSY.—See post, *APPEAL AND ERROR*; *ATTACHMENT AND GARNISHMENT*; *JURISDICTION*; *JUSTICES OF THE PEACE*; *LANDLORD AND TENANT*.

AMUSEMENTS.—As to amusement privileges, see post, *THEATERS AND SHOWS*. As to gaming on grounds of fair association, see post, *THEATERS AND SHOWS*.

ANCESTORS.—See post, *DESCENT AND DISTRIBUTION*.

ANCIENT DOCUMENTS.

CROSS REFERENCES.

See the title *ANCIENT DOCUMENTS*, vol. 1, p. 372, and references there given. In addition, see post, *BEST AND SECONDARY EVIDENCE*; *EVIDENCE*; *HANDWRITING*.

Ancient Deed as Evidence.—An ancient deed, made by a commissioner to the heirs of a deceased purchaser of land, under an order of sale in a proceeding to sell it as forfeited for non-payment of taxes; reciting the death of the purchaser, and inheritance by the grantees, is evidence of the facts recited, against strangers. *Webb v. Ritter*, 60 *W. Va.* 193, 54 *S. E.* 484.

Recitals of heirship and widowhood in deeds upwards of thirty years old under which possession has been continuously held are presumptive evidence of the truth of the same, and admissible against strangers to the title claiming adversely. *Wilson v. Braden*, 56 *W. Va.* 372, 49 *S. E.* 409.

Declarations in ancient deeds are admissible to prove boundary lines and such traditional evidence is admissible, not only that a certain tree or other monument marked a certain boundary line, but also that a public body of land, such as a manor, parish, or highway, or the like, or even a private body of land in which a number of persons have

a common interest, marked such boundary line, where the declaration comes from one having such common interest. *Kepler v. Richmond*, 124 *Va.* 592, 98 *S. E.* 747.

In a suit by the owner of a lot to enjoin the city from claiming that a part of the lot had been dedicated as an alley a deed, over thirty years old, to property abutting on the alleged alley was held admissible in evidence against complainants, although they were not in privity therewith, under the exception which ancient deeds afford to the rule as to the inadmissibility of hearsay evidence. It was admissible because of its declaration that the rear line of the lot it conveyed was on an alley. *Kepler v. Richmond*, 124 *Va.* 592, 98 *S. E.* 747.

A public alley, or an alley in common, as marking the boundaries of abutting property owners, may be a subject upon which traditional declarations may be admissible in evidence as tending to prove its existence. *Kepler v. Richmond*, 124 *Va.* 592, 98 *S. E.* 747.

Weight.—Declarations in an ancient

deed as to boundaries upon the existence or location of a way, are not entitled to much weight, and may be rebutted by very slight evidence of a more definite character. In the instant case the ancient deed itself contained a clause which rebutted any inference which might be drawn from it as to the existence of the alley in question of the width claimed by the city. *Keppler v. Richmond*, 124 Va. 592, 98 S. E. 747.

Where the question at issue involved the width of an alley ancient deeds describing it as a wide alley, while admissible, have little probative value since they give no definite width. *Keppler v. Richmond*, 124 Va. 592, 98 S. E. 747.

Deeds less than thirty years old are inadmissible in evidence as ancient deeds. *Keppler v. Richmond*, 124 Va. 592, 98 S. E. 747.

Quære, whether recitals in a deed less than thirty years old are sufficient to establish the facts recited, in an ejectment suit with defendants in possession. *Curtis v. Deepwater R. Co.*, 68 W. Va. 762, 70 S. E. 776.

Impeachment of Ancient Deed.—An

ancient deed, bearing date in the year in which the apparent grantors admit the execution of a different kind of deed to the apparent grantees and certificates of acknowledgement apparently signed by the officer before whom they had acknowledged such different deed, and produced from proper custody, cannot be impeached by the mere recollections of witnesses as to the contents of the deed they executed and the size of the paper. *Titchenell v. Titchenell*, 74 W. Va. 237, 81 S. E. 978.

If an ancient deed be lost, but its existence and contents be proven by oral evidence; and it be also proven to have been recently in the possession of and produced by the grantee, and such account thereof is given, as might be reasonably expected, under all the circumstances, such oral evidence is admissible to establish such deed or grant, without otherwise proving the due execution and delivery thereof; and such deed will be treated as presumptively genuine, until such presumption is overcome by evidence to the contrary. *Shaffer v. Shaffer*, 69 W. Va. 163, 71 S. E. 111.

ANCIENT LIGHTS.—See ante, ADJOINING LANDOWNERS; post, EASEMENTS.

Not in force in W. Va.—Barnes Code, ch. 79, § 13.

ANCILLARY ADMINISTRATION.—See post, EXECUTORS AND ADMINISTRATORS.

ANCILLARY GUARDIANSHIP.—See post, GUARDIAN AND WARD.

ANCILLARY RECEIVERSHIP.—See post, RECEIVERS.

AND.—See post, OR.

ANEMOMETER.—In *Squilache v. Tidewater Coal, etc., Co.*, 64 W. Va. 337, 346, 62 S. E. 446, it is said: "But we are asked to hold him (the fire-boss) incompetent because he said he had never used an **anemometer**, an instrument not mentioned in the statute (§§ 409, 410, chap. 15H, Code 1906), but used for measuring air. This would be to interpolate into the statute a qualification not required by it. The **anemometer** is not one of the instruments required by the statute to be kept on hand or furnished by the owner. A safety lamp is. By it the fire-boss is required to be able to detect the presence of dangerous and noxious gases." See post, MASTER AND SERVANT.

ANGUISH.—See post, DAMAGES.

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CROSS REFERENCES.

See the title ANIMALS, vol. 1, p. 373, and references there given. In addition, see post, CRUELTY TO ANIMALS; FALSE PRETENSES AND CHEATS; FISH AND FISHERIES; GAME AND GAME LAWS; LARCENY; LICENSES; LIVERY STABLE KEEPERS; RAILROADS; STREETS AND HIGHWAYS; SUNDAYS AND HOLIDAYS; TAXATION; As to master's duty to furnish servant a safe mule, and assumption of risk, see post, MASTER AND SERVANT. As to duties and liabilities of railroads with respect to cattle guards and fences, see post, RAILROADS.

I. IN GENERAL.**C. DEAD OR DISEASED ANIMALS AND CERTAIN SANITARY REGULATIONS.****½. In General.**

Va. Code 1919, §§ 906-920, 1155-1228, 1289, 1554, amended by Va. Acts 1918, pp. 446; Pollard's Code 1220, p. 449; §§ 2743, 4743; Barnes Code, ch. 15 D, §§ 1-56, W. Va. Acts 1919, p. 369, amending Barnes Code 1918, ch. 15 D, §§ 11, 22, 23, ch. 15 L, §§ 1-3, ch. 39, §§ 25, 27, ch. 43, § 56a. (75), ch. 150, § 20 d. (1), W. Va. Supp. 1918, §§ 437a-438, superseding Barnes Code, ch. 15 D, §§ 22-30.

F. DOGS.

Va. Code 1919, §§ 412, 413, 1551-1553, 2317-2327, 3350, 4445, 4467, 4550, Va. Acts 1918, p. 622, Va. Acts 1919, p. 42, Va. Acts 1920, p. 602; Pollard's Code 1920, p. 597; Va. Acts 1920, ch. 369; Barnes Code, ch. 62, §§ 7-9a, W. Va. Acts 1921, p. 420, amending Barnes Code, ch. 62, ch. 145, § 25, ch. 149, § 14.

Running at Large Prohibited—Tags, etc.—W. Va. Code Supp. 1918, ch. 62, Code Supp. 1918, ch. 62, § 3467c.

Foreigners Not to Keep.—W. Va. Code Supp. 1918, ch. 62, § 3467c.

As Property.—Va. Code 1919, §§ 2324-2326, 4445, 4467; Barnes Code, ch. 47, § 31.

Section 2324 of the code of 1919, relating to property rights in dogs, does not expressly or impliedly abrogate the common law doctrine, but only adds to such property rights. Under the statute where the owner had had his dog assessed and paid the prescribed license tax, he may not only recover possession or recover damages for injury done the dog but he may prosecute one who stole his dog. If he has not complied with the provisions of the statute he has the lesser or base property in his dog and while he can recover possession, he can not prosecute one who stole him or main-

tain an action for injury to him. *Layton v. Brown*, 6 Va. L. Reg. (N. S.) 179.

At common law the owner had a qualified or base property interest in his dog, which was sufficient to maintain an action for its recovery against one in unlawful possession, but a dog was not the subject of larceny or malicious prosecution. *Layton v. Brown*, 6 Va. L. Reg. (N. S.), 179.

Keeping dogs in yard may be enjoined as a nuisance; and it is immaterial that a town ordinance affords the plaintiff an easy and expeditious remedy. *Herring v. Wilton*, 106 Va. 171, 55 S. E. 546. See post, NUISANCES.

G. ANIMALS AS RELATED TO OR AFFECTING AGRICULTURE.

See ante, "Dead or Diseased Animals and Certain Sanitary Regulations," I, C; post, "Animals Running at Large," IV; "Enclosures and Certain Trespasses," VI; "Estrays and Drift Property," VII.

Male Breeding Animals.—W. Va. Acts 1921, p. 455, amending W. Va. Acts 1917, W. Va. Supp. 1918, § 3857; Va. Code 1919, § 4744.

Lien for Services of Stallion, etc.—W. Va. Supp. 1918, § 3857; Va. Code 1919, § 6446.

Purchase of Breeding Stock by Certain State Institutions.—Pollard's Code 1920, p. 754, Va. Acts 1920, ch. 290, p. 405.

Stock Foods.—Va. Code 1919, §§ 1229-1249.

Driving Unbranded Sheep.—Va. Code 1919, § 4742.

II. INJURIES TO ANIMALS BY RAILROADS.**A. LIABILITY IN GENERAL.**

See post, "Failure to Fence," II, H, 2, a.

Failure to Give Crossing Signals.—Va. Code 1919, § 3959; Barnes Code, ch. 54, § 61.

The failure to ring the bell or sound

the whistle, to frighten animals off the track, is not, per se, negligence. *Whelan v. Railroad Co.*, 70 W. Va. 442, 74 S. E. 410.

Must Use Ordinary Care.—A railroad company is bound to use ordinary care to prevent injuries to animals on its tracks and right of way. *Hanger Bros. v. Chesapeake, etc., R. Co.*, 70 W. Va. 212, 73 S. E. 713.

Discovery of Danger.—The servants of a railway company are equally bound to adopt the ordinary precaution to discover danger to animals as to avoid its consequences after it becomes known. *Hanger Bros. v. Chesapeake, etc., R. Co.*, 70 W. Va. 212, 73 S. E. 713.

It is the duty of the engineer to keep a reasonable lookout for dumb animals trespassing on the tracks. *Whelan v. Railroad Co.*, 70 W. Va. 442, 74 S. E. 410.

It is the duty of the servant of a railroad company in charge of its trains to keep a lookout for stock upon the tracks and if stock happens to be on the track and is killed by the train, the company is liable for the value of the stock so killed if the killing could have been avoided by the exercise of ordinary care; that is, if it could have been seen in time to have avoided the killing by the use of ordinary care, though it may not actually have been seen in time to avoid the killing. *Robbins v. Railroad Co.*, 62 W. Va. 535, 59 S. E. 512; *Carper v. Monongahela Valley Tract. Co.*, 78 W. Va. 282, 286, 88 S. E. 843.

"Ordinary care does not mean extraordinary care. It means such care as the employees of the railway company, under all the circumstances and consistent with their other duties should have observed respecting such dumb animals on the track. The evidence in the present case does not bring it within the rules of those cases. The motor-man swears that he could not and did not see the steer in question in time to have avoided killing him. No one contradicts him; the facts do not con-

tradict him, and a case of actionable negligence is not made out." *Carper v. Monongahela Valley Tract. Co.*, 78 W. Va. 282, 286, 88 S. E. 843; *Underwood v. Chesapeake, etc., R. Co.*, 78 W. Va. 409, 410, 89 S. E. 2.

A railroad company is not bound, in the exercise of the ordinary care and prudence required of it for the safety of trespassing animals, to maintain such a constant and rigid observation of the track, as will enable it to discover, at the inception of their trespass, animals coming on it near a curve, in advance of a train, and quickly proceeding around the curve and beyond the range of view. *Ellison v. Norfolk, etc., R. Co.*, 83 W. Va. 316, 98 S. E. 257.

Nor can it be deemed or held to be guilty of negligence for failure to discover animals on its track, at the end of a curve around which a train is passing, at a point so near to the curve as to allow the enginemen only two or three seconds in which to discover them, determine what course to pursue and apply the brakes. *Ellison v. Norfolk, etc., R. Co.*, 83 W. Va. 316, 98 S. E. 257.

Same—Character of Train.—It is manifestly immaterial whether the injury was occasioned by a passenger train, a freight train or a work train. The duty to maintain a lookout and to have the engines equipped with suitable headlights is imposed upon railroad companies in respect of all of their trains." *Kay v. Director General*, 86 W. Va. 93, 95, 103 S. E. 108.

Same—Effect of Stock Law.—Section 3, chap. 59 of the acts of 1919, making it unlawful for horses, cattle, etc., to run at large on a railroad right of way and fixing a penalty on the owner if injury to property results therefrom, does not relieve a railroad company from the duty of keeping a reasonable lookout for such animals upon its tracks. *Warden v. Hines*, 87 W. Va. 756, 106 S. E. 130.

Headlight.—It is negligence per se for a railroad company, in the night time, to run an engine backwards over

its main track without a proper headlight on the tender sufficient to enable the enginemen, in the exercise of reasonable and ordinary care, to see ahead a reasonable distance, so as to avoid doing injury to dumb animals astray upon the track. *Hanger Bros. v. Chesapeake, etc., R. Co.*, 70 W. Va. 212, 73 S. E. 713; distinguishing *Melton v. Railroad*, 64 W. Va. 168, 61 S. E. 39.

B. PARAMOUNT DUTY IS SAFETY TO PASSENGERS.

"If the servants of a railroad company in charge of a train, by exercise of ordinary care, can see and save domestic animals which have wandered on the railroad, it is their duty to do so; but this duty must be exercised consistently with the paramount duties they owe to the passengers on the train under their charge." *Hanger Bros. v. Chesapeake, etc., R. Co.*, 70 W. Va. 212, 215, 73 S. E. 713, quoting from *Kirk v. Norfolk, etc., R. Co.*, 41 W. Va. 722, 24 S. E. 639.

C. UNAVOIDABLE ACCIDENT.

The killing of a horse on a railroad track by a railroad train, under circumstances which show that such killing was an unavoidable accident does not make the railway company liable for damages therefor. *Christian v. Chesapeake, etc., R. Co.*, 78 W. Va. 378, 89 S. E. 17.

The killing of a cow by a motor, hauling a train of loaded cars, where it is shown by positive evidence that the cow came from behind a plank fence where she was hid from the view of the motorman, and onto the railroad crossing about thirty feet before the rapidly moving train, making it impossible to prevent the killing, although the service brakes were immediately set, will not justify a verdict and judgment against the railroad company for negligence, although it appeared from the evidence that the crossing could have been seen by the motorman, by aid of the headlight,

for a distance of one hundred and fifty yards or more. *Warden v. Hines*, 87 W. Va. 756, 106 S. E. 130.

D. CONTRIBUTORY NEGLIGENCE AND OFFENSES OF OWNER OR CUSTODIAN OF ANIMAL.

Va. Code 1919, §§ 4469, 4475.

Driving cattle on track without looking or listening for trains may preclude recovery for their injury by a train unless the trainmen were negligent after being chargeable with notice of the dangerous position of the cattle, and but for such negligence could have prevented collision with the animals. *Jones v. Hines*, 85 W. Va. 496, 102 S. E. 143.

Duty of Trainman to Trespassing Horse.—Plaintiff's negligence in permitting his horse to stray upon a railroad track, does not relieve the railroad company's servants from the exercise of reasonable care to avoid injuring him. *Whelan v. Railroad Co.*, 70 W. Va. 442, 74 S. E. 410.

G. FRIGHTENING HORSES.

When a horse becomes frightened upon a public highway, at the mere sight of a train or at the noise necessarily incident to the running of the train and the operation of the road, and injures itself, the railroad company is not responsible, in the absence of negligence on the part of the company. *Kunkle v. Baltimore, etc., R. Co.*, 77 W. Va. 650, 652, 88 S. E. 113, citing *Southern R. Co. v. Cooper*, 98 Va. 299, 36 S. E. 388.

Horse Frightened at Hand Car Near Crossing—Pleading.—It was necessary to aver that the hand car was, under the circumstances stated, an object of such unusual or extraordinary appearance as to have a natural tendency to frighten horses of ordinary gentleness and training, although that was a question to be determined by the jury from all the circumstances of the case, under proper instructions from the court. *Norfolk, etc., R. Co. v. Gee*, 104 Va. 806, 52 S. E. 572.

H. DUTY OF RAILROAD TO FENCE.

1. Common Law.

In the absence of a contractual or statutory requirement, it is not the duty of a railroad to fence its track. *Starks v. Baltimore, etc., R. Co.*, 77 W. Va. 93, 87 S. E. 88; *McCreary v. Chesapeake, etc., R. Co.*, 77 W. Va. 305, 87 S. E. 374.

2. Code Provisions.

$\frac{1}{2}$ a. In General.

Stock Injured on Enclosed Track.—Va. Code 1919, § 3948.

Lateral Railroads.—Barnes Code ch. 54, § 69a (7).

Condemnation of Right of Way.—In absence of contract stipulation or express statutory provision, a railroad company is not required to fence its right of way. Section 14, ch. 42, Code (Barnes Code, ch. 42, § 14), requires such inclosure only when the right of way is acquired by condemnation. *Starks v. Baltimore, etc., R. Co.*, 77 W. Va. 93, 87 S. E. 88; *McCreary v. Chesapeake, etc., R. Co.*, 77 W. Va. 305, 87 S. E. 374.

Liability for Trespass by Cattle Passing through Culvert under Track.—Where a railroad right of way is the dividing line between two landowners, and is fenced on both sides, except at a necessary culvert, where the fences are brought in to each side of the culvert, so as to make it impossible for cattle to get upon or over the track, the fact that cattle of one landowner can and do pass through the culvert under the track and trespass upon the other landowner does not make the railroad company liable to the latter for the damage, as it committed no breach of duty in not obstructing such passage through the culvert. *Morgan v. N. & W. R. Co.*, 15 Va. L. Reg. 112.

a. Failure to Fence.

Injury to Stock on Unenclosed Track.—Va. Code 1919, § 3949.

H $\frac{1}{2}$. PLEADING.

In an action on the case for damages for killing plaintiff's horse by a railway company, the declaration should allege clearly and distinctly the cause of action; and a count therein reciting the supposed cause of action under a whereas, a cum quod, is fatally defective on demurrer. *Gould v. Coal, etc., R. Co.*, 74 W. Va. 8, 81 S. E. 529.

The form of declaration laid down in Hogg's Pleadings and Forms, page 343, against a railroad company "for the negligent killing of plaintiff's horse while on its track" is approved as sufficient on demurrer without alleging more particularly than therein stated acts of negligence of omission or commission. *Robbins v. Railroad Co.*, 62 W. Va. 535, 59 S. E. 512.

An allegation of negligence in a declaration against a railroad company "for the negligent killing of plaintiff's horse while on its track," implies a duty on the part of the defendant as well as a breach of that duty. *Robbins v. Railroad Co.*, 62 W. Va. 535, 59 S. E. 512.

I. EVIDENCE.

1. Proof of Negligence.

a. Burden of Proof upon Plaintiff.

In order to charge a railroad company with damages for killing stock upon its tracks negligence on the part of the company must appear, and the burden of showing it rests upon the plaintiff. *Christian v. Chesapeake, etc., R. Co.*, 78 W. Va. 378, 379, 89 S. E. 17, citing *Maynard v. Norfolk, etc., R. Co.*, 40 W. Va. 331, 21 S. E. 733; *Hawker v. B. & O. R. Co.*, 15 W. Va. 628; *Talbott v. West Virginia, etc., R. Co.*, 42 W. Va. 560, 26 S. E. 311; *Harvey Coal, etc., Co. v. Chesapeake, etc., R. Co.*, 69 W. Va. 228, 71 S. E. 178; *Underwood v. Chesapeake, etc., R. Co.*, 78 W. Va. 409, 410, 89 S. E. 2, citing *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. 123.

Operation of Road by Receiver.—In an action against a receiver of a railroad company to recover damages for killing cattle by a train, it must be proven that the railroad was being operated by a receiver. *Hudkins v. Bush*, 69 W. Va. 194, 71 S. E. 106.

b. Sufficiency of Evidence.

Negligence justifying recovery against a railroad company for killing dumb animals on the track must be established either by positive proof of the fact, or by facts proven from which negligence may reasonably be inferred. *Underwood v. Chesapeake, etc., R. Co.*, 78 W. Va. 409, 89 S. E. 2.

Circumstantial evidence was held sufficient to fix liability upon railroad for injury to cattle trespassing upon its track in the night, there being no defensive evidence tending to rebut inferences of negligence arising from such circumstantial evidence and opinion evidence based upon it. *Kay v. Director General*, 86 W. Va. 93, 95, 103 S. E. 108.

Lookout.—"The character of the ground and track and other facts the jury were warranted in finding from the evidence, justified the further findings, in the absence of proof to the contrary, that a proper lookout was not maintained and that the failure to maintain it was the proximate cause of the injury." *Kay v. Director General*, 86 W. Va. 93, 95, 103 S. E. 108.

Demurrer.—In an action for injuries to plaintiff's horse, the court held that a demurrer to the evidence was rightly sustained. *Bower v. Virginian R. Co.*, 72 W. Va. 737, 79 S. E. 727. See also *Gould v. Coal, etc., R. Co.*, 74 W. Va. 8, 81 S. E. 529.

Negligence.—Judgment below reversed, verdict set aside, and a new trial awarded for want of sufficient evidence showing actionable negligence of defendant in killing plaintiff's mules. Applying *Toudy v. Norfolk, etc., R. Co.*, 38 W. Va. 694, 18 S. E. 896, and *Lovejoy v. Chesapeake, etc., R. Co.*, 41

W. Va. 693, 24 S. E. 599; *Harvey Coal, etc., Co. v. Chesapeake, etc., R. Co.*, 69 W. Va. 228, 71 S. E. 178.

c. Question for Jury.

In an action against a railroad company for the negligent killing of a horse, trespassing upon the company's right of way, negligence is generally a mixed question of law and fact for the jury, and if circumstances are proven from which they may reasonably infer negligence, such, for instance, as that the horse could have been seen, dangerously near the track, by the engineer in charge of the train, for a distance of three hundred yards; that the speed of the train increased, and no effort was made to stop it until after the engine struck the horse; that the train was a light one making only a half a load for the engine, the case should go to the jury. *Whelan v. Railroad Co.*, 70 W. Va. 442, 74 S. E. 410.

Where a railroad company is so operating an engine, in the night time, runs over and kills a horse astray upon its track, and the evidence is such that the jury may reasonably infer that had there been a proper headlight on the tender in front of the moving train the enginemen, in the exercise of due and reasonable care, would probably have discovered the horse on the track in time to have avoided injuring him, the question of negligence is one of mixed law and fact for the jury, and the court should not for want of sufficient evidence to support it set aside a verdict in favor of the owner of the horse, and award defendant a new trial. *Hanger Bros. v. Chesapeake, etc., R. Co.*, 70 W. Va. 212, 73 S. E. 713.

J. DAMAGES.

Va. Code 1919, §§ 3994-3997.

III. INJURIES TO ANIMALS ON PUBLIC HIGHWAYS.

C. FRIGHTENING HORSES.

See ante, "Frightening Horses," II, G. The owner of a boiler near a high-

way, on which boiler is a large steam whistle used for giving employees time for beginning and closed work, which, when blown makes a loud, coarse noise calculated to frighten horses, must not blow the whistle negligently, but must keep a lookout for horses on the highway, and is liable for injury resulting from the fright and running away of horses on the highway caused by blowing the whistle when such horses are near it. *Truex v. South Penn Oil Co.*, 62 W. Va. 540, 59 S. E. 517.

IV. ANIMALS RUNNING AT LARGE.

See post, "Vicious Animals—Liability of Owner," V, "Enclosures and Certain Trespasses," VI; "Estrays and Drift Property," VII.

A. GENERAL RULE AND GENERAL TREATMENT.

"It was the rule of the common law that the owner of animals was required to confine them on his own premises, and if he failed to do so, and they trespassed upon the lands of another and did injury, either to his clothes, person, or animals, defendant was liable. Thus it was held, in an English case, where a horse bit and kicked a mare through a fence that the owner of the horse was liable. Lord Coleridge, in that case, says: 'It seems to me sufficiently clear that some portion of the defendant's horse's body must have been over the boundary. That may be a very small trespass; but it is trespass in law.' *Ellis v. Loftus Iron Co.*, L. R. 10, C. P. 10. But the rule of the common law requiring the owners of animals to keep them confined on their own land is no part of the law of West Virginia." *Johnston v. Mack Mfg., Co.*, 65 W. Va. 544, 545, 64 S. E. 841.

No Duty to Keep within Close.—The common-law rule requiring the owner of stock to keep them within his own close, does not prevail in Virginia, except where the no-fence law is in force, as it is not in Pulaski county, and each land-

owner must fence against his neighbor's stock, except in case of a line fence under the statute applicable. *Morgan v. N. & W. R. Co.*, 15 Va. L. Reg. 112.

The common law, inhibiting the running at large of domestic animals, is not in force in this state, except as to such of them as are unruly and dangerous. *Fink v. United States Coal, etc., Co.*, 72 W. Va. 507, 78 S. E. 702.

Alternate Stock Laws.—See post, "Enclosures and Certain Trespasses," V.

So much of § 2730, Code 1906, as relates to the running at large of bulls, buck sheep and boars, is the law only in those counties wherein it has been adopted by a vote of the people taken in the manner provided by § 2733 of the Code. *Johnston v. Mack Mfg. Co.*, 65 W. Va. 544, 64 S. E. 841. But see next paragraph.

All acts pertaining to certain male animals running at large were repealed by W. Va. Acts 1917, Reg. Sess., c. 31, W. Va. Code Supp. 1918, § 3415.

Trespass on Fenced Lands.—Va. Code 1919, § 3541, Barnes Code, ch. 60, § 3, as amended and re-enacted by W. Va. Acts 1919, ch. 59, p. 241.

"Where the animal trespasses upon the land of another enclosed by a lawful fence, the owner of the trespassing animal might be liable, under § 2735 (Barnes Code, ch. 60, § 3), for a personal injury inflicted by the animal, as well as for injury done to the clothes. This question, however, we do not decide as it does not arise in the case." *Johnston v. Mack Mfg., Co.*, 65 W. Va. 544, 548, 64 S. E. 841. See post, TRESPASS.

C. FENCE LAWS, ETC.—CONSTITUTIONAL LAW.

Special Laws.—Va. Const., § 63.

E. RIGHT TO DISTRAIN TRESPASSING ANIMALS.

Trespassing in Certain Counties by Animals of Non-Residents.—Va. Code 1919, § 3542; Barnes Code, ch. 60, § 11a.

No statute of general operation throughout this state confers right upon a land owner to seize and hold domestic animals found trespassing on his land as a remedy for enforcement of payment of the damages done by them, unless they are estrays or the land is enclosed by a lawful fence and the animals have trespassed on the same a third time after notice in writing to the owner of the two previous trespasses. *Fink v. United States Coal, etc., Co.*, 72 W. Va. 507, 78 S. E. 702.

To avail himself of the right of acquisition of title to trespassing animals given by section 3 of chapter 60 of the code, the claimant must clearly show strict and full compliance with its provisions and maintenance of a lawful fence. *Fink v. United States Coal, etc., Co.*, 72 W. Va. 507, 78 S. E. 702.

Recoupment and Set-Off.—In an action for the value of animals taken and sold as having been forfeited to the owner of lawfully enclosed premises, by virtue of proceedings under section 3 of chapter 60 of the code (Barnes Code, ch. 60, § 3), the damages done to the property by the animals can neither be recouped nor set-off against their value. *Fink v. United States Coal, etc., Co.*, 72 W. Va. 507, 78 S. E. 702.

V. VICIOUS ANIMALS—LIABILITY OF OWNER.

Unruly and dangerous animals within the meaning of the law are such as are likely to injure other domestic animals and persons, not such as merely endanger real property by trespassing therein. *Fink v. United States Coal, etc., Co.*, 72 W. Va. 507, 78 S. E. 702.

Owner's Knowledge of Vicious Propensities of Animal.—Domestic animals, as a general rule, are not vicious, and are not liable to attack mankind; and in order to make out a case entitling one to recover for injury to his per-

son inflicted by such domestic animals it is necessary to allege and prove a scienter. Ingham, in his work on the Law of Animals, § 94, says: 'Except in the case of animals *feræ naturæ*, it is essential to show that the owner or keeper of an animal knew of its vicious or dangerous disposition; otherwise there can be no recovery for an injury committed by it.' " *Johnston v. Mack Mfg. Co.*, 65 W. Va. 544, 546, 64 S. E. 841.

The owner and keeper of a boar is not liable for a personal injury inflicted by him, unless it appear that he was vicious, and that such owner and keeper had previous knowledge of his vicious propensity; or unless the injury was done while trespassing upon lands enclosed by a lawful fence. *Johnston v. Mack Mfg. Co.*, 65 W. Va. 544, 64 S. E. 841.

Same—Imputable Knowledge.—The true doctrine is that the knowledge of the vicious propensities of an animal need not necessarily be actual in the ordinary acceptance of the term. Either constructive or imputed notice is sufficient. If in the exercise of reasonable diligence and common prudence the owner ought to have known an animal owned or kept by him was dangerously inclined and likely would, if unrestrained, inflict injury upon the person or property of another, he is chargeable as if he had actual, direct and positive notice of acts of viciousness committed by it. *Butts v. Houston*, 76 W. Va. 604, 607, 86 S. E. 473.

The owner of an animal may be chargeable with knowledge of its viciousness through his neglect to take notice of attacks frequently repeated upon the person or property of others, made near his residence and usual place of business, and ranging in time from two days to three days prior to the injury sought to be redressed. *Butts v. Houston*, 76 W. Va. 604, 86 S. E. 473.

"Thompson on Negligence, vol. 1, §

845, says that the trend of most decisions is to break away from the ancient rule which made the keeper of a vicious animal, having knowledge of his vicious propensity, liable at all hazards, for injury done by it, and to hold him liable only in case of some negligent act as the proximate cause of the injury." *Johnson v. Mack Mfg. Co.*, 65 W. Va. 544, 547, 64 S. E. 841.

Testimony offered to prove restraint upon the animals following a previous assault by it, the restraint being a circumstance from which, if true and unexplained, knowledge of its disposition to inflict injury may reasonably be inferred, is admissible. *Butts v. Houston*, 76 W. Va. 604, 86 S. E. 472.

Admissibility of Expert Testimony.—The habits and propensities of domestic animals are matters of common knowledge to all men, and expert testimony to prove the vicious propensities of a particular kind of animals, in general, after they become a certain age, is inadmissible for the purpose of proving that the owner of an animal of that class had knowledge of his vicious propensity.

Johnston v. Mack Mfg. Co., 65 W. Va. 544, 64 S. E. 841.

Question for Jury.—Whether defendant had knowledge express or implied, as to the malevolent disposition of the horse, ordinarily is solely a question for the jury, upon proper instructions, as is also the probative force and value of the proof in the case. *Butts v. Houston*, 76 W. Va. 604, 86 S. E. 473.

VI. ENCLOSURES AND CERTAIN TRESPASSES.

See ante, "Animals Running at Large," IV.

Va. Code 1919, §§ 3538-3563; Barnes Code, ch. 60, §§ 1-11a.

VII. ESTRAYS AND DRIFT PROPERTY.

Va. Code 1919, §§ 3564-3572; Barnes Code, ch. 61, §§ 1-10.

VIII. VETERINARIANS.

Va. Code 1919, §§ 1272-1279; Barnes Code, ch. 15 D, §§ 30-42.

State Veterinarian.—Va. Code 1919, §§ 908, 910, 912, 914, 916, 917, 919, 920, 924; Barnes Code, ch. 151, §§ 11-13.

ANNEXATION OF TERRITORY.—See post, COUNTIES; MUNICIPAL CORPORATIONS.

ANNUITY.

I. Definition and General Consideration.

III. On What Property Chargeable.

½A. In General.

V. Payment.

C. Value—How Computed.

D. Interest.

E. Defenses against Collection.

CROSS REFERENCES.

See the title ANNUITY, vol. 1, p. 385, and references there given. In addition, see post, LIMITATION OF ACTIONS; MISTAKE AND ACCIDENT.

I. DEFINITION AND GENERAL CONSIDERATION.

Definition.—"An annuity, in its strict sense, is a yearly payment of a certain

sum of money, granted to another in fee, or for life, or for years, and chargeable only on the person of a grantor." 2 Minor's Inst., p. 31. *Dulaney v. Du-*

laney, 105 Va. 429, 433, 54 S. E. 40.

Particular Example.—Where a husband, by ante-nuptial contract, gives to his wife, in lieu of dower, the "interest" on \$3,500, part of his estate to be paid to her annually so long as she survives him, and she accepts it, the taxes on the principal sum must be paid by the widow. This is not the gift of an annuity, though payable annually, but of the interest or income, from a specified sum, and the widow must pay the tax on the principal just as she would be compelled to do when dower is assigned in kind. An annuity is usually chargeable only on the person of the grantor, but interest on a fund is income. *Dulaney v. Dulaney*, 105 Va. 429, 54 S. E. 40.

Annuities Issued by Life Insurance Companies.—Barnes Code, ch. 34, § 17.

Action on Annuity Bond.—Va. Code 1919, § 6262; Barnes Code, ch. 131, § 17.

If Investment Impossible Annuity Will Be Commuted.—Where it is impossible to invest a sum at interest sufficient to produce annually the sum to which an annuitant is entitled, the court will adopt some other mode of adjustment that will produce the greatest equality with the least inconvenience. In the case in judgment, such an impossibility exists, and the trial court properly paid to the annuitant the present value of his annuity, as that was as equitable as any other mode that could have been adopted, and attended with as little inconvenience. *American Nat. Bank v. Taylor*, 112 Va. 1, 70 S. E. 534.

Under certain circumstances a court of equity can direct a gross sum to be paid in lieu of an annuity without the consent of all parties interested. *Slater v. Slater*, 124 Va. 370, 98 S. E. 7.

Right to Have Life Estate Paid in Gross.—As a general rule, a party who has a life estate in a fund arising from the proceeds of a sale of land is not entitled to have the value of

his life estate commuted and paid to him in gross instead of the annual interest on the fund, unless the parties in interest agree to it. *American Nat. Bank v. Taylor*, 112 Va. 1, 70 S. E. 534.

Agreement to Pay Annuity.—An agreement to pay an annuity, making no reference in any way to the existence of an antecedent debt, the interest on which would equal the annual payments, nor in any way suggesting the payments stipulated for are interest, can not be regarded as evidence of such debt or of the postponement of payment thereof, until the time of cessation of the annual payments. *Griffith v. Adair*, 74 W. Va. 646, 82 S. E. 479.

Same—Parol Evidence.—Nor can parol evidence be admitted to broaden or extend its operation so as to give it such effect. *Griffith v. Adair*, 74 W. Va. 646, 82 S. E. 479.

Same—Presumption as to Maturity of Debt.—Pre-existing indebtedness of the person obligating himself to pay such an annuity, shown by his admission, accompanied by his further admission that the payments contemplated were interest on the debt, is presumed, in the absence of evidence to the contrary, to have been due and payable at the date of the annuity agreement. *Griffith v. Adair*, 74 W. Va. 646, 82 S. E. 479.

III. ON WHAT PROPERTY CHARGEABLE.

½A. IN GENERAL.

Testator directed the payment of an annuity for five years to his daughter out of his estate other than that loaned to his wife for life or widowhood, and further directed that, upon the death or marriage of his wife, the property loaned to her should be sold and the proceeds divided equally among all his children, including said daughter. Looking to the will as a whole, it is manifest that the annuity to his

daughter was not to be paid out of the property loaned to his wife. *Willcox v. Willcox*, 106 Va. 626, 56 S. E. 588.

V. PAYMENT.

C. VALUE—HOW COMPUTED.

When a testator charges his estate with the maintenance and support of his widow during her life, and later by decree a certain sum is ascertained as an allowance for the annual support of the widow, her right to such sum depends on her using it during her natural life. Such sum can not be charged against the estate in favor of her devisee or personal representative. *Brown v. Cresap*, 61 W. Va. 315, 56 S. E. 603.

Where a testator directed the payment of an annuity for five years to his daughter out of his estate other than that loaned to his wife for life or widowhood, the annuity to the daughter continued only for a period of five years. *Willcox v. Willcox*, 106 Va. 626, 56 S. E. 588.

A testator, by clause 2 of his will, devised real estate to his son E., for life, with remainder to his children; and if none, to a trustee named in clause 3, to be held upon precisely the same trusts as those declared in clause 3. By clause 3 he devised other real estate to a trustee with directions to lease it, and after paying expenses and repairs, to pay to his son M. \$600 per annum till marriage, and after during his lifetime to pay him \$1,200 per annum, if the property yielded so much; to invest the residue; and upon the death of M. the real estate and the invested funds were to pass to the children, if any, of M. and their descendants by stocks, and if no such children or descendants then to the other son E. for life, with remainder to his children or their descendants, as provided by clause 2. Clause 3 declared that the sole purpose of providing for M. was to furnish him with a maintenance and support, dur-

ing his natural life, and forbade him to sell, encumber or anticipate his annuity; and further provided that it should not be liable for any of his debts, present or future. By clause 4 he directed that if neither E. nor M. left any child, or descendant of any child, then the estate devised by clauses 2 and 3 should pass to the children of his uncle R. The son E. died without any child or descendant of any child during the lifetime of M. The latter claimed that by the death of E. two trust funds were created, and that he was entitled to receive \$600 per annum from each fund until marriage, and \$1,200 from each after marriage until his death. Held, but one trust fund was created, and M. is only entitled to \$600 per annum till marriage and \$1,200 per annum thereafter during his lifetime. The assets from which the annuity is payable are increased, but not the annuity. *McCurdy v. O'Rourke*, 106 Va. 683, 56 S. E. 573.

Annuity Table—Rules of Computation.—Va. Code 1919, §§ 5131-5133. Barnes Code, ch. 65, §§ 17-20.

D. INTEREST.

The annual payments not having been made, the beneficiary is entitled to interest on each annual payment from the time it became due and payable. *Willcox v. Willcox*, 106 Va. 626, 56 S. E. 588.

E. DEFENSES AGAINST COLLECTION.

A will by which a testator gave to his daughter an annuity for five years was admitted to probate in October, 1878. In November, 1879, she demanded payment of the first installment, but it was refused because the estate was largely indebted and delay in settlement was unavoidable. In 1880 the executor filed his bill asking a construction of the will and the administration of the estate under the direction of the court. The estate, exclusive of certain property loaned to

the testator's widow for life, was insufficient to pay his debts. The cause continued on the docket until 1905, when the daughter filed her answer demanding the payment of her annuity, with interest. Among other defenses to her claim was that of laches. There was no death of parties, loss of evidence, or change of conditions alleged in support of the defense. Held, the daughter was not guilty of laches in asserting her claim. *Willcox v. Willcox*, 106 Va. 626, 56 S. E. 588.

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CROSS REFERENCES.

See the title ANSWERS, vol. 1, p. 389, and references there given. In addition, see ante, ABATEMENT, REVIVAL AND SURVIVAL; post, APPEAL AND ERROR; ATTACHMENT AND GARNISHMENT; BANKS AND BANKING; CORPORATIONS; CROSS BILLS; DEMURRERS; DISCOVERY; EQUITY; EXECUTION AND PROOF OF DOCUMENTS; INFANTS; LEGAL CONCLUSIONS; PLEADING; RECEIVERS. As to

amendment of answers, see ante, AMENDMENTS. As to answers to cross bills, see post, CROSS BILLS. As to answer as a cross bill, see post, CROSS BILLS.

II. NATURE AND FUNCTION.

A. IN GENERAL.

Double Office.—An answer in cases where relief is sought, properly consists of two parts; and in fact performs a double office. It consists, first, of the defense of the defendant to the case made by the bill; and, secondly, of the examination of defendant on oath, as to the facts charged in the bill, of which a discovery is sought, and to which interrogatories are usually addressed. *Johnson v. Mundy*, 123 Va. 730, 97 S. E. 564.

When Answer May Pray for Affirmative Relief.—The general rule of chancery practice is that an answer to a bill can only pray for dismissal of the bill, and not for affirmative relief on new matter presented by it, that being a proper subject for a cross bill; but, under our practice, there are certain exceptions to this, outside of answers under § 35, Ch. 125, Code. In such cases, relief may be given to the defendant on such ordinary answer against the plaintiff, but not against a co-defendant. To affect him, resort must be had to a cross bill, or an answer, under § 35, Ch. 125, in lieu of a cross bill. *Freeman v. Egnor*, 72 W. Va. 830, 79 S. E. 824. See post, CROSS BILLS.

An answer can not introduce foreign matter as ground for affirmative relief. *Price v. Price*, 68 W. Va. 389, 392, 69 S. E. 892.

Effect of Denial by Answer.—*Barnes* Code W. Va., p. 1119, ch. 125, § 59.

B. NECESSITY FOR ANSWER.

Where an amended bill to meet new matter introduced in the answer, not as a basis for affirmative relief, but defensive only and calling for a reply, relates only to certain items of debit and credit in an accounting to be had between the parties, and the case on

its merits has been fully matured for hearing, it is unnecessary to await the answer of the defendant to the amended bill before adjudicating the principles of the cause and directing such accounting. *Gay v. Gibson*, 85 W. Va. 226, 101 S. E. 365.

III. RIGHT AND TIME TO FILE.

A. GENERAL RULE.

1. In Virginia.

When Defendant in Equity May Answer; Penalty for Delay.—A defendant in equity upon whom process has been executed shall file his answer or other defense in the court or in the clerk's office of the court in which the suit or proceeding is pending within six months from the date of such service, unless after notice to the adverse party, and for good cause shown, the time be lessened by the court or additional time be given by the court, or the judge thereof in vacation, within which to file the same. After the lapse of such six months, or additional time, if any such be granted, no answer or other defense shall be received except for good cause shown and upon payment to the complainant of his costs up to that time, or such part thereof as the court or judge shall deem reasonable, and unless the defendant will undertake to file his answer within such time as the court or judge shall direct, and submit to such other terms as the court or judge shall direct, for the purpose of speeding the cause. Va. Code 1919, § 6122.

This provision of the Code of 1919 changed the rule embodied in § 3275 of the Code of 1887, under which the defendant had the right to file an answer at any time before final decree. *Collier v. Seward*, 113 Va. 228, 74 S. E. 155, citing *Bean v. Simmons*, 9 Gratt. (50 Va.) 389.

Although it is true that under § 3275 of the Code of 1904 a defendant might

have been allowed, under certain restrictions, to file his answer at any time before final decree, that did not affect the right of the plaintiff, by the proper proceeding, to have the court compel him to answer sooner. *Johnson v. Mundy*, 123 Va. 730, 97 S. E. 564.

2. In West Virginia.

Time within Which Answer May Be Filed.—*Barnes W. Va. Code*, p. 1118, ch. 125, § 53.

Defendant may file his answer at any time before final decree. *Stoddard v. Jarrett*, 76 W. Va. 203, 85 S. E. 251; *Ash v. Lynch*, 72 W. Va. 238, 78 S. E. 365.

A defendant has a right to file his answer at any time before final hearing, but he can not delay the hearing unless, by affidavit filed, good cause be shown therefor. Section 53, chapter 125, Code (1906); *Keck v. Allender*, 37 W. Va. 201, 16 S. E. 520; *Kimble v. Wotring*, 48 W. Va. 412, 37 S. E. 606; *Augir v. Warder*, 68 W. Va. 752, 755, 70 S. E. 719.

Although a decree has been pronounced, signed and directed to be entered, an answer may be filed in the cause, if it has not been actually entered in the order book. *Ash v. Lynch*, 72 W. Va. 238, 78 S. E. 365.

That, in such case, the defendant prevented entry of the decree by taking it and the papers in the cause from the clerk's office of the court, does not justify rejection of the answer or denial of leave to file it. *Ash v. Lynch*, 72 W. Va. 238, 78 S. E. 365.

B. AFTER FINAL DECREE.

An answer, tendered after a final decree has been rendered upon bill taken for confessed, is properly rejected when not accompanied by affidavit showing good cause for delay. *McDonald v. McDonald Planing Mill Co.*, 73 W. Va. 78, 79 S. E. 1081. See also, *McLaughlin v. Sayers*, 72 W. Va. 364, 78 S. E. 355.

After a final decree in a suit to obtain the removal of a guardian and the settlement of his accounts, the guardian

filed a petition for rehearing (regarded by the court as a bill of review) on the ground that the commissioner in taking his account failed to allow him certain credits dependent upon extrinsic evidence. Held: That the bill of review of the guardian was in truth a belated answer sought to be filed after a final decree, and that this could not be done even under the liberal practice permitted by § 3275 of the Code of 1904. *Gills v. Gills*, 126 Va. 526, 101 S. E. 900.

An answer, filed after the term of court has ended at which an appealable decree was rendered, can not raise an issue upon the questions determined by such decree. *Wright v. Pittman*, 73 W. Va. 81, 79 S. E. 1091.

C. AFTER PLEA OR DEMURRER OVERRULED.

Barnes W. Va. Code, p. 114, ch. 125, § 30.

Necessity for Rule to Answer.—On the overruling of a demurrer to the bill, if the defendant does not answer or waive his right to do so, a rule to answer must be given him before any decree affording the plaintiff relief can be taken. *Ross v. Ross*, 72 W. Va. 640, 78 S. E. 789.

"Yet the rule need not be served, and amounts only to an order that the defendant answer within a certain time, which may be regulated according to the circumstances of the particular case. So the statute has long been interpreted. From our examination into the origin and history of this statute we doubt whether it has always been rightly understood and interpreted. It would seem that it should not apply in favor of a defendant who, as appellant here, is in default by a bill taken for confessed against him at rules. *Brent v. Washington*, 18 Gratt. (59 Va.) 526; *Reynolds v. Bank*, 6 Gratt. (47 Va.) 174. Such a defendant has already neglected a rule to plead. Why should another be given him? But no distinction has ever been made in our cases.

They apply the statute to any defendant, whether one in default or not." *Ross v. Ross*, 72 W. Va. 640, 642, 78 S. E. 789.

Right to Answer at Any Time before Final Decree Not Precluded.—Section 30 of ch. 125 of the Code, ser. § 4784. *Waggy v. Waggy*, 77 W. Va. 144, 87 S. E. 178. See ante, "In West Virginia," III, A, 2.

D $\frac{1}{4}$. FILING AT SPECIAL TERM.

Reliance upon a local rule of practice relieving from duty to prepare chancery causes for submission at special terms constitutes no excuse for failure to answer within the period prescribed by a rule requiring the defendant to do so, and such default confers upon the plaintiff right to a decree at a special term, if his bill and evidence are sufficient. *Waggy v. Waggy*, 77 W. Va. 144, 87 S. E. 178.

D $\frac{1}{2}$. ANSWER TO AMENDED BILL.

Time Allowed to Answer Amended Bill.—Barnes Code W. Va., p. 1112, ch. 125, § 12.

D $\frac{3}{4}$. WHEN A CROSS BILL IS FILED.

Va. Code 1919, § 6097.

E. EFFECT OF FAILURE TO FILE OR IRREGULARITY IN FILING.

Va. Code 1919, § 6120. Barnes Code W. Va., pp. 1114, 1116, ch. 125, §§ 30, 44.

IV. FORMAL REQUISITES.

C. OATH.

1. General Rule.

a. In Virginia.

Va. Code 1919, § 6128.

In the absence of statute, or rule of court, or express leave by order of court, answers in all suits in equity must be under oath, except the answers of corporations, infants, committees of persons of unsound mind, and guardians ad litem, which need not be under oath, unless required by statute in some statutory proceedings. *Johnson v. Mundy*, 123 Va. 730, 758, 97 S. E. 564.

Prior to 1884 all answers were under oath, and in 1884 the statute was passed modifying the effect of answers as evidence in chancery suits by allowing the complainant to waive an answer under oath. *Vashon v. Barrett*, 105 Va. 490, 54 S. E. 705. See post, "Waiver of," IV, C, 5; "Effect of Waiving Oath to Answer," XIII, D, 3.

b. In West Virginia.

Barnes Code W. Va., p. 1115, ch. 125, § 38.

3 $\frac{1}{4}$. Before Whom Taken.

Answer May Be Sworn to before Clerk of Court.—Va. Code 1919, § 6129.

4. Sufficiency of.

Affidavit of Belief Sufficient.—Va. Code 1919, § 6129.

5. Waiver of.

Effect of Waiver of Answer under Oath.—Va. Code 1919, § 6128.

This statute modifies the effect of answers as evidence in chancery suits by allowing the complainant to waive an answer under oath. *Vashon v. Barrett*, 105 Va. 490, 54 S. E. 705. See post, "Effect of Waiving Oath to Answer," XIII, D, 3.

Mode of Waiver.—It is suggested, if it is desired to waive an answer under oath, that, instead of the form in common use, the bill should simply pray that the desired parties "be made defendants to this bill, and, waiving an answer under oath, that," etc. *Blanchard v. Dominion Nat. Bank*, 125 Va. 586, 100 S. E. 463.

V. SUFFICIENCY OF ANSWER.

A. MUST BE FULL.

1. General Rule.

"As Mr. Hogg says, in his valuable work on Equity Pleading, in reference to an answer: 'Its real purpose is to apprise the plaintiff of the extent and nature of the defense offered to the bill, and so inflexible is this principle that a defendant can avail himself of no matter of defense not stated in the answer, even though it is established by the evidence. I Hogg's Eq. Pr.," §

397, p. 471. *Johnson v. Mundy*, 123 Va. 730, 748, 97 S. E. 564.

The answer, as a pleading, may traverse each and all of the material allegations of the bill directly, distinctly, categorically and unequivocally, but that is not enough, if the plaintiff insists upon a full answer. It must go further and state affirmatively the facts constituting the defense of the respondent, whether that defense is in conflict, in whole or in part, with the allegations of fact in the bill, or is in confession and avoidance. *Johnson v. Mundy*, 123 Va. 730, 97 S. E. 564.

2. Must Contain Specific, Direct Denial.

General Denial in Absence of Specific Exceptions.—A general denial in an answer of such allegations of a bill as are not admitted suffices, in the absence of specific exceptions to the denial on account of its generality, pointing out the particular allegations as to which admissions or denials are insisted upon. *Huntington, etc., Co. v. Harvey Coal, etc., Co.*, 73 W. Va. 527, 80 S. E. 871.

Though the answer in this case was somewhat informal, inartistic and general, yet in the absence of an exception to it for generality and a demand for a more specific denial, it was held to be sufficient. *George v. Crim*, 66 W. Va. 421, 429, 66 S. E. 526.

The answer of an assignee to a bill, attacking an assignment of a fund, as having been fraudulently made, must deny notice of fraudulent intent of the assignor, as well as fraudulent intent on the part of the assignee. Failure to deny it is equivalent, in legal effect, to an admission of the truth of the allegation of notice. *Dent v. Pickens*, 59 W. Va. 274, 53 S. E. 154. See post, "Effect of Not Answering Particular Allegations," XIII, N, 3.

The answer of an assignee, responding to a bill charging fraud in the assignment, specifically denies the fraudulent intent imputed to him by the al-

legations of the bill, says nothing as to the fraudulent intent imputed to his assignor, is silent as to the allegation of notice of the fraud of the latter, and denies generally each and every charge or intimation of fraud charged against respondent in plaintiff's original and amended bills; and there is no exception to said answer. Held, the general denial is insufficient to negative fraudulent intent of the assignor and notice thereof to the assignee. *Dent v. Pickens*, 59 W. Va. 274, 275, 53 S. E. 154.

The answer in this case is argumentative and evasive, not making a full and square denial of the plaintiff's claim. *Grant v. Cumberland Valley Cement Co.*, 58 W. Va. 162, 172, 52 S. E. 36.

2½. Answer As to Defendant's "Remembrance, Information and Belief" May Be Required.

The plaintiff is entitled to insist upon an answer, not only according to the "knowledge" of the defendant, but also "as to his remembrance, information and belief." *Johnson v. Mundy*, 123 Va. 730, 97 S. E. 564.

2½. Denial of Knowledge of Facts Not Denied Sufficient.

"If the defendant answers, and answers only a part of the allegations of the bill, if he denies knowledge as to the facts not denied, it is sufficient, under the practice in Virginia, to put such facts in issue. 1 Hogg's Eq. Pr. § 404, p. 482." *Johnson v. Mundy*, 123 Va. 730, 748, 97 S. E. 564.

3. Answering Interrogatories.

In the instant case where complainant waived an answer under oath, the defendants having answered fully all of the allegations of the bill, except the interrogatory, they could properly refrain from answering further, and this notwithstanding the general rule that having answered defendant must answer fully. *Johnson v. Mundy*, 123 Va. 730, 97 S. E. 564.

3½. Where Second Amended Bill Adds No New Matter.

Where a second amended bill in a case adds no new matter, an answer filed to the original and first amended bills puts in issue all matters of fact involved in the cause. *Baker v. Berry Hill Mineral Springs Co.*, 112 Va. 280, 71 S. E. 626.

4. What Need Not Be Answered.

a. Immaterial Matter.

An allegation in a bill, which, by reason of its vagueness and uncertainty, fails to show materiality of its subject matter, need not be answered. *Burkheimer v. National Mut., etc., Ass'n*, 59 W. Va. 209, 210, 53 S. E. 372.

c. Statement of Facts Constituting Part of Plaintiff's Case Not Required.

An answer not under oath is not free from all exception for insufficiency. But the requirements of modern equity procedure as to affirmative statements of defense in an answer, when considered merely as a pleading, does not lead to the result of allowing a plaintiff to compel a respondent to go beyond traversing each and all of the material allegations of the bill and giving an affirmative statement of facts constituting his own defense, and compel him to also add a statement of facts not a part of his defense, but a part of the plaintiff's case, and which the plaintiff needs and seeks as evidence to support his case. *Johnson v. Mundy*, 123 Va. 730, 97 S. E. 564.

B½. DENIAL OF CONTRACT BY STATEMENT OF IT WITH CONDITIONS OR LIMITATIONS NOT MENTIONED IN BILL.

An answer denying the contract alleged by the bill, not in affirmative or negative terms, but by statement of the same contract with conditions or limitations not mentioned in the bill, is defensive and sufficient, if the truth

of its averments would preclude relief sought by the bill. *Ash v. Lynch*, 72 W. Va. 238, 78 S. E. 365.

Such an answer can not be rejected for mere omission of admission or denial of other portions of the bill not conclusive of the case. *Ash v. Lynch*, 7 W. Va. 238, 78 S. E. 365.

VI. SPECIAL DEFENSES WHICH MAY BE SET UP BY ANSWER.

For a full treatment of this subject, see the specific titles in this work.

VII½. EFFECT OF ANSWER.

Plea Overruled by Answer.—"If an answer commences as an answer to the whole bill, it will overrule a plea to any part of the bill, although the defendant did not in fact answer that part of the bill which is covered by plea." So says a late and admirable book. *Fletcher, Eq. Pl. & Pr.*, § 247." *McDermitt v. Newman*, 64 W. Va. 195, 202, 61 S. E. 300.

VIII. ANSWERS BY PARTIES IN SPECIAL INSTANCES.

Infants.—See post, INFANTS.

Corporations.—See post, CORPORATIONS.

IX. OBJECTIONS AND EXCEPTIONS TO ANSWER.

A. IN GENERAL.

Effect of Objection to Answer Presenting No Defense.—Where an answer which presents no defense is offered, the court should, upon objection, refuse to permit it to be filed. *Gauley Coal Land Ass'n v. Spies*, 61 W. Va. 19, 55 S. E. 903.

C. EXCEPTIONS.

1. Office and Object.

a. In Virginia.

Exceptions for Insufficiency Abolished—Motion to Strike Out Substituted.—Va. Code 1919, § 6123.

An exception to the sufficiency of an answer is tantamount to an averment that the answer, if true, constitutes no defense to the complainant's demand.

If the answer states a good defense, the exception should be overruled. *Keys Planing Mill Co. v. Kirkbridge*, 114 Va. 58, 75 S. E. 778.

b. In West Virginia.

Strictly speaking the office of an exception to answer in equity is to specifically point out some particular allegation of the bill which is not responded to, or to which a better or more specific answer is required, or to rid the answer, when desired, of some scandalous or impertinent matter. *Lawrence v. Montgomery Gas Co.*, 84 W. Va. 382, 99 S. E. 496.

But in West Virginia by a loose practice indulged, the sufficiency of an answer as a whole or in part may be challenged by an objection or exception thereto; and perhaps, on specific objection to immaterial matter in the answer, such matter may be eliminated, and the issues thereby limited to the material facts put in issue by the bill and answer. *Lawrence v. Montgomery Gas Co.*, 84 W. Va. 382, 99 S. E. 496.

The practice in some of our federal courts to treat a demurrer to an answer, or general exceptions thereto which are equivalent to a demurrer, as a motion to set the cause down for hearing on bill and answer, and a waiver of the right to contest the facts alleged, has not been followed in the courts of this state. And where such general exceptions are interposed to answer and one or more of the allegations thereof may be good or sufficient to put in issue some material fact alleged in the bill, the decree below overruling such exceptions as a whole will not be reversed on appeal. *Lawrence v. Montgomery Gas Co.*, 84 W. Va. 382, 99 S. E. 496.

2. Grounds of.

When Plaintiff Can Not Except Because of Failure to Make Discovery—Answer Not under Oath.—If a plaintiff, in a bill for equitable relief (which the court has jurisdiction to give in-

dependent of discovery), prays for certain disclosures of fact by the defendants, in aid of such equitable relief, but waives answer under oath, the plaintiff can not except to the answer as insufficient because the respondents, although answering fully as to all other portions of the bill, fail to make the discovery asked for. In the absence of statute, or some rule of court authorizing it, there can be no discovery compelled by a bill waiving answer under oath, and § 3281 of the Code of 1904 (Code 1919, § 6128) has not changed this established rule of procedure in chancery. *Johnson v. Mundy*, 123 Va. 730, 97 S. E. 564. See post, DISCOVERY.

4½. Admissions by.

Exceptions to an answer which sets up affirmative matter in bar, being analogous to a demurrer to a bill or plea, admit the truth of the allegations excepted to. *Caswell v. Caswell*, 84 W. Va. 575, 100 S. E. 482.

Exceptions filed to an answer in chancery have the effect of a demurrer to other pleadings, and admit as true all the statements and allegations of the answer which are relevant and properly pleaded. *Norfolk v. Norfolk County Water Co.*, 113 Va. 303, 74 S. E. 226.

"The exception is tantamount to saying that the averment in the answer, if true, constitutes no defense to the bill." *Caswell v. Caswell*, 84 W. Va. 575, 100 S. E. 482, 485.

5. Disposition of.

Barnes Code W. Va., p. 1118, ch. 125, § 54.

X. DISCOVERY AND COMPELLING ANSWER.

See post, DISCOVERY.

XI. AMENDMENT OF ANSWERS.

See ante, AMENDMENTS.

XIII. ANSWER AS EVIDENCE.

A. GENERAL RULE.

Where "no replication is made, and no proof taken * * * the allega-

tions of the answer must be taken as true. *Wilt v. Huffman*, 46 W. Va. 473, 33 S. E. 279, and *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804." *Brown v. Click*, 65 W. Va. 459, 460, 64 S. E. 613.

In the absence of a replication, the answer of a defendant in an equity suit is taken as true for the purposes of the case, if the defendant has not taken depositions as if one had been filed and thus submitted the case upon its merits. *McCoy v. McCoy*, 74 W. Va. 64, 81 S. E. 562.

An answer to a bill for specific performance of a contract of sale of land, founded upon a written contract, exhibited therewith, and an alleged verbal contract, so far performed as to take it out of the statute of frauds, denying the sufficiency of the written contract on the ground of uncertainty, and also the existence of any contract, either written or verbal, and also the alleged acts of part performance, casts upon the plaintiff the burden of proving a written contract, good under the statute of frauds, or part performance of a verbal contract, sufficient to take it out of said statute. *Smith v. Peterson*, 71 W. Va. 364, 76 S. W. 804.

B. RESPONSIVENESS.

An answer responsive to a bill of discovery must be taken as true, unless overcome by other evidence. *Anderson v. Union Bank*, 117 Va. 1, 83 S. E. 1080.

D. LIMITATIONS AND EXCEPTIONS.

1. Answer Setting up Affirmative Matter.

a. In Virginia.

"It is well settled that where the answer is not responsive to the bill, or sets up affirmative allegations of new matter in avoidance of the complainant's demand, and is replied to, the answer is of no avail as evidence in respect to such allegations, and the respondent is as much bound to establish the allegations by independent testimony as the complainant is to sustain

his bill. * * * 1 *Daniel's Chy. Pr.*, 844, note; 1 *Barton's Chy. Pr.*, 419." *Wingfield v. McGhee*, 112 Va. 644, 647, 72 S. E. 154.

b. In West Virginia.

Admission by Failure to Reply to Allegations of Answer.—Every material allegation of new matter in the answer constituting a claim for affirmative relief, not controverted by a special reply in writing, shall for the purposes of the suit, be taken as true, and no proof thereof shall be required. *Barnes Code W. Va.*, p. 1115, ch. 125, § 36.

3. Effect of Waiving Oath to Answer.

Va. Code 1919, § 6128.

Where an answer under oath has been waived, the answer affords no evidence in favor of defendant, and amounts to nothing more than a traverse, serving to compel the plaintiff to prove the material allegations of his bill. *Hutcheson v. Savings Bank*, 129 Va. 281, 105 S. E. 677.

F. EVIDENCE NECESSARY TO OVERCOME ANSWER.

1. General Rule.

If a bill calls for an answer under oath from the defendant, such answer, when made, in so far as it is responsive to the bill, is admissible in favor of the defendant, and is conclusive until it is overcome by two witnesses, or by one witness and corroborating circumstances. *Shenandoah Land, etc., Coal Co. v. Clarke*, 106 Va. 100, 55 S. E. 561.

An answer under oath, denying substantially all the allegations of the bill; (answer under oath not having been waived) furnishes evidence for the defendant and will be taken as true unless overcome by the testimony of two witnesses, or of one witness and corroborating circumstances, or by documentary evidence. *Becker v. Johnson*, 111 Va. 245, 68 S. E. 986; *Haynor v. Haynor*, 112 Va. 123, 125, 70 S. E. 531.

There was a general waiver of an answer under oath in an amended bill against a corporation and other de-

fendants, but there was also a subsequent special prayer therein for a discovery under oath from the corporation as to a certain fact. The disclosure in the corporation's answer was made in strict response to the prayer, and the answer was sworn to by the corporation's president, in effect stating as facts such matters therein as came within his own knowledge. It appeared from the record that the president necessarily had personal knowledge of the facts as to which the discovery was demanded. Held: That the answer of the corporation upon that point was evidence against the complainant, only to be overcome by the evidence of two witnesses, or of one witness and corroborating circumstances. *Carle v. Corhan*, 127 Va. 223, 103 S. E. 699.

G. AS EVIDENCE AGAINST AND FOR CODEFENDANTS.

1. Against Codefendant.

"The answer of one defendant, as to its statement of facts, is binding on his codefendant where they have a joint interest as stated in *Dickinson v. Clarke*, 5 W. Va. 280, pt. 3, and 10 Cyc. 981, and 4 Elliot on Ev., § 3206, and 1 Am. & Eng. Ency. L. (2d Ed.), 703, 720." *Hudkins v. Crim*, 64 W. Va. 225, 235, 61 S. E. 166.

The answer of an adult codefendant has no effect against an infant. *Holderby v. Hagan*, 57 W. Va. 341, 346, 50 S. E. 437. See post, "Answer of Infant Defendant," XIII, H.

2. For Codefendant.

a. General Rule.

"The general rule, certainly in Virginia, is that the separate answer of one defendant can not be used as evidence for a codefendant. *Frank v. Lilienfeld*, 33 Gratt. (74 Va.) 377, 380; *Lile's Eq. Pl. & Pr.*, § 192; 1 Hogg's Eq. Proc., § 447. *Carle v. Corhan*, 127 Va. 223, 230, 103 S. E. 699.

In a suit brought to enforce the specific performance of a contract,

where the party with whom the contract is alleged to have been made, and against whose heirs the contract is sought to be enforced, is dead; and where the administrator and heirs of the decedent are made parties defendant, an answer filed by the administrator, contesting the right of plaintiff to have specific performance, and denying the allegations of the bill, does not enure to the benefit of his codefendants. *Ferrell v. Camden*, 57 W. Va. 401, 50 S. E. 733.

b. Exceptions to Rule.

But, as said by Judge Burks in the case of *Frank v. Lilienfeld*, 33 Gratt. (74 Va.) 377, there are exceptions to the rule. *Carle v. Corhan*, 127 Va. 223, 230, 103 S. E. 699.

Answer of Corporation as Evidence for Co-Defendants.—The answer of the corporation in the instant case falls within one of the exceptions to the rule that an answer of one defendant is not evidence for a co-defendant. The respondent corporation, as to this particular matter, stood in a relationship of privity with its co-defendants; and, moreover, the very form of the bill and its special prayer for discovery called for an answer, which, if adverse to complainant, necessarily established as a fact the very defense upon which the corporation's co-defendants relied. *Carle v. Corhan*, 127 Va. 223, 103 S. E. 699.

H. ANSWER OF INFANT DEFENDANT.

"The answer of an infant defendant by his guardian is not evidence against him; material allegations in the bill must be proved by other means. It may, however, be evidence in his favor." *Holderby v. Hagan*, 57 W. Va. 341, 346, 50 S. E. 437. See post, "Admissions of an Infant or His Codefendant," XIII, N, 5.

N. ADMISSIONS BY ANSWER.

1. Express Admissions.

As Evidence in a Different Cause.

—"An admission in an answer may be evidence in a wholly different cause. 2 Wigmore on Evidence, § 1064; 11 Amer. & Eng. Enc. of Law, 449." *Morrison v. Leach*, 75 W. Va. 468, 84 S. E. 177, 179.

On the hearing of an issue in chancery between co-defendants to a cause, made by pleadings allowed subsequent to a final determination of the main issues, the answer of either of the parties on the former issues may be read as an admission against him. *Morrison v. Leach*, 75 W. Va. 468, 84 S. E. 177.

Admission of Common Source of Title.—In a suit to remove cloud upon plaintiff's title and to enjoin the cutting of timber on his land, admission in defendant's answer of a common source of title, though not alleged in the bill, will excuse plaintiff on the trial from proof of title back of the common source so admitted. *Halstead v. Aliff*, 78 W. Va. 480, 89 S. E. 721.

Such common source of title not being the foundation for the relief prayed for, but only a fact provable under the allegation of good title in defendant, and possession, the proposition stated in the preceding paragraph does not contravene the rule that admissions in an answer to a bill in chancery can not lay the foundation for relief under any specific head of equity, unless substantially set forth in the bill. *Halstead v. Aliff*, 78 W. Va. 480, 89 S. E. 721.

Admission that Money Was Paid Out and Not Retained.—Where it is alleged that a party to a partnership settlement, having the custody of social property and funds, authority to incur and pay expenses and make, and cause to be made, entries of such expenses in the firm books, as charges against its assets, made entries therein of large charges, as for expenses paid, of money which had not been paid and for payment of which there was no obligation, rights or basis and so

procured a settlement leaving such sums of money in his own hands as secret, wrongful and clandestine profits, an answer, admitting the existence of the charges on the books, not denying the making thereof by the defendant, or at his instance, and averring payment of the money represented by them to a person other than any of those named in the entries, for the persons so named, is a judicial admission that such sums were paid out and not retained, and is conclusive upon the defendant in all of its tendencies, bearings and aspects, wherefore evidence of rightful retention thereof is neither admissible nor probative. *Teter v. Moore*, 80 W. Va. 443, 93 S. E. 342.

Admission that Election Was Valid.—A defendant who has set up the defense, by answer, that an election was valid, can not subsequently claim that it was invalid and claim a new election, although the plaintiff had alleged the invalidity of the election in his complaint, but had subsequently abandoned that position. *Board v. Spilman*, 113 Va. 391, 74 S. E. 151.

The answer of vendees in garnishment proceedings admitting a balance of indebtedness under the contract of sale to the vendor is not inconsistent with vendees' claim of title to the lumber itself under the contract of sale or their right to charge the vendor with any advances or loans the vendees may have made to him under the contract of sale or otherwise. *Ellis, Etc., Lumber Co. v. Hubbard*, 123 Va. 481, 96 S. E. 754.

2. Admissions by Implication.

Proposal in Answer Not Amounting to Admission Entitling Plaintiffs to Specific Performance.—The mere proposal of a defendant in his answer to release or surrender a part of the land held under a lease from plaintiffs, in a suit to cancel the entire lease, where the answer denies the material facts alleged in plaintiffs' bill does not amount to admission of the facts en-

titling plaintiffs to specific performance of such proposal. *Hart v. Kanawha Oil Co.*, 79 W. Va. 161, 90 S. E. 604.

3. Effect of Not Answering Particular Allegations.

a. In Virginia.

Allegations of a bill not denied or noticed in the answer are not to be taken as admitted by the defendant, but, if material to the plaintiff's case, must be proved by independent testimony. If the plaintiff desires to insist upon a response to such allegations he should except to the answer for insufficiency. *Wright v. Wright*, 124 Va. 114, 97 S. E. 358.

This rule, however, is subject to the qualification that on a motion to dissolve an injunction, the allegations not denied or admitted in the answer must be taken as true. *Wright v. Wright*, 124 Va. 114, 117, 97 S. E. 358, quotes and reaffirms the rule laid down in *Dangerfield v. Claiborne*, 2 Hen. & M. 17. See ANSWERS, vol. 1, p. 414.

b. In West Virginia.

See post, "Admissions of an Infant or His Codefendant," XIII, N, 5.

Barnes Code W. Va., p. 1115, ch. 125, § 36.

"All allegations (of the bill) not denied are taken as true. Code, chapter 125, § 36; *Gardner v. Landcraft*, 6 W. Va. 36; *Dickinson v. Railroad Co.*, 7 W. Va. 390; *Warren v. Syme*, 7 W. Va. 474; *Burlew v. Quarrier*, 16 W. Va. 108." *Grant v. Cumberland Valley Cement Co.*, 58 W. Va. 162, 172, 52 S. E. 36.

Assignee's Failure to Deny Notice of Fraudulent Intent of Assignor.—In the answer of an assignee to a bill, attacking an assignment of a fund, as having been fraudulently made, failure to deny notice of fraudulent intent of the assignor, is equivalent, in legal effect, to an admission of the truth of the allegation of notice. *Dent v. Pickens*, 59 W. Va. 274, 53 S. E. 154.

What Amounts to a Denial of Allegations of Bill.—If the protestations of want of knowledge of the truth of the allegations of the bill is accompanied by a general denial, it devolves upon the plaintiff to prove the facts, but a mere averment of want of personal knowledge is not a denial of the allegations. "A general denial of all material allegations will be sufficient, if not expected to. *Richardson v. Donehoo*, 16 W. Va. 685; *Warran v. Syme*, 7 W. Va. 474; *Fleming v. Holt*, 12 W. Va. 143, 160. This liberality in favor of the respondent, however, does not go so far as to enable him to put the complainant to the proof of an allegation without denying it all. *Dent v. Pickens*, 59 W. Va. 274, 53 S. E. 154." *Hogan v. Piggott*, 60 W. Va. 541, 544, 56 S. E. 189.

Answer Not Amounting to Denial of Allegations of Bill.—Where a bill charges the making, execution and delivery by decedent to plaintiff of the note sued on, nonpayment of the principal and interest thereof, and that the same remains wholly due and unpaid, the answer of defendants that said allegation may be true, though not admitted by them to be true, and that it may also be true as alleged that no part of said note or interest has been paid, but calling for full proof, does not within the meaning of § 3856, Code 1906 (*Barnes Code*, p. 1115, ch. 125, § 36), amount to a denial calling for further proof by plaintiff of the allegations of his bill. *Shurtleff v. Right*, 66 W. Va. 582, 66 S. E. 719.

An answer to a bill by a purchaser in a suit to cancel a deed of trust improperly admitted to record, as being a cloud upon the title, which, for denial of the allegation of payment of a valuable consideration says only that "Respondent is further informed that as a matter of fact" the plaintiff "paid nothing whatever by way of cash" for the property, does not amount to a denial thereof, and, for the purposes of the suit, the allegation must be

taken as true. *Ihrig v. Ihrig*, 78 W. Va. 360, 88 S. E. 1010.

4. Effect of Not Answering at All.

When a bill specifically assails rights claimed by a defendant who is summoned or enters an appearance in the suit recognizing the jurisdiction of the court, he must make direct defense by plea or answer if he would prevent decree against him on the bill taken for confessed. *Katzenstein v. Prager*, 67 W. Va. 343, 67 S. E. 792.

In suit for a settlement and distribution of the assets of an insolvent firm, though the bill makes no allegations affecting the claim of a creditor who is made defendant and appears thereto, if he does not in some way present his claim for adjudication, or does not meet the bill by plea or answer, a decree in the cause will be one upon the bill taken for confessed as to him. *Katzenstein v. Prager*, 67 W. Va. 343, 67 S. E. 792.

A mere suggestion to the court by a defendant that his rights are involved in another pending cause will not alone suffice to prevent decree against him upon the bill taken for confessed. If he would rely upon the pendency of the other cause as a defense to the bill, he must plead it in such a way as to show that it is a bar, or that the other cause has priority of jurisdiction. *Katzenstein v. Prager*, 67 W. Va. 343, 67 S. E. 792.

5. Admissions of an Infant or His Co-defendant.

"From the authorities, uniformly, it is held that not even the admissions of the infant in his answer can be taken against him, but the plaintiff is required to prove each material allegation of his bill with the same certainty and clearness as would be required of him if an answer had been filed denying positively each allegation, and, a fortiori, the

admissions in the answer of a codefendant cannot bind him, although their interests may be joint." *Holderby v. Hagan*, 57 W. Va. 341, 346, 50 S. E. 437.

"Section 36, ch. 125, Code, authorizing averments of the bill to be taken for confessed if they are not denied by answer, is held not to apply to infants, for the reason that they are not competent to make admissions, nor are their guardians ad litem permitted to bind them by admissions in the pleadings. So that, so far as averments in a bill relate to the rights, of an infant defendant, they must be proven in the same manner as if they had been denied by answer. *Laidley v. Kline*, 8 W. Va. 218; *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59; and *Glade Coal Min. Co. v. Harris*, 65 W. Va. 152, 63 S. E. 873;" *Harrison v. Harman*, 80 W. Va. 68, 73, 92 S. E. 460.

Admissions in the answers of mother and father of infant defendants, to a bill of complaint against them and others, are not binding on such infant defendants, and can not be read against them on final hearing of the cause. *Glade Coal Min. Co. v. Harris*, 65 W. Va. 152, 63 S. E. 873.

6. Whole Answer Must Be Taken Together and Explanations Considered.

Where it is sought to charge a defendant by reason of admissions made in his answer to a bill, the whole answer upon that question, if used at all, must be used and taken together, and explanations given must be used in connection with the admissions made; but if answer under oath is waived, and the facts admitted are clearly proved, independent of admissions in the answer, the defendant is not entitled to the benefit of qualifying explanations contained in his answer. *Reager v. Chapplear*, 104 Va. 14, 51 S. E. 170.

ANTEDATING.—As to antedating insurance policy, see post, INSURANCE; LIFE INSURANCE.

ANTE-NUPTIAL CONTRACTS AND SALES.—See post, MARRIAGE CONTRACTS AND SETTLEMENTS.

ANTI-TRUST LAW.—See post, MONOPOLIES AND CORPORATE TRUSTS.

ANY.—See post, FOR; OTHER—OTHERS.

ANY ACTION.—See *Smith v. Northern Neck, etc., Ass'n*, 112 Va. 192, 195, 70 S. E. 482, citing *Danville v. Pace*, 66 Va. (25 Gratt.) 1, 27.

ANY AND ALL LICENSES.—See *Kelley v. Bowman*, 68 W. Va. 49, 56, 69 S. E. 456.

ANY CITY, etc.—*St. Marys v. Woods*, 67 W. Va. 110, 113, 67 S. E. 176. See also post, MUNICIPAL CORPORATIONS.

ANY CLAIM.—See post, COUNTIES.

ANY CONTRACT.—See *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 164, 67 S. E. 613.

ANY DEVISE.—See *Kent v. Kent*, 106 Va. 199, 55 S. E. 564. See also, post, WILLS.

ANY DISTRICT.—See *Townsend v. Board*, 68 W. Va. 40, 44, 69 S. E. 378. See also, post, SCHOOLS.

ANY LAND.—See *White v. Romney*, 69 W. Va. 606, 608, 73 S. E. 323. See also, post, EMINENT DOMAIN.

ANY MEANS.—See post, WOUND.

ANY OTHER ROAD.—In *Ray v. Chesapeake, etc., R. Co.*, 57 W. Va. 333, 50 S. E. 413, the court in construing a statute requiring a bell to be rung or a steam whistle to be whistled "where the railroad crosses any public street or highway" quotes *Thomp. Com. on Negligence* as follows: "The term **any other road** in such a statute has been construed as referring to public highways only, and not to private crossings." See post, CROSSINGS.

ANY PERSON.—See *Norman v. Virginia-Pocahontas Coal Co.*, 68 W. Va. 405, 417, 69 S. E. 857. See also, post, MASTER AND SERVANT.

ANY POLICY.—See *Smith v. Northern Neck, etc., Ass'n*, 112 Va. 192, 196, 70 S. E. 482. Citing *Danville v. Pace*, 66 Va. (25 Gratt.) 1. See also, post, INSURANCE.

ANY POWER.—See post, EXERCISE OR ATTEMPT TO EXERCISE ANY POWER.

ANY QUESTION.—See post, QUESTION.

ANY SEA-GOING SHIP.—See *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 165, 67 S. E. 613.

ANY TIME.—See post, AT.

A PART OF.—See post, UNDER.

APPARATUS.—See *Virginia Lumber & Extract Co. v. O. D. McHenry Lumber Co.*, 94 S. E. 173, 122 Va. 111.

School Apparatus. — *Barnes Code*, ch. 45, § 161, provides "**apparatus**" shall mean maps, charts, globes, arithmetical blocks, rules, pointers, dictionaries and atlases.

APPARENT EASEMENT.—See *Miller v. Skaggs*, 79 W. Va. 645, 91 S. E. 536. See also, post, EASEMENTS.

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CROSS REFERENCES.

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action of State Board of Health granting or refusing to permit to furnish water, to public, see post, **WATER COMPANIES AND WATERWORKS**. As to appeal from the decision of the clerk in proceedings to probate a will, see post, **WILLS**. As to rules of court relating to appellate practice, see 129 Va. p. v.; 83 W. Va. p. xli.

I. GENERAL PRINCIPLES.

A. REVIEW AS A MATTER OF RIGHT.

1. In General.

An appeal from the decision of an inferior court does not lie, unless jurisdiction to entertain such appeal is conferred by Constitution or statute. *Richmond Cedar Works, etc., Co. v. Harper*, 129 Va. 481, 106 S. E. 516; *Carskadon v. Board*, 61 W. Va. 468, 471, 56 S. E. 834; *Wingfield v. Neall*, 60 W. Va. 106, 113, 54 S. E. 47. See post, "Jurisdiction Dependent upon Statute," V, B.

By § 3, art. 8, W. Va. Const., the right of appeal in cases as are therein provided for is secured, which can not be taken away or restricted by legislative enactment. *Carskadon v. Board*, 61 W. Va. 468, 56 S. E. 834. See W. Va. Const., Art. 8, § 6.

Statutory Provision. — Va. Code 1919, § 6336; Barnes Code, ch. 135, § 1.

Compliance with Statutory Conditions Precedent.—The defendant is entitled to an appeal as a matter of right, upon compliance with the statutory conditions precedent. *County Court v. Holt*, 61 W. Va. 154, 156, 56 S. E. 205.

Conditions precedent to the allowance of an appeal, prescribed by the statute, are regarded jurisdictional, and must be strictly complied with. *Smith v. West Virginia Cent. Gas Co.*, 65 W. Va. 216, 217, 63 S. E. 1096. See *Tyson v. Scott*, 116 Va. 243, 81 S. E. 57.

But whether these conditions have been complied with is a matter calling for judicial inquiry and determination. *County Court v. Holt*, 61 W. Va. 154, 156, 56 S. E. 205.

No Religious or Test Oath Required as Prerequisite to Appeal.—Const. of W. Va., Art. III, § 11.

Right to Appeal Question for Appellate Court.—It is the duty of the appellate court to grant a writ of error prayed for unless the decision called in question is plainly right. *Townsend v. Norfolk R., etc., Co.*, 105 Va. 22, 39, 52 S. E. 970.

Construction of Statutes Providing for Appeal.—Statutes providing for the right of appeal are remedial in their nature, and liberal construction will be given to the language employed. *State v. Nangle*, 82 W. Va. 224, 95 S. E. 833.

A statute providing for the right of appeal will be construed so as to maintain the right where this can be done without violating the well established rules for construing statutes. *State v. Nangle*, 82 W. Va. 224, 95 S. E. 833.

But it is not within the powers of the courts to enlarge, by construction, the constitution or statute so as to extend the remedy by appeal, if its provisions do not call for such construction, but, giving them a liberal construction, they must be construed and applied as they exist. *Carskadon v. Board*, 61 W. Va. 468, 471, 56 S. E. 834.

2. Legislative Power as to Causes and Courts.

a. General Rule.

See post, "Controversies Concerning Roads, Ferries or Landings," I, A, 3, a.

The right of appeal is subject to legislative control. *Richmond Cedar Works, etc., Co. v. Harper*, 129 Va. 481, 106 S. E. 516.

"Where the constitution does not expressly give the right of an appeal, the legislature has the right to extend or deny this remedy to the litigant." *Carskadon v. Board*, 61 W. Va. 468, 471, 56 S. E. 834; *Hulvey v. Roberts*, 106 Va. 189, 55 S. E. 585.

Amount in Controversy.—Under the Virginia constitution, the legislature has no right to extend the remedy by appeal, in cases dependent upon the amount in controversy, but under the West Virginia constitution the legislature has no right to restrict the appeal but would have the power to extend the remedy. *Carskadon v. Board*, 61 W. Va. 468, 473, 56 S. E. 834.

b. Establishment of Special Courts of Appeal.

Statutory Provisions. — Va. Code 1919, § 5873.

3. Proceedings in Which Appeals Are as of Right.

a. Controversies Concerning Roads, Ferries, or Landings.

Va. Code 1919, § 6336; Barnes Code, ch. 135, § 1.

While it is true that under the general road law there is an unrestricted appeal to the supreme court, it is within the power of the legislature, by special enactment, to limit that right to judicial questions only. *Wilburn v. Raines*, 111 Va. 334, 68 S. E. 993.

b. Controversies Concerning Wharves.

Statutory Provisions.—See Va. Code 1919, § 6336.

c. Controversies Concerning Mills.

See Va. Code 1919, § 6336; Barnes Code, ch. 135, § 1.

d. Appointment or Qualification of Personal Representative, Guardian, Etc.

Va. Code 1919, § 6336; Barnes Code, ch. 135, § 1.

f. Miscellaneous Proceedings.

Generally.—Va. Code 1919, § 6336; Barnes Code, ch. 135, § 1.

Proceedings before State Corporation Commission.—Va. Code 1919, § 3734. See post, "Appeals from Public Service Commissions," XVI, A, 10½.

Failure or Refusal of Commissioner of Insurance to Review License of Insurance Company.—Va. Code 1919, § 4210.

Proceedings Relating to Public Service Corporations.—Va. Code 1919, § 3902.

Tax Proceedings.—Va. Code 1919, §§ 2237, 2263, 2285, 6336; Barnes Code, ch. 135, § 1.

g. Criminal Cases.

Granted as Matter of Right.—Va. Acts 1920, p. 416; Pollards Code 1920, p. 308 amending Va. Code 1919, § 6348; Barnes Code, ch. 135, § 1.

Verdict on Plea of Guilty.—Ordinarily an appeal does not lie in a criminal case from a judgment of conviction rendered upon a plea of guilty. *Nicely v. Butcher*, 81 W. Va. 247, 94 S. E. 147.

Before receiving a plea of guilty in a criminal case, the court should see that it is made by a person of competent intelligence, freely and voluntarily, and with a full understanding of its nature and effect, and of the facts on which it is founded. If it is doubtful whether the party accused made such plea of guilty, and it clearly appears that he had no such purpose, and did not know that his actions were being so construed until afterward, when he promptly repudiated the construction given his conduct by the court, an appeal will be allowed to a judgment entered thereon. *Nicely v. Butcher*, 81 W. Va. 247, 94 S. E. 147.

5. Estoppel or Waiver Affecting Right.

See post, "Estoppel to Appeal," IV, F.

B. NECESSITY FOR EXISTENCE OF REAL CONTROVERSY.

Whenever it appears, or is made to appear by extrinsic evidence, that there is no actual controversy between the litigants, or that, if it once existed, it has ceased, the appeal or writ of error should be dismissed. Courts of justice sit to decide actual controversies by a judgment which can be enforced, and not to give opinions upon moot questions or abstract propositions of law. *Hamer v. Commonwealth*, 107 Va. 636,

59 S. E. 400; Roanoke R., etc., Co. v. Young, 108 Va. 783, 62 S. E. 961; Norfolk v. Portsmouth, 124 Va. 639, 98 S. E. 755; Levy v. Kosmo, 129 Va. 446, 106 S. E. 228; State v. Carter, 63 W. Va. 684, 60 S. E. 873; Whyel v. Jane Lew Coal, etc., Co., 67 W. Va. 651, 655, 69 S. E. 192; First Nat. Bank v. Cootes, 74 W. Va. 112, 81 S. E. 844.

When pending a writ of error, without fault of a party, an event occurs rendering it impossible for the appellate court, if it should decide in favor of the plaintiff, to grant him substantial relief, the court will not decide the merits and give formal judgment, but will dismiss the writ of error without awarding costs. Elbon v. Hamrick, 53 W. Va. 236, 46 S. E. 1029; Hamilton v. Ammons, 56 W. Va. 190, 49 S. E. 128; DeBoard v. Camden Interstate R. Co., 62 W. Va. 41, 51, 57 S. E. 279, citing Baker v. Tappan, 56 W. Va. 349, 49 S. E. 447; Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co., 105 Va. 574, 576, 54 S. E. 593.

But in the case of Kaufman v. Mastin, 66 W. Va. 99, 66 S. E. 92, it was said that: "Whenever the judgment, if left unreversed, will preclude the party against whom it stands as to a fact vital to his rights, though the judgment if affirmed may not be directly enforceable by reason of lapse of time or change of circumstances pending appeal, a writ of error will not be dismissed as involving only a moot case." See also, Ferguson v. Millender, 32 W. Va. 30, 9 S. E. 38. Barbee v. Howard, 66 W. Va. 631, 632, 66 S. E. 1002.

An appeal from a decree setting aside conveyances as having been made with intent to hinder, delay and defraud creditors can not be dismissed on the motion of the appellee, over the objection of the parties to the deeds, as involving only moot questions, on proof of payment of the debt by the grantee and release of the decree by the creditor, subsequent to the date of the decree. First Nat. Bank v. Danser, 70 W. Va. 529, 74 S. E. 623.

Costs.—"This court will not determine the moot questions presented in order that it may be advised as to who should pay costs." State v. Jones, 81 W. Va. 182, 94 S. E. 120.

Cases Held Moot.—Levy v. Kosmo, 129 Va. 446, 106 S. E. 228; Boatright v. Litz, 125 Va. 613, 100 S. E. 547.

Acquisition of Title Rendering Question as to Easement Moot.—Pingley v. Pingley, 82 W. Va. 228, 95 S. E. 860.

Question of Title to Office Where Term Has Expired.—Barbee v. Howard, 66 W. Va. 631, 66 S. E. 1002. See Baker v. Tappan, 56 W. Va. 349, 49 S. E. 447; Hamilton v. Ammons, 56 W. Va. 190, 49 S. E. 128.

Judgment Ousting Public Officer Where Term Has Expired.—State v. Jones, 81 W. Va. 182, 94 S. E. 120.

Election Pending Writ of Error Relating to Appointment of Election Officials.—State v. Carter, 63 W. Va. 684, 60 S. E. 873.

Removal by Codefendant of Laundry Enjoined as Nuisance.—Garrett v. Smead, 121 Va. 390, 93 S. E. 628.

Dissolution of Injunction as Constituting Moot Question.—Crawford v. Le Fevre, 78 W. Va. 73, 88 S. E. 1087.

Discharge of Defendant on Habeas Corpus.—State v. Emsweller, 78 W. Va. 214, 88 S. E. 787.

Discharge in Bankruptcy Pending Appeal.—This court will not dismiss an appeal, as presenting only a moot question, because defendant was discharged in bankruptcy pending the appeal. First Nat. Bank v. Cootes, 74 W. Va. 112, 81 S. E. 844; Meyers Bros. v. Harman Bros., 78 W. Va. 460, 89 S. E. 140.

C. CONSIDERED AS NEW ACTIONS.

A writ of error or appeal prosecuted in Supreme Court of Appeals is the beginning of a new suit, and not a continuation of an old suit. State v. Moore, 77 W. Va. 325, 87 S. E. 367; Perkins v. Pfalzgraff, 60 W. Va. 121,

132, 53 S. E. 913; *Wingfield v. Neall*, 60 W. Va. 106, 54 S. E. 47.

An appeal to reverse a final decree is a new *lis pendens*, as regards purchasers claiming title under the decree, and is not a mere continuation of the original suit. *Perkins v. Pfalzgraff*, 60 W. Va. 121, 132, 53 S. E. 913; *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

"Except where the statutory proceeding called an appeal is nothing more than a substitute for the common-law remedy by writ of error, an appeal differs from the writ of error in that it is not a new suit, but a continuation of the suit below." *Wingfield v. Neall*, 60 W. Va. 106, 114, 54 S. E. 47.

D. EFFECT OF CHANGE IN LAW WHILE SUIT PENDING.

See post, "In Virginia," V, E, 1, a.

II. DEFINITIONS AND GENERAL CONSIDERATION OF VARIOUS MODES OF REVIEW.

A. DEFINITION AND NATURE.

1. Writ of Error.

See ante, "Considered as New Actions," I, C; post, "Appeal and Writ of Error," II, B, 1.

"A writ of error lies in a common law action or criminal case, and is in the nature of a new suit. It is awarded by a superior to an inferior court of record, and operates to transfer the record of the case (but nothing else) to the superior court, where the judgment of the inferior court is reviewed. Upon such review the appellate court either affirms or reverses the judgment of the lower court, and if it reverses, enters such judgment as the inferior court ought to have entered. On a writ of error generally only questions of law are reviewed. In the federal courts, and in many of the state courts, the findings of the trial courts upon questions of fact are conclusive." *Tyson v. Scott*, 116 Va. 243, 251, 81 S. E. 57.

2. Appeal.

See ante, "Considered as New Actions," I, C; post, "Appeal and Writ of Error," II, B, 1.

The word "appeal," when used in practice, is defined as: "The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial." *Williamson v. Musick*, 60 W. Va. 59, 62, 53 S. E. 706.

"In the civil law and equity jurisprudence, its object was to take the whole case to the higher tribunal, there to be tried and determined *de novo*, upon the issues between the parties, as though the cause had originated in the appellate court. It will be found, upon examination of this question, that it is attended with considerable confusion, from the fact that in some of the states the appellate proceeding is denominated 'appeal,' while in others the distinction between appeals in equity and review upon petition in error is strictly adhered to." *Wingfield v. Neall*, 60 W. Va. 106, 111, 54 S. E. 47.

"In *Burks on Pleading and Practice*, at § 372, it is said: 'For practical purposes, though perhaps not technically accurate, we may say that, under existing rules of practice, an appeal lies from a lower to a higher court, and is a continuation of the same case upon the same evidence before the higher tribunal, and the case is simply heard *de novo* before the higher tribunal. It is a rehearing before the higher court, with no presumptions against the appellant, except in case of doubt, where the decision of the lower tribunal will be affirmed. With this exception, the decision of the lower court has no effect. An appeal lies in a suit in chancery. The party taking the appeal is called the appellant. The defendant to the appeal is called the appellee.'" *Tyson v. Scott*, 116 Va. 243, 251, 81 S. E. 57.

As Denoting Appellate Jurisdiction.—In *Wingfield v. Neall*, 60 W. Va. 106, 111, 54 S. E. 47, the court said: "Ap-

peal is sometimes used with us, in legal language, to denote the nature of appellate jurisdiction as distinguished from original jurisdiction, without regard to the particular mode by which a cause is transmitted to a superior court. In fact, our constitution, article VIII, § 3, so denominates it."

5. Certiorari.

See post, CERTIORARI.

B. DISTINCTIONS.

1. Appeal and Writ of Error.

"An appeal is a process of civil-law origin, and removes a cause entirely, subjecting the facts as well as the law to a review and retrial; but a writ of error is a suit of common-law origin, and it removes nothing for retrial but the law." *Wingfield v. Neall*, 60 W. Va. 106, 112, 54 S. E. 47.

In *Wingfield v. Neall*, 60 W. Va. 106, 113, 54 S. E. 47, it is said in replying to appeal: "It is a process issuing out of this court upon petition assigning errors, the same as upon application for writ of error. In fact, the writ of error, and appeal, under our statute, which are used to remove or bring causes to this court, are only distinguishable in this—appeal lies to equity proceedings, and writ of error to law causes."

2. Appeal and Bill of Review.

See post, BILL OF REVIEW.

3. Writ of Error and Certiorari.

See post, CERTIORARI.

4. Habeas Corpus Not a Substitute for Writ of Error or Certiorari.

See post, CERTIORARI.

Error in an order committing children to the custody of the Children's Home Society of Virginia could not have been reviewed by the Supreme Court of Appeals in a proceeding by application for a writ of habeas corpus, but only by appeal from such order. *Ex Parte Mallory*, 122 Va. 298, 94 S. E. 782.

5. Appeal and Prohibition.

Ruling As to Inability of Husband to Pay Suit Money.—In a suit for divorce the question of the husband's ability to pay suit money, because of his infancy or penury is properly within the jurisdiction of the trial court, and its rulings thereon are not reviewable upon a rule in prohibition, but by appeal only. *State v. Kittle*, 86 W. Va. 587, 104 S. E. 44. See post, PROHIBITION.

6. Case Certified.

See post, CASE CERTIFIED OR RESERVED.

III. APPEALABLE JUDGMENTS, ORDERS AND DECREES.

A. APPEALABILITY AS DEPENDENT ON FINALITY OF DECISIONS.

1. In General

A writ of error does not lie in an action at law until there has been a final order or judgment in the cause. *Salem Loan, etc., Co. v. Kelsey*, 115 Va. 382, 79 S. E. 329; *Brown v. Carolina, etc., R. Co.* 114 Va. 597, 83 S. E. 981.

Proceedings by writ of error or appeal are for the correction of errors in decrees or judgments already entered. *State v. Moore*, 77 W. Va. 325, 87 S. E. 367; *Ritchie County Bank v. Bee*, 60 W. Va. 386, 389, 55 S. E. 380.

In the absence of special statutory provision to the contrary, the jurisdiction of the trial court must cease before the jurisdiction of the appellate court accrues. *Allison v. Wood*, 104 Va. 765, 768, 52 S. E. 559.

Final Judgment Decree or Order in Any Civil Case.—Va. Code 1919, § 6336.

2. What Are Final Judgments and Decrees within Rule.

See post, "Applications of Rule in Particular Instances," III, A, 3; "Interlocutory Decrees," III, B.

Definition.—A final decree is one

which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the decree. *Richardson v. Gardner*, 128 Va. 676, 105 S. E. 225; *Salem Loan, etc., Co. v. Kelsey*, 115 Va. 382, 79 S. E. 329. See *Richmond v. Richmond*, 62 W. Va. 206, 214, 57 S. E. 736; *Stull v. Harvey*, 112 Va. 816, 72 S. E. 701.

Refusing or Granting Relief Sought.—A decree is final so as to be appealable when it either refuses or grants the relief sought by the party complaining. *Jones v. Buckingham Slate Co.*, 116 Va. 120, 81 S. E. 28.

Final Determination of Rights of Parties.—A judgment in an action is final when it is a termination of the particular action or suit, although it is not a final determination of the rights of the parties. *Brown v. Carolina, etc., R. Co.*, 116 Va. 597, 83 S. E. 981.

Difficulty in Cases of Decrees in Equity.—*Hill v. Cronin*, 56 W. Va. 174, 179, 49 S. E. 132.

Adjudicating Principles of Cause.—An interlocutory decree may adjudicate the principles of a cause, as well as a final decree, hence, complete evidence of finality is not afforded by the adjudication of such principles. *Richardson v. Gardner*, 128 Va. 676, 105 S. E. 235. See post, "Decree or Order Adjudicating Principles of Cause," III, B, 3, e.

Same—Within Statute Relating to Filing Answer.—"As the decree is undoubtedly one settling the principles of the cause, it is final within the meaning of the terms of § 53 of chapter 125 of the W. Va. Code, permitting the defendant to file his answer at any time before final decree. This conclusion is the logical result of principles declared in *Barbour v. Tompkins*, 58 W. Va. 572, 52 S. E. 707." *Ash v.*

Lynch, 72 W. Va. 238, 240, 78 S. E. 365.

Adjudication on Merits.—"To be final, in the sense that it is appealable, a decree must be entered on the merits, and adjudicate the matters in controversy between the parties to the cause. *Core v. Strickler*, 24 W. Va. 689; *Hill v. Als*, 27 W. Va. 215." *Harper v. South Penn Oil Co.*, 77 W. Va. 294, 87 S. E. 483, 487.

Same—Exception to Rule.—"A well recognized exception to the general rule is where the judgment abating or dismissing the suit is upon grounds precluding further proceedings, as for want of jurisdiction, etc. In such cases the judgment or order is appealable. *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S. E. 664; *Carson v. Phoenix Ins. Co.*, 41 W. Va. 136, 23 S. E. 552." *Armentrout v. Lambert*, 79 W. Va. 602, 91 S. E. 452.

Determination of Substantial Merits of Controversy.—A decree in chancery cause, such as will support an appeal, is not necessarily the last decree rendered, by which all proceedings in the cause are terminated, and nothing is left open for the future judgment or action of the court; but it is a decree which determines the substantial merits of the controversy—all the requisites of the case—though there may remain a reference to be had, or the adjustment of some incidental or dependent matter. *Hill v. Cronin*, 56 W. Va. 174, 49 S. E. 132.

Finally Determinative of Controversy to Aggrievement of Complainant.—"A reviewable final judgment or decree must be finally determinative of the controversy to the aggrievement of the person claiming review." *Ritchie County Bank v. Bee*, 60 W. Va. 386, 387, 55 S. E. 380.

If it appears upon the face of the judgment that further action in the cause is necessary to give completely the relief contemplated by the court, then the judgment is not final. *Salem*

Loan, etc., Co. v. Kelsey, 115 Va. 382, 79 S. E. 329. See Stull v. Harvey, 112 Va. 816, 72 S. E. 701.

A decree or judgment to be final must be complete and certain in itself, and not a recital or memorandum. It must show intrinsically and distinctly and not inferentially that the matter has been adjudicated. It must contain the sentence of the law. *Pickens v. Daniels*, 58 W. Va. 327, 331, 52 S. E. 215; *Hill v. Cronin*, 56 W. Va. 174, 49 S. E. 132; *Ritchie County Bank v. Bee*, 60 W. Va. 386, 387, 55 S. E. 380.

In Proceeding for Enforcement of Forfeitures.—Va. Code 1919, § 3376.

Final as to One Party Not as to Another.—A decree may be final as to one party and not as to another, depending upon the circumstances of the case. *Jones v. Buckingham Slate Co.*, 116 Va. 120, 81 S. E. 28.

Final Order Not Necessarily Last One.—"While in its strict sense a final order is the last or concluding order in a case, in the popular sense, and in the sense in which it is most used by the lawmakers, as well as by the legal profession, it is ordinarily considered to be such an order as is subject to review by appeal, writ of error, or other appellate process, and our statutes providing for appellate process in other cases do not in all instances contemplate the last or concluding order in the case as the only one subject to review by such process. We are of the opinion that the Legislature in the use of this term meant to cover all such orders as change the position of the parties, as take from one and give to the other something that he was not entitled to, and could not receive before." *Charleston v. Public Service Comm.*, 83 W. Va. 718, 722, 99 S. E. 63.

3. Applications of Rule in Particular Instances.

See post, JUDGMENTS AND DECREES.

a. Decisions Held Final and Appealable.

Order Referring Case to Commissioner.—A decree construing a deed, and adjudicating that the widow of the grantor took and held thereunder the exclusive use and enjoyment of personal estate for her natural life, and that upon her death the plaintiff as surviving grantee was entitled in remainder to said property and had the exclusive right to the possession and enjoyment thereof, and referring the cause to a commissioner to report upon the necessary facts to carry such decree into execution is an appealable decree. *Roush v. Hyre*, 62 W. Va. 120, 57 S. E. 368.

Order in Eminent Domain Proceedings.—In a proceeding to condemn land for a city street there is an order adjudicating that the city has a right to condemn, and appointing commissioners to assess compensation for the land, and an order filing the report of the commissioners and allowing the money to be paid into court, and it is paid in. These orders are final in character, so as to give jurisdiction for a writ of error and supersedeas where the right to take is in controversy, but not where the only question is the amount of compensation. *Bluefield v. Bailey*, 62 W. Va. 304, 57 S. E. 805, overruling *Wheeling, etc., R. Co. v. Atkinson*, 53 W. Va. 539, 44 S. E. 773, and *Pack v. Chesapeake, etc., R. Co.*, 5 W. Va. 118.

Order Quashing or Abating or Refusing to Quash or Abate an Attachment.—"Subsection 8 of § 11, ch. 135, of the West Virginia Code, provides that a party to a controversy in any circuit court may obtain an appeal in any case where there is a judgment or order quashing or abating or refusing to quash or abate an attachment." *Elkins Nat. Bank v. Simmons*, 57 W. Va. 1, 4, 49 S. E. 893.

An order, refusing to admit to probate a paper offered as a will is a final judgment to which a writ of error lies,

although no provision is made for the costs of the proceedings in which the will is offered. *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596, Va. Code 1919, § 6336.

A judgment improperly abating an action upon a ground which precludes further proceedings, is appealable. *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S. E. 664.

Judgment as to Set-Offs.—In an action by a plaintiff against two defendants where one of the defendants files a plea of set-offs in excess of the plaintiff's demand, and the other defendant files no plea, if the court, without the intervention of jury, gives judgment in favor of the defendant pleading for the excess of his set-offs over and above the plaintiff's demand and for his costs, this is a final judgment, disposing of the case as to both defendants and to it a writ of error lies. *Stimmel v. Benthall*, 108 Va. 141, 60 S. E. 765.

Divorce Proceedings.—A decree of divorce a mensa or a vinculo, based upon some ground authorized by §§ 5 and 6, of chapter 64, Code 1906, alleged in the bill and supported by proof, pronounced after due process duly served, and default of appearance by defendant, and which by § 8 of said chapter, can not be upon bill taken for confessed, can not at a subsequent term of the court be set aside upon motion by defendant pursuant to § 5, chapter 134, Code 1906. Such decree is final, and so far as based on the facts alleged and proven can not be re-examined except upon appeal to this court by the party claiming to be examined except upon appeal to this court by the party claiming to be aggrieved thereby. Nor may such a decree be set aside after the term at which it was pronounced upon a petition or bill by defendant in the same court on the ground that the evidence on which the same was predicated is false or insufficient. *Chapman v. Chapman*, 70 W. Va. 522, 74 S. E. 661.

Dismissal of Appeal.—Where an appeal from a judgment or order of a county court appointing or refusing to appoint an administrator, has been allowed by and docketed in a circuit court, and the person appealing has right of appeal, the order of dismissal thereof by the circuit court, as improvidently awarded, will be treated as a final judgment, from which a writ of error will lie to the supreme court. *Butcher v. Kunst*, 65 W. Va. 384, 64 S. E. 967.

Decree Dismissing Cause for Failure to Diligently Prosecute.—Ordinarily an appeal may be taken from a decree dismissing a cause, over the objection of the plaintiff, for alleged want of diligence in the prosecution thereof, as such decree is a final determination of the proceeding for all purposes, irrespective of his right, if any, to institute another to obtain the same relief; otherwise the court might indefinitely continue to dismiss the cause, and thereby effectually deny him the right to redress his grievance. *Coogle v. Smith*, 87 W. Va. 112, 104 S. E. 284.

b. Decisions Held Not Final and Unappealable.

See post, "Interlocutory Decrees, III, B.

Reference.—A decree which fixes the amount of the fee of counsel employed by a trustee, but refers other questions at issue between the parties to a master for report is not final. *Stull v. Harvey*, 112 Va. 816, 72 S. E. 701.

Decree Ascertaining Personal Indebtedness Only.—A decree merely ascertaining a personal indebtedness from a defendant to the plaintiffs, but not decreeing payment thereof, and not fixing a lien therefor or otherwise providing for the payment thereof, is not final or appealable. *Pickens v. Daniels*, 58 W. Va. 327, 52 S. E. 215.

Order Sustaining Demurrer or Exceptions.—An order merely sustaining a demurrer to a bill in equity, not dis-

missing the bill, is not appealable. *Bosworth v. Wilson*, 57 W. Va. 80, 49 S. E. 942; *Gulland v. Gulland*, 81 W. Va. 487, 94 S. E. 943.

An order in a chancery cause, sustaining exceptions to an answer and striking from it only evidential matter, without eliminating the allegations of defensive rights or denials of controverted averments of the bill, is not appealable. *Baltimore, etc., R. Co. v. Wheeling Tract. Co.*, 70 W. Va. 33, 73 S. E. 53.

Judgment Overruling Demurrer.—Even if the supreme court had appellate jurisdiction to hear an appeal from a judgment of the circuit court overruling a demurrer which an inferior court sustained, there is no final judgment. A writ of error does not lie to a judgment merely overruling a demurrer. *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285; *White v. Chesapeake, etc., R. Co.*, 26 W. Va. 800; *Ritchie County Bank v. County Court*, 65 W. Va. 208, 209, 63 S. E. 1098.

Order Overruling Exceptions to Answer.—An order overruling exceptions to an answer for insufficiency is not a final decree or order, as that term is used in § 3454, Code of 1904, allowing appeals from such decrees or orders. *Johnson v. Mundy*, 126 Va. 730, 97 S. E. 564.

Setting Aside Verdict and Awarding New Trial.—A writ of error does not lie from the supreme court to the judgment or order of the circuit court in a criminal case setting aside the verdict of the jury and awarding a new trial. *Reaffirming State v. Bluefield Drug Co.*, 41 W. Va. 638, 24 S. E. 649; *State v. Martin*, 87 W. Va. 544, 68 S. E. 270.

The supreme court has no jurisdiction to award a writ of error to a judgment of a circuit court setting aside a final judgment in ejectment, and awarding a new trial to a defendant who had not appeared or been served with process. The judgment awarding a new trial is not a final judgment

within the meaning of § 3454 of the Code allowing a writ of error from this court. *Smiley v. Provident Life, etc., Co.*, 106 Va. 787, 56 S. E. 728.

Refusing New Trial.—A judgment or order overruling a motion to set aside a verdict for defendant, and refusing plaintiff a new trial, is not such final judgment. The judgment to be final, in such a case, must be a judgment *nil capiat*. *Barker v. Stephenson*, 67 W. Va. 490, 68 S. E. 113.

Judgment for Costs.—There is no jurisdiction for a writ of error when there is a verdict for defendants and only a judgment for their costs. *Epstein v. Totten*, 63 W. Va. 602, 60 S. E. 614; *DeArmit v. Whitmer*, 63 W. Va. 300, 302, 60 S. E. 136; *Armen-trout v. Lambert*, 79 W. Va. 602, 91 S. E. 452; *Ritchie County Bank v. Bee*, 60 W. Va. 386, 55 S. E. 380.

In such a case the appellate court has not jurisdiction to extend the judgment into a final judgment in favor of the defendant in order to pass upon the alleged errors of the court in the trial of the case. *Ritchie County Bank v. Bee*, 60 W. Va. 386, 388, 55 S. E. 380.

If, in the trial of an action upon a demurrer to evidence which is sustained, the court does not render a judgment of *nil capiat*, but only for costs, there is no final judgment, and the supreme court is without jurisdiction to review the case. *Bower v. Virginian R. Co.*, 68 W. Va. 629, 70 S. E. 369. See *Kirk v. Camden Interstate R. Co.*, 66 W. Va. 486, 487, 66 S. E. 683; *Barker v. Stephenson*, 67 W. Va. 490, 68 S. E. 113; *Myers v. Carnahan*, 69 W. Va. 136, 71 S. E. 15.

Judgment in Revenue Cases.—A writ of error does not lie from the West Virginia supreme court at the instance of the state, to an order of a circuit court overruling a motion by the state to set aside a verdict of "not guilty" by a jury in a criminal case, for the violation of a law relating to the revenue, when there has been no final judgment on the verdict. In such case

the writ of error allowed will be dismissed as improvidently awarded. *State v. Peyton*, 58 W. Va. 380, 52 S. E. 393.

A nonsuit is not a final judgment, as regards appealability, and no writ of error lies to it. *Marcus & Sons v. McClure*, 63 W. Va. 215, 59 S. E. 1055.

See *Brown v. Carolina, etc., R. Co.*, 116 Va. 597, 83 S. E. 981, wherein the court said: "In the case cited, in which there was a compulsory nonsuit, it was held that while a new action could be brought for the same cause of action, it was final disposition of the particular case, and that the party against whom the judgment of nonsuit was entered was entitled to a writ of error. *Van DeVier v. Stanton*, 1 Cowan (N. Y.) 84."

Granting Injunction. — No appeal lies from an order granting an injunction. A decree in a chancery cause not regularly matured for hearing, commanding certain things to be done and inhibiting the doing of others, all of which are dependent upon the same right and title, designating the prohibitive part only as an injunction, and containing a paragraph making "the injunction" conditional as to its effect, upon the giving of a bond, is interlocutory and not appealable. *Clark v. Hazlett*, 72 W. Va. 21, 77 S. E. 327. See *Wheeling v. Chesapeake, etc., Tel. Co.*, 81 W. Va. 438, 94 S. E. 511.

Order Refusing to Appoint Receiver. — The refusal to appoint a receiver is not an appealable order. *Stafford v. Jones*, 65 W. Va. 587, 64 S. E. 723; *Bartlett v. Boyles*, 66 W. Va. 327, 66 S. E. 474; *George v. Brown*, 84 W. Va. 359, 99 S. E. 509.

Judgment as to Two of Three Notes. — Where an action is brought upon three notes and there is a general verdict for the defendant, an order made by the trial court setting aside the verdict as to two of the notes and awarding a new trial as to them, but refusing to set it aside as to the other note, and directing that the plaintiff take nothing by his action as

to that note, and that the defendant recover his costs, is not a final order or judgment to which a writ of error will lie. *Salem Loan, etc., Co. v. Kelsey*, 115 Va. 382, 79 S. E. 329.

Condemnation Proceedings. — To be final and, therefore, appealable, orders in condemnation proceedings, pursuant to Ch. 42, Code 1906, must adjudge right to appropriate to public use, ascertain and fix compensation upon report of commissioner and accept payment thereof by petitioner. Otherwise, they are ineffectual to change possession or pass title. *Panhandle Tract Co. v. Schenk*, 73 W. Va. 226, 80 S. E. 345.

Prior to the entry of such orders and payment of compensation a writ of error and supersedeas will not lie, and if granted will be dismissed as improvidently awarded. *Panhandle Tract Co. v. Schenk*, 73 W. Va. 226, 80 S. E. 345.

Judgment in Eminent Domain Proceedings. — In a proceeding under the statute authorizing a railroad company to take and appropriate land for its railroad purposes by paying just compensation therefor and damages to the residue of the land, an order of the court adjudicating the fact that the company has a right to so condemn the land proposed to be taken and appointing commissioners to ascertain such compensation and damages is not final and a writ of error thereto will not lie. *White Oak R. Co. v. Gordon*, 61 W. Va. 519, 56 S. E. 837.

Decree Fixing Liability for Rent. — A decree fixing upon a party liability for rents is interlocutory until the amount of the rent is ascertained. The amount may not be sufficient to give this court jurisdiction. *Goodloe v. Woods*, 115 Va. 540, 80 S. E. 108.

A decree ordering sale of land, but not directing application of proceeds held interlocutory and not final, though it adjudicated the principles of the cause. *Richardson v. Gardner*, 128 Va. 676, 105 S. E. 225.

Provisional Decree Not Appealable.

—Ordinarily, a cestui que trust interested in the purpose and subject matter of a suit in equity can not be omitted as a party, on the theory of representation by his trustee, and certainly not in instances of controversy between them as to the subject matter; wherefore reservation of such a controversy in a decree determining the same issue between the trustee and other parties to the suit makes such decree provisional and unappealable. *Arnold v. Mylius*, 85 W. Va. 123, 101 S. E. 78.

Judgment Remanding Cause Not Final.—*Ritchie County Bank v. County Court*, 65 W. Va. 208, 63 S. E. 1098; *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684.

B. INTERLOCUTORY DECREES.**1. In General.**

See ante, "Decisions Held Not Final and Unappealable," III, A, 3, b.

The appellate court in the absence of statute has no jurisdiction of an appeal from an interlocutory decree. *Bosworth v. Wilson*, 57 W. Va. 80, 81, 49 S. E. 942; *Hobson v. Hobson*, 105 Va. 394, 400, 53 S. E. 964; *Smiley v. Provident Life, etc., Co.*, 106 Va. 787, 56 S. E. 728; Va. Acts 1920, p. 416; *Pollards Code* 1920, p. 308, amending *Code* 1919, § 6348.

Every decree which leaves anything to be done by the court in the cause is interlocutory as between the parties remaining in court. *Stull v. Harvey*, 112 Va. 816, 72 S. E. 701.

Provisional orders and decrees not final in character, but reserving for future adjudication matters in litigation are not appealable. *Benedum v. First Citizens' Bank*, 72 W. Va. 124, 78 S. E. 656.

A decree in a suit for partition of land, determining a controversy therein concerning the location, identity, boundaries and quantity of the land, as between some of the parties, and expressly reserving disposition thereof as to others, is provisional and interloc-

utory only as to the findings and adjudications made by it and not appealable. *Arnold v. Mylius*, 85 W. Va. 123, 101 S. E. 78.

A decree, prematurely entered, pending exceptions to a commissioner's report undisposed of, and which does not finally adjudicate the controversies between the parties to the cause is interlocutory, and not appealable. *Kerfoot v. Dandridge*, 69 W. Va. 337, 71 S. E. 396.

A mere expression of an opinion in an interlocutory order, stating reasons for rulings on exceptions to an answer, not replied to, and not purporting to settle all the principles of the cause, is not an appealable order. *Harper v. South Penn Oil Co.*, 77 W. Va. 294, 87 S. E. 483.

Overruling Motion to Quash Attachment.—Under subsection 8 of § 1 of chapter 135 of the West Virginia Code 1919, a decree overruling a motion to quash an attachment is an interlocutory but appealable decree. *Elkins Nat. Bank v. Simmons*, 57 W. Va. 1, 49 S. E. 893.

3. Statutory Provisions.**a. General Statement of Provisions.**

Virginia Statute.—Va. Code 1919, § 6330.

b. Decree or Order as to Dissolution of Injunctions.

Appeal Allowed from Decree or Order Dissolving Injunction.—The statute allows an appeal from a decree or order dissolving an injunction or overruling a motion to dissolve it. Va. Code 1919, § 6336; W. Va. Code 1906, ch. 135, § 1. *Clark v. Hazlett*, 72 W. Va. 21, 77 S. E. 327. *Wheeling v. Chesapeake, etc., Tel. Co.*, 81 W. Va. 438, 440, 94 S. E. 511.

The right of appeal given by the Va. Code from a final decree, or from a decree adjudicating the principles of a cause, is the same in a case for equitable relief by injunction as in other equity cases. *French v. Chapin-Sacks Mfg. Co.*, 118 Va. 117, 86 S. E. 842.

See post, "Decree or Order Adjudicating Principles of Cause," III, B, 3, e.

c. Decree or Order Requiring Money to Be Paid.

Appeal Allowed.—Va. Code 1919, § 6336.

d. Decree or Order Requiring Possession or Title of Property to Be Changed.

Appeal Allowed.—Va. Code 1919, § 6336; W. Va. Code 1906, § 4038.

A decree adjudging, ordering and decreeing that the plaintiff do take and hold the land mentioned and described in the bill for and during his natural life, and referring the cause to a commissioner to take and report an account of rents, issues and profits, taxes and permanent improvements made on the property, pronounced on a bill, demanding rents, issues and profits, as well as title and possession of the land, is appealable as one changing title to real estate. *Beverlin v. Casto*, 62 W. Va. 158, 57 S. E. 411.

An order appointing a receiver has been held to be appealable on the ground that it falls under the W. Va. statute allowing an appeal from an order requiring the possession or title of property to be changed. *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. 5; *Staford v. Jones*, 65 W. Va. 567, 572, 64 S. E. 723; *Davidson v. Davidson*, 70 W. Va. 203, 73 S. E. 715; *George v. Brown*, 84 W. Va. 359, 367, 99 S. E. 509; *Baltimore Bargain House v. St. Clair*, 58 W. Va. 565, 52 S. E. 660; *Virginia Passenger, etc., Co. v. Fisher*, 104 Va. 121, 51 S. E. 198.

And, where the property is in the hands of receivers of another court, a direction to the receiver to intervene in that court and apply for the possession, and to take and receive the property from the receivers of that court is a sufficient change in possession and control to warrant an appeal to this court. *Virginia Passenger, etc., Co. v. Fisher*, 104 Va. 121, 51 S. E. 198. See

Whyel v. Jane Lew Coal, etc., Co., 67 W. Va. 651, 69 S. E. 192.

Order Refusing to Appoint Receiver.—See ante, "Decisions Held Not Final and Unappealable," III, A, 3, b.

e. Decree or Order Adjudicating Principles of Cause.

See ante, "Decisions Held Not Final and Unappealable," III, A, 3, b.

A decree "adjudicating the principles of a cause" is appealable. Va. Code 1919, § 6336; W. Va. Code, ch. 135, § 1, ch. 7; *Armstrong v. Ross*, 56 W. Va. 16, 17, 48 S. E. 745; *Hill v. Cronin*, 56 W. Va. 174, 49 S. E. 132; *Barbour v. Tompkins*, 58 W. Va. 572, 581, 52 S. E. 707; *Richmond v. Richmond*, 62 W. Va. 206, 217, 57 S. E. 736; *Harper v. South Penn Oil Co.*, 77 W. Va. 294, 87 S. E. 483, 487.

But it must settle all the principles of the cause, leaving nothing to be done except subsidiary and sequential matters, necessary to the full execution of what is thereby decreed. *Hill v. Cronin*, 56 W. Va. 174, 49 S. E. 132; *Barbour v. Tompkins*, 58 W. Va. 572, 581, 52 S. E. 707; *Beverlin v. Casto*, 62 W. Va. 158, 161, 57 S. E. 411; *Richmond v. Richmond*, 62 W. Va. 206, 212, 57 S. E. 736; *Harper v. South Penn Oil Co.*, 77 W. Va. 294, 87 S. E. 483.

An order of reference, founded on the expressed opinion of the judge, without adjudicating the principles involved, is not appealable. *Armstrong v. Ross*, 56 W. Va. 16, 48 S. E. 745, approved in *Hill v. Cronin*, 56 W. Va. 174, 182, 49 S. E. 132; *Rainey v. Freeport Smokeless Coal, etc., Co.*, 58 W. Va. 381, 387, 52 S. E. 473; *Beverlin v. Casto*, 62 W. Va. 158, 161, 57 S. E. 411; *Pickens v. Daniels*, 58 W. Va. 327, 331, 52 S. E. 215.

The statute seems to be little more than a declaration of what the court had previously held. The purpose of this rule is to prevent frequent and successive appeals in the same case, to the end that delay and confusion may

be avoided. *Barbour v. Tompkins*, 58 W. Va. 572, 581, 52 S. E. 707; *Richmond v. Richmond*, 62 W. Va. 206, 217, 57 S. E. 736.

Troublesome Question.—Whether a decree is appealable as adjudicating the principles of the cause has often been a troublesome question, depending for solution in each case upon the nature and character of the decree. *Richmond v. Richmond*, 62 W. Va. 206, 212, 57 S. E. 736.

Determination as to All Parties in Interest.—To be appealable as one settling the principles of a cause, a decree must not only determine all of the governing and controlling issues therein, but must also determine them as to all of the parties whose interests in such issues have been asserted in the cause by pleadings. *Arnold v. Mylius*, 85 W. Va. 123, 101 S. E. 78.

Decree Conclusive of Every Matter Decided.—A decree that is appealable under clause 7 of § 1 of chapter 135 of the West Virginia Code, as one adjudicating the principles of a cause, or that is final in such sense as to make it reviewable by bill of review, is conclusive of every matter decided by it, and every matter which, by the rules of equity practice, the parties were bound to set up in reference to it, before submitting it for adjudication, and can not be altered or disturbed except by appeal or bill of review, within the respective periods allowed therefor by the statutes. *Barbour v. Tompkins*, 58 W. Va. 572, 52 S. E. 707.

Decrees Held Appealable.—A decree in a suit by an executor against devisees to convene creditors and administer the assets for their payment made on a report of debts by a commissioner, which decrees debts against the estate and subjects its lands to their payment, is appealable. *Trail v. Trail*, 56 W. Va. 594, 49 S. E. 431.

A decree which settles the principles of a cause is clearly appealable, but not necessarily final. If a decree does not purport to be final, makes no order for

costs, and shows upon its face that further action "in the cause" is intended, and is necessary to give completely the relief contemplated by the court, both as to the creditors of the judgment debtor, who are complainants in the cause, and as to the purchasers of the real estate sold therein, it is not a final decree. In the case in judgment, further action "in the cause" was necessary in order to decree money to creditors and to perfect the titles of purchasers, and hence the defendant had the right to file an answer thereto, under the provisions of § 3275 of the Code. *Collier v. Seward*, 113 Va. 228, 74 S. E. 155.

A decree of partition, whether by default or after full defense, which adjudges title in the parties, the interests they hold and that partition be made in the proportion defined by it, and leaves nothing to be done except for the commissioners appointed, in furtherance of its execution, to divide the land in kind if possible, or if not to report the fact to the court for decree of sale and distribution of the proceeds, adjudicates the principles of the cause and contains every element necessary to render it appealable. *Richmond v. Richmond*, 62 W. Va. 206, 57 S. E. 736.

A suit was brought by a wife for a divorce on the ground of desertion and incidentally to set aside as fraudulent the sale of certain property made by the husband to his brothers. There was a preliminary motion to dismiss the appeal on the ground that the decree appealed from was not final, and did not adjudicate the principles of the cause. It was clear that the decree was not final, as the divorce prayed for was not granted. The decree, however, contained the opinion of the court that the brothers were guilty of no fraud in the purchase of the property from the husband, and that the fund to the credit of the court arising from the proceeds of notes given for the property of the husband, and should be paid

over to the wife as alimony, but for an interpleader improperly allowed. Held: That the decree appealed from did adjudicate the principles of the cause, and was final to support an appeal. *Crowder v. Crowder*, 125 Va. 80, 99 S. E. 746.

In a suit to determine whether certain gifts from a parent to a child and her husband were gifts of advancements, an order overruling plaintiff's exceptions to defendants' answer, which decided against the plaintiff a very important question to him, namely, the right to the relief sought by his bill of a discovery by the defendants of all sums of money or property received by them or either of them from the decedent, determined a rule of evidence by which the rights of the parties were to be finally worked out, and adjudicated a "principle of the cause," and hence is appealable. *Johnson v. Mundy*, 123 Va. 730, 97 S. E. 564.

Decree Held Not Appealable.—A decree on a bill filed by plaintiffs who, *prima facie*, are tenants in common with some of the defendants, charging deeds from those under whom they claim to persons under whom such defendants claim, purporting to be absolute conveyances of undivided interests, to have been in fact mortgages, and seeking redemption or reconveyances and an accounting for rents and profits, which adjudicates the conveyances to have been absolute, sustains demurrers to the bill, without dismissal, and grants leave to show grounds for an accounting, by amendment of the bill, is not appealable, because it does not settle all of the principles of the cause. *Drake v. O'Brien*, 83 W. Va. 678, 99 S. E. 280.

Upon a bill filed by a wife against her husband to secure a permanent separate maintenance for herself and infant daughter, it is premature to allow an appeal from a decree overruling defendant's demurrer to the bill, and, without deciding any question in the cause, awarding the plaintiff a pen-

dente lite allowance for support, costs to date, including attorney's fee, and referring the cause to a commissioner to ascertain the value of the estate and income of the husband, and what would be a reasonable allowance to the wife for the support of herself and her child, and for fees to her consent. The cause should be proceeded with further in the trial court, and the rights of the parties be there adjudicated, before an appeal is allowed. The supreme court will not undertake to adjudicate the rights of the parties in advance of a decision of the trial court. *Beatty v. Beatty*, 105 Va. 213, 53 S. E. 2.

A decree of reference founded upon the following expressed opinion: "The Court is of opinion that the plaintiff and the defendant have mechanics' liens against the real estate owned by the defendant corporation, the Freeport Smokeless Coal and Coking Company, as alleged in the plaintiff's bill," but not otherwise adjudicating the principles of the cause, is not final or appealable. *Rainey v. Freeport Smokeless Coal, etc., Co.*, 58 W. Va. 381, 387, 52 S. E. 473.

C. CHARACTER OF PROCEEDINGS.

1. Generally.

In What Cases Awarded.—Va. Code 1919, § 6336; Barnes Code, ch. 135, § 1.

When Prohibited.—Va. Code 1919, § 6337.

Judicial Nature of Decision.—In a proceeding under Acts 1914, page 165, as amended by Acts 1916, page 672, and Acts 1918, page 402, for an election to change the form of government of a city to that known as the "City Manager Plan," the judge of the circuit court acts in a ministerial capacity, and to his finding of facts certified to the clerk of the city council no writ of error lies. *Roanoke v. Elliott*, 123 Va. 393, 96 S. E. 819.

6. Contempt Proceedings.

Va. Code 1919, § 4932; Barnes Code, ch. 160, § 4.

Judgments of State Corporation Commission.—Va. Code 1919, § 3728.

Disobedience of Orders of Court.—

No writ of error lies from the supreme court of appeals to a judgment of an inferior court imposing a fine upon a party to a suit for disobedience of its orders, and directing his imprisonment in jail in default of the payment of said fine. Such judgment is not within the purview of § 4053, Va. Code (Code 1919, § 4932), or of any other section of the Code. The theory seems to be that if the order disobeyed is erroneous, the parties affected should appeal. If it is right, it should be obeyed. *Forbes v. State Council*, 107 Va. 853, 60 S. E. 81.

Where no writ of error lies from the supreme court of appeals to the judgment of an inferior court imposing a fine on a party for a contempt of its judgment, the decision of the trial court that the acts of such party amount to a contempt is final, and this court will not intimate any opinion upon the subject. *Forbes v. State Council*, 107 Va. 853, 60 S. E. 81.

West Virginia.—A judgment for contempt of a trial court, consisting of disobedience of its judgment, decree or order, is not reviewable in the appellate court, if the trial court had jurisdiction of the cause in which it rendered, pronounced or entered the violated judgment, decree or order, and did not exceed its jurisdiction in doing so. *Fortney Lumber, etc., Co. v. Baltimore, etc., R. Co.*, 73 W. Va. 1, 79 S. E. 834.

But, if such court had not such jurisdiction, or, having it, exceeded its powers in entering the judgment, decree or order, its lack of jurisdiction affords ground for appellate jurisdiction to annul the judgment of contempt. *Fortney Lumber, etc., Co. v. Baltimore, etc., R. Co.*, 73 W. Va. 1, 79 S. E. 834.

A writ of error does not lie to a judgment of contempt for disobedience of a decree requiring payment of ali-

mony. *Smith v. Smith*, 81 W. Va. 761, 95 S. E. 199.

7. Contested Election Cases.

Va. Code 1919, § 268; *Barnes W. Va. Code*, p. 108, ch. 6, § 3.

Where the validity of a law under which a local option election was held was not called in question in the trial court, but the election is sought to be set aside on the ground that the judges of election put a wrong interpretation upon the law, and permitted persons to vote who were not entitled that privilege, the decision of the circuit court upon that question is final. No constitutional question being raised or decided by the circuit court, no appeal lies. *Hulvey v. Roberts*, 106 Va. 189, 55 S. E. 585.

County Bond Election.—In a proceeding to determine the regularity and validity of an election to determine whether or not county bonds shall be issued for permanent road improvements in the magisterial districts of a county, an appeal lies to this court from the final order of a circuit court in such controversy. *Board v. Spilman*, 113 Va. 391, 74 S. E. 151.

W. Va. Statute Constitutional.—The part of chapter 80 of the acts of the legislature of West Virginia of 1901 which provides for an appeal either party, from the final order or decision of the county court in an election contest for a county or district office, to the circuit court and a trial de novo in that court, is constitutional. *Williamson v. Musick*, 60 W. Va. 59, 53 S. E. 706.

8. Criminal Cases.

Va. Code 1919, § 4931; *Barnes Code*, ch. 160, §§ 1, 3.

Judgment Requiring Bail in Misdemeanor Cases after Conviction.—Va. Code 1919, 4930.

West Virginia.—To entitle a party indicted for felony to a writ of error to the supreme court of appeals under the provisions of the West Virginia constitution and code, he must either

have been convicted in the circuit court of the offense charged in the indictment, or he must have been convicted thereof in some tribunal inferior to the circuit court, and the conviction must have been affirmed by the circuit court. *State v. Daugherty*, 39 W. Va. 470, 19 S. E. 872.

The appellate court is without jurisdiction to entertain a writ of error from the judgment of the circuit court discharging a prisoner from prosecution under a municipal ordinance for public drunkenness and disorderly conduct, even though the validity of such ordinance may be involved. *Philippi v. Kittle*, 56 W. Va. 348, 49 S. E. 238.

11¼. Crossing Proceedings.

In General.—Va. Code 1919, § 2007.

Proceedings When One Public Service Corporation Desires to Cross the Works of Another.—Va. Code 1919, § 3884.

Proceedings Where a Public Service Corporation Desires or Is Required to Cross County Road Above or Below Grade.—Va. Code 1919, § 3885.

11½. Dower Proceedings.

A decree tacitly denying a right of dower in land, set up and claimed by an answer, amounts to an adjudication against such right and confers right of review by an appeal. *Sleeth v. Taylor*, 82 W. Va. 139, 95 S. E. 597.

14. Habeas Corpus Cases.

See post, HABEAS CORPUS.

15. Mandamus Cases.

Refusing Mandamus.—The pendency of a writ of error to the ruling of a circuit court dismissing the appeal of a railroad company from the refusal of the board of supervisors of a county to act upon its petition asking the board's consent to a proposed alteration of a county road, is no bar to the prosecution of a writ of error to the ruling of said circuit court refusing to award to said railroad company a mandamus to compel the board to take action on said petition. The writ of

error in the first case is neither an adequate nor a proper remedy. *Carolina, etc., Railway v. Board*, 109 Va. 34, 63 S. E. 412.

17¼. Partition Proceeding.

A decree rendered in a partition suit, establishing a lost deed and settling a question of disputed title is appealable. *Wright v. Pittman*, 73 W. Va. 81, 79 S. E. 1091.

18¼. Proceedings Relating to Decedent's Estate.

If, in a suit to ascertain the debts of a decedent and subject his real and personal estate to the payment thereof, a final decree has been entered declaring that the assets of the decedent have been exhausted in the payment of his debts and that there is nothing in the hands of the court or due from the purchasers of land sold in the cause to which the complainants are entitled, the complainants have the right, if the decree is erroneous, and there is really money due from purchasers, either to appeal from the decree, or to have the cause reinstated on the docket and reviewed within the time prescribed by law. *Hogg v. Shield*, 114 Va. 403, 76 S. E. 934.

Order Confirming Ex Parte Settlement of Executor's Account.—No appeal lies to the supreme court from an order of an inferior court merely overruling exceptions and confirming a commissioner's report of an ex parte settlement of an executor's account. The remedy is by a bill to surcharge and falsify the ex parte settlement. Until surcharged and falsified it is to be taken as prima facie correct, and an order of the supreme court affirming the order of the inferior court would not make it any more final than it was before the appeal was taken. *Owens v. Owens*, 109 Va. 432, 63 S. E. 990.

19. Quo Warranto Proceedings.

See post, QUO WARRANTO.

Order Refusing Quo Warranto.—Va. Code 1919, § 6336; Barnes Code, ch. 135, § 1.

22. Tax Valuation and Proceedings.

Appeal from State Corporation Commission.—See post, "Appeals from Public Service Commissions," XVI, A, 10½.

West Virginia.—Barnes Code, p. 332, ch. 29, §§ 94, 139.

There can be no appeal from, or writ of error to, a judgment or order of a circuit court, rendered or made on an appeal from an order of a county court, in respect to an erroneous assessment of property, involving only a question of valuation. *Ritchie County Bank v. County Court*, 65 W. Va. 203, 63 S. E. 1098.

There is no jurisdiction in the supreme court of West Virginia for a writ of error taken by the state from the decision of a circuit court made on appeal in a proceeding by a land owner to correct a reassessment of the value of real estate under said section. *McLean v. State*, 61 W. Va. 537, 56 S. E. 884.

There is no jurisdiction for a writ of error in the appellate court from the decision of a circuit court made upon appeal from a county court in a proceeding under Code chapter 29, § 129, brought in a county court by a corporation to be released from an alleged erroneous assessment of its property returned for taxation, because of the refusal of the county court and assessor to deduct indebtedness of such corporation from its money, credits and investments. *Bluefield Water Works, etc., Co. v. State*, 63 W. Va. 480, 60 S. E. 403.

Va. Statute — Assessment of Lands and Lots.—Va. Code 1919, § 2237.

Assessment of Personal Property.—Va. Code 1919, § 2263.

Assessment Where Land Divided Among Several Owners.—Va. Code 1919, § 2285.

Proceedings for Assessment of Taxes — Property Exempt.—Supplement West Va. Code 1918, § 941.

Appeal from Assessment of License Tax.—Barnes W. Va. Code, p. 379, ch. 32, § 42a.

Assessment of Inheritance and Transfer Taxes.—Barnes W. Va. Code, p. 417, ch. 33, § 20.

Assessment of Tax on Corporation by State Corporation Commission.—Code 1919, p. 3153.

23. Relating to Insurance Companies.

Revocation or Suspension of License of Insurance Company.—Va. Code 1919, § 4250; Va. Code 1919, § 4180, as amended by Act 1920, p. 22 (*Polards Code Biennial*, § 4180).

Revocation of License of Fire Insurance Company.—Va. Code 1919, § 4307.

Assessment of Insurance Companies.—Va. Code 1919, § 4195.

Enforcement of Penalties by State Corporation Commission against Insurance Companies.—Va. Code 1919, § 4234.

Failure or Refusal of Commissioner of Insurance to Renew License of Insurance Company.—Va. Code 1919, § 4210.

Refusal of License to Foreign Fraternal Beneficiary Association.—Va. Code 1919, § 4288.

24. Miscellaneous Proceedings.

Boundary Proceedings.—Va. Code 1919, § 5490.

Mere delay in the execution of a writ of inquiry, in an action in which the issues were finally made up and tried, is not available as ground of error. *Hubbard v. Equitable Life Assur. Soc.*, 81 W. Va. 663, 95 S. E. 811.

Order Overruling Exceptions to Report of Commissioner of Accounts.—An appeal lies to the Supreme Court of Appeals from an order of an inferior court overruling exceptions to and confirming a commissioner of account's report upon the accounts of a county treasurer, which disallowed credits claimed by the treasurer of \$893.78, and awarded costs against him. *Leachman v. Board*, 124 Va. 616, 98 S. E. 656, distinguishing *Owens v. Owens*, 109 Va. 432, 63 S. E. 990.

Judgment Forfeiting Corporate Charter.—Va. Code 1919, § 3831.

Dissolution of Municipal Corporation.—This court has jurisdiction by writ of error to review the judgment of a circuit court, proceeding according to § 2 of chap. 47 of the Code of 1918 (Code 1913 § 2383), annulling its charter and dissolving a municipal corporation. *Houseman v. Anawalt*, 85 W. Va. 60, 100 S. E. 848.

"The jurisdiction of this court to review the judgment of the circuit court annulling the charter and dissolving the corporation is challenged by the petitioners, upon the principles laid down in *In re Town of Union Mines*, 39 W. Va. 179, 19 S. E. 398; *Elder v. Incorporators*, 40 W. Va. 222, 21 S. E. 738; *Bloxton v. McWhorter*, 46 W. Va. 32, 32 S. E. 1004; *Summers County Court v. Monroe County*, 43 W. Va. 207, 27 S. E. 307; *McWhorter v. Dorr*, 57 W. Va. 608, 50 S. E. 838; *Morris v. Taylor*, 70 W. Va. 618, 74 S. E. 872. These decisions support the general proposition first affirmed in *In re Town of Union Mines*, that the judgment of the circuit court in the exercise of the legislative and quasi-judicial authority, delegated by said chapter, to incorporate towns and villages was not subject to the appellate jurisdiction of this court. But the jurisdiction here invoked is not to reverse the judgment of the circuit court granting the charter and incorporating the municipality, but one annulling the charter and dissolving the corporation, quite a different proposition from any affirmed in the decisions cited." *Houseman v. Anawalt*, 85 W. Va. 60, 61, 100 S. E. 848.

An order setting aside a judgment by default, entered upon an inquiry of damages, is a subject of review by writ of error, under clause 9, § 1, ch. 135, W. Va. Code, serial § 4981. *Clark v. Lee*, 76 W. Va. 144, 85 S. E. 64.

Proceedings to Require Corporation to Construct Wagonways Where Line

or Works Passes Through Lands of Another.—Va. Code 1919, § 3883.

Proceedings before State Corporation Commission.—See post, "Appeals from Public Service Commissions," XVI, A, 10½.

Order Granting or Refusing Leave of City to Erect Dam in Watercourse.—Va. Code 1919, § 3060.

Assessment of Damages to Abutting Owners.—Va. Code 1919, § 3038.

Judgment in Proceedings to Incorporate Towns.—Va. Acts 1918, p. 560; *Pollard's Code Biennial*, p. 532. Va. Code 1919, § 2884.

Order of Court Discharging or Refusing to Discharge Treasurer of County or City.—Va. Code 1919, § 2792.

Proceedings for the Transition of Cities of the Second Class to Cities of the First Class.—Va. Code 1919, § 2912.

Proceedings for Acquisition of Real Estate by County, etc.—Va. Code 1919, § 2709.

Proceedings for Removal of Public Officers.—Va. Code 1919, § 2706.

Barnes W. Va. Code, p. 409, ch. 32A, § 29; Supplement W. Va. Code 1918, § 1305c.

Proceedings Relating to Public Service Corporations.—Va. Code 1919, § 2902.

Unlawful Entry or Detainer.—Va. Code 1919, § 5449.

Cases under Act Relating to Dependent and Delinquent Children.—*Barnes Code*, ch. 46A, § 30.

Revocation of License.—Va. Acts 1918, p. 669; *Pollard's Code* 1920, p. 636.

Offenses at Elections.—*Barnes W. Va. Code*, p. 106, ch. 5, § 8b (19).

Registration of Voter.—*Barnes v. Va. Code*, p. 89, ch. 3, § 98a (7).

D. MATTERS OF DISCRETION.

1. In General.

The exercise of the discretion of the trial court will not be disturbed on appeal in the absence of abuse. *Pow-*

hatan Lime Co. *v.* Whetzel, 118 Va. 161, 86 S. E. 898; Reid *v.* Medley, 118 Va. 462, 87 S. E. 616; Sutherland *v.* Wampler, 119 Va. 800, 89 S. E. 875; Bice *v.* Boothsville Tel. Co., 62 W. Va. 521, 525, 59 S. E. 501.

Matters arising in the conduct of a trial are largely in the discretion and under the control of the trial judge. Chesapeake, etc., R. Co. *v.* Rowsey, 108 Va. 632, 62 S. E. 363.

2. Applications of Rule in Particular Instances.

a. In General.

Court's Interpretation of Its Rule.—

The court prescribing a rule has authority to interpret and apply it, wherefore its ruling that a postponement of a case to a later date than that for which it was formerly set for trial does not except it from the operation of the rule, can not be disturbed by the appellate court. Teter *v.* George, 86 W. Va. 454, 103 S. E. 275.

Argument of Counsel. — See post, ARGUMENTS OF COUNSEL.

Consolidation of Cases. — The trial court has discretion in the matter of consolidating causes, and, to warrant a reversal of a decree on this ground, it must appear that such discretion has been misused to the prejudice of the party complaining. Castle *v.* Castle, 69 W. Va. 400, 71 S. E. 385.

Judicial Sales—Confirmation or Setting Aside.—Before confirmation the rights of the purchaser are inchoate, and upon a showing of inadequacy of price, or upon an offer of a higher bid, properly secured, it is discretionary with the court whether it will confirm the sale or set it aside and direct a resale. The exercise of this discretion depends in large measure upon the facts of each case, abuse thereof when effecting inequities being subject to review by the appellate court. Eakin *v.* Eakin, 83 W. Va. 512, 98 S. E. 608.

Removal of Fiduciary.—A court is vested by § 2687 of the Code of 1904 with a very large discretion in regard

to the removal of a fiduciary appointed by it, and while it is a legal discretion, to be exercised in a proper case, an appellate court ought not to interfere, except in a case where manifest injustice has been done, or where it is plain that a proper case has not been made for the exercise of the powers which the legislature has specially conferred upon that court, from which the fiduciary derives his authority. Nickels *v.* Horseley, 126 Va. 54, 100 S. E. 831.

Enforcement of Forfeiture.—The discretion of the court in relating to the enforcement of a forfeiture is a sound legal discretion, subject to review, and the appellate court will reverse the action of the trial court when, in its opinion, relief has been improperly denied. Wheeling, etc., R. Co. *v.* Triadelphia, 58 W. Va. 487, 52 S. E. 499.

Vacating Unauthorized Judgment before Issuing Writ of Prohibition.—The rule respecting application to the inferior court, to vacate its unauthorized judgment before awarding a writ of prohibition, to prevent the enforcement thereof, is discretionary, and the judgment of a circuit court, on review in the supreme court of appeals, will not be reversed for failure of the circuit court to require such application before awarding the writ. Bice *v.* Boothsville Tel. Co., 62 W. Va. 521, 59 S. E. 501.

Allowance of Commissioner's Accounts.—Where in a suit the accounts of a receiver have been audited by a commissioner and allowed by the court, and the disbursements and expenses of the receiver are supported by evidence, this court will not interfere therewith, unless it clearly appears the discretion of the court below has been abused. Hulings *v.* Jones, 63 W. Va. 696, 60 S. E. 874.

Ruling on Dismissal or Non-Suit.—W. Va. Code 1906, ch. 127, § 11, does not peremptorily require every dismissal or non-suit to be set aside simply because the court is asked to do so. The court has a sound discretion

in the premises. *Higgs v. Cunningham*, 71 W. Va. 674, 77 S. E. 273.

Allowing Disinterment of Body of Murdered Person.—If a court, in a murder prosecution, has power to order the body of the deceased to be disinterred for examination for evidential purposes, it is only when to do so is plainly necessary and essential to the justice and fairness of trial, and is a matter in the discretion of the court, and its refusal to make such order is, as a rule, not reviewable as cause for reversal. *State v. Highland*, 71 W. Va. 87, 76 S. E. 140.

Allowance of Alimony.—The right to fix the amount of alimony rests in the sound discretion of the chancellor, and this court will not disturb his judgment unless he has grossly abused such discretion. *Henrie v. Henrie*, 71 W. Va. 131, 76 S. E. 837; *Reynolds v. Reynolds*, 72 W. Va. 349, 78 S. E. 360. See ante, ALIMONY.

Joinder in or Withdrawals of Demurrers to Evidence.—As in other matters pertaining to a trial, wide discretion should be accorded the trial court in compelling joinder in or permitting withdrawals of demurrers to the evidence, and such discretionary action will not be reviewed unless plainly arbitrary or otherwise obviously improper. *Daniels v. Thacker Fuel Co.*, 79 W. Va. 255, 90 S. E. 840.

Granting Permission to Remove Papers from Bar.—Section 12, ch. 131, West Virginia Code, respecting the carrying from the bar by the jury of depositions or other papers read in evidence, leaves the subject in the sound discretion of the court; and, unless such discretion is clearly abused, the action will not constitute reversible error. *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384.

b. Evidence.

There is a vast amount of evidence which, in a certain legal sense, is relevant, but at the same time is so unimportant when compared with better evi-

dence which is easily available as to be properly excluded. The admission or rejection of such evidence is not controlled by any inflexible rule, but by a sound, though undefined, judicial discretion, depending upon the circumstances of the particular case, and subject to review. *Norfolk Southern R. Co. v. Fentress*, 127 Va. 87, 102 S. E. 588.

Exclusion of Evidence.—An appellate court will not disturb a verdict and judgment, because of the refusal of the trial court to admit evidence, offered after the conclusion of the introduction of evidence by both plaintiff and defendant, unless it appears that the trial court, in so doing, abused its discretionary powers, by refusing to allow an act in furtherance of substantial justice. *Webb v. Ritter* 60 W. Va. 193, 54 S. E. 484.

Admission of Expert Testimony.—The qualifications of a witness to testify as an expert being largely in the discretion of the trial court, the admission of such testimony will not be reviewed unless it clearly appears that the witness was not qualified. *Virginia Iron, etc., Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362.

The application of the res gestæ rule to a particular case depends upon the circumstances of that case, and necessarily rests at last in every instance upon the discretion and judgment of the trial court. Such discretion and judgment, of course, may be the subject of review; but in doubtful cases there ought to be and is a presumption in favor of the action of the court below. *Washington-Virginia R. Co. v. Deahl*, 126 Va. 141, 142, 100 S. E. 840.

The order of introduction of evidence lies largely in the discretion of the trial court, and its ruling will not be reviewed where no prejudice or injury to the party objecting is shown. *Rust v. Reid*, 124 Va. 1, 97 S. E. 324; *Pocahontas Collieries Co. v. Williams*, 105 Va. 708, 54 S. E. 868; *Sutherland v. Gent*, 116 Va. 783, 784, 82 S. E. 713.

See post, "Examination of Witnesses," III, D, 2, c.

A judgment of conviction in a criminal case is not reversible because the trial court exercising a reasonable discretion refused to admit evidence of the good character of defendant at a particular stage of the trial. *State v. Edwards*, 73 W. Va. 46, 79 S. E. 1005.

Reopening the case for the introduction of evidence is within the discretion of the trial court and will not be reviewed unless such discretion is exercised in an arbitrary or obviously improper manner. *Virginia R., etc., Co. v. Gorsuch*, 120 Va. 655, 91 S. E. 632; *State v. Littleton*, 77 W. Va. 804, 88 S. E. 458.

Illustrations. — In the present case, the plaintiff having rested his case, the defendant demurred to the evidence, after which, but before formal joinder in the demurrer, the court permitted the plaintiff, over defendant's objection, to read a deposition taken but not read by the defendant, as provided by § 3367 of the Code of 1887, the defendant having also introduced further evidence. After the deposition was read the defendant again demurred to the evidence. Held, under the circumstances, the defendant being in no respect prejudiced by the reading of the deposition at the time at which it was read, there was no reversible error in permitting it to be so read. *Pocahontas Collieries Co. v. Williams*, 105 Va. 708, 54 S. E. 868.

In prosecutions for the violation of the act of 1914, p. 252, relating to catching of fish in Rockbridge county, where the Commonwealth's attorney had concluded his opening address to the jury, and counsel for defendants was addressing the jury and pressing the point that the existence of the local law had not been legally proved by the records of the board of supervisors, and it being conceded that the fact of such local law had not been proved, it was not error for the trial court, over the objection of counsel for the defendants, to

suspend the argument and permit the introduction of certain records of the board of supervisors to prove the local law. The time and order of the introduction of proof rests largely in the discretion of the trial court, and the record failed to disclose any reason for supposing that the defendants could have bettered their condition if the evidence had been introduced at an earlier stage. *Burks v. Commonwealth*, 126 Va. 763, 101 S. E. 230.

c. Examination of Witnesses.

The subject of the examination of witnesses lies chiefly in the discretion of the court in which the case is tried, and its exercise is rarely, if ever, controlled by the appellate court, but the discretion which is vested in the trial court is not an ordinary discretion, but a sound judicial discretion, and an erroneous exercise of it will be corrected. *Robertson v. Atlantic, etc., Co.*, 129 Va. 494, 106 S. E. 521.

The rule that an appellate court will not interfere with the discretion of the trial court in the examination of witnesses applies more strongly to a case where the trial court permitted a witness to be recalled than to one where such permission was refused, for it is exceptional where injury is done by the reception of evidence. *Robertson v. Atlantic, etc., Co.*, 129 Va. 494, 106 S. E. 521.

Much latitude of discretion should be allowed the trial court in the matter of the examination of witnesses, and its ruling will not be reversed merely because evidence proper in chief was introduced in rebuttal. *Jacobs v. Warthen*, 115 Va. 571, 80 S. E. 113; *Dowler v. Gas, etc., Co.*, 71 W. Va. 417, 76 S. E. 845; *Smith v. Stanley*, 114 Va. 117, 122, 75 S. E. 742.

Generally, if a party wishes to cross-examine a witness upon matters not brought out on his examination in chief, he should do so by making the witness his own and calling him as such during the progress of the case,

but even if this rule be violated it is not ground for reversal unless the trial court has abused its discretion in the matter. If the objection to evidence is as to the time it is offered, the objection should so state. *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742.

Leading Questions.—Ordinarily, permitting a leading question to be asked is no ground for reversal. *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742.

While this court will not go so far as to say that it will not reverse because a leading question has been improperly propounded to a witness which was duly excepted to, yet trial courts are clothed with a large discretion in such matters which this court will not lightly undertake to control, and, in the case in judgment, there does not appear to be such prejudicial error to the accused as to warrant a reversal. *Flint v. Commonwealth*, 114 Va. 820, 76 S. E. 308.

The order of the examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely, if ever, to be controlled by an appellate court. It will not be reviewed where no prejudice or injury to the party objecting is shown. *Chesapeake, etc., R. Co. v. Chapman*, 115 Va. 32, 78 S. E. 631, citing *Southern R. Co. v. Stockdon*, 106 Va. 693, 56 S. E. 713; *McIntyre v. Smyth*, 108 Va. 736, 62 S. E. 930.

Permitting a witness to be recalled, after having refreshed his recollection, to correct a mistake in his previous testimony as to a date, is not reversible error. *Dowler v. Gas, etc., Co.*, 71 W. Va. 417, 76 S. E. 845.

Where a witness has testified to the correctness of a paper in evidence, and says that he wrote the paper, and on cross-examination is asked to rewrite certain words with a view of comparison with the paper purporting to have been written by him, and objection is made, it is within the sound discretion of the court trying the case to determine whether or not under the

circumstances the experiment shall be made, and an appellate court will not reverse the judgment of the trial court for either permitting or refusing the experiment to be made, unless it plainly appear that he has abused the discretion. *Bond v. National Fire Ins. Co.*, 77 W. Va. 736, 88 S. E. 389.

d. Change of Venue.

The question of defendant's good cause for a change of venue is one of fact addressed to the sound discretion of the court, and if his ruling thereon is prejudicial to the accused, it is cause for reversal. *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450.

A motion under Code 1904, § 4036, for a change of venue on the ground of prejudice against accused is addressed to the discretion of the trial court, and its ruling will not be disturbed unless it plainly appears that the discretion has not been properly exercised. *Looney v. Commonwealth*, 115 Va. 921, 78 S. E. 625.

e. Continuance.

See post, CONTINUANCE.

f. Costs.

Allowance of Costs.—Costs in trial courts are in the discretion of those courts and their action will not be reversed, except upon a clear showing of abuse. *Goodloe v. Woods*, 115 Va. 540, 80 S. E. 108; *Coffman v. Viquesney*, 76 W. Va. 84, 84 S. E. 1069; *State v. Moore*, 77 W. Va. 325, 87 S. E. 367.

Ordinarily an appeal does not lie from a decree for costs only in a chancery suit; but there are exceptions to the rule, turning on the question of the discretionary power of the trial court, respecting costs. A decree for such costs as are discretionary is not appealable; but one for costs not in the discretion of the court is appealable provided the amount thereof is more than one hundred dollars. *Nutter v. Brown*, 58 W. Va. 237, 52 S. E. 88. See *State v. Moore*, 77 W. Va. 325; 87 S. E. 367.

Extraordinary costs, such as allowances of expenses and compensation of receivers, either as between the receiver and the fund in court and parties, or as between party and party, are not discretionary, and a decree respecting such costs is appealable. *Nutter v. Brown*, 58 W. Va. 237, 52 S. E. 88.

Extraordinary costs such as allowances or expenses and compensation of receivers may, in a proper case, be provisionally allowed to the officer out of the fund and ultimately decreed to be paid to the party entitled to the fund by his adversary, but, in either case, a decree of such character is appealable. *Nutter v. Brown*, 58 W. Va. 237, 52 S. E. 88.

When, in a suit in equity, the title to personal property of such character as renders sale thereof necessary for the adequate protection of the rights of the parties interested, is involved, one defendant claimed four-fifths of the property in dispute and two others jointly claimed the remaining interest, and the court adjudged the property to belong to the plaintiff and gave the ordinary costs against all the defendants, reserving its judgment as to the extraordinary costs, and afterwards decreed that the defendant who had claimed the four-fifths interest pay the same, the decree as to the extraordinary costs will not be disturbed on appeal, unless the court can see that such defendant has been required to pay more than his due proportion of the entire cost. *Nutter v. Brown*, 58 W. Va. 237, 52 S. E. 88.

g. Issues Out of Chancery.

Directing Issues.—In directing an issue out of chancery the court has a sound discretion, which will not be disturbed unless clear abuse thereof appears. *Barthlow v. Hoge*, 71 W. Va. 427, 76 S. E. 813.

While directing an issue to be tried by a jury is a matter of discretion with a court of equity, it is not an arbitrary discretion, but one to be exercised upon sound principles of reason and justice.

A mistake in its exercise is just ground of appeal, and the appellate court will determine whether or not it has been properly exercised in a given case. *Catron v. Norton Hdw. Co.*, 123 Va. 380, 96 S. E. 853; *Carter v. Jeffries*, 110 Va. 735, 67 S. E. 284.

Failure to Order Issue.—Where the chancellor (although not requested to do so) has failed to order an issue out of chancery in a proper case, and has proceeded to hear and determine the case, and the Supreme Court of Appeals is not satisfied that the ends of justice have been attained, it will reverse and remand the cause, with directions to impanel a jury and determine the issue. *Hook v. Hook*, 126 Va. 249, 101 S. E. 223. *

An issue out of chancery awarded merely to satisfy the conscience of the chancellor is advisory only, and if he is not satisfied with the verdict he may set it aside and award a new trial of the issue, or he may disregard it and proceed to decide the cause without the intervention of another jury. The discretion of the chancellor in awarding an issue, and likewise in approving or disapproving the verdict thereon of the jury, must be exercised upon sound principles of reason and justice, and is subject to review on appeal. In the case in judgment, the written evidence is wholly inconsistent with the conclusion reached by the jury, and hence it was error in the trial court to have approved their verdict. *Carter v. Jeffries*, 110 Va. 735, 67 S. E. 284.

h. Jury.

Disqualification of Juror.—Upon the question of whether a venireman has formed such an opinion as disqualifies him from serving as a juror, great weight is justly due to the opinion of the trial judge, who sees and hears the venireman. *Rust v. Reid*, 124 Va. 1, 97 S. E. 324.

Special Jury.—An application for a special jury is one addressed to the sound discretion of the trial court, and the action of the trial court on such a

motion will not be reversed unless it is made to appear that its discretion has been improperly exercised. *Rust v. Reid*, 124 Va. 1, 97 S. E. 324; *Lemons v. Harris*, 115 Va. 809, 80 S. E. 740.

View by Jury.—The allowance of a view by a jury is peculiarly within the discretion of the trial court, and its refusal will not be ground of reversal, unless it is clearly manifest that a view was necessary to a just verdict, and that its refusal operated to the injury of the party asking it. *Bond v. National Fire Ins. Co.*, 77 W. Va. 736, 88 S. E. 389; *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271, 89 S. E. 305; *Fairview Fruit Co. v. Brydon & Bro.*, 85 W. Va. 609, 102 S. E. 231; *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

i. Parties.

"As a general rule, except where statutes otherwise provide, an order overruling or sustaining objections as to parties, directing, permitting or refusing amendments as to parties, or the substitution or addition of parties, is not appealable." *Harper v. South Penn Oil Co.*, 77 W. Va. 294, 87 S. E. 483, 487.

j. Pleading.

Time of Filing.—Trial courts have a very large discretion as to the time of filing and perfecting pleadings, which the Supreme Court of Appeals will not review unless such action is clearly erroneous and harmful. *Keister v. Phillips*, 124 Va. 585, 98 S. E. 674; *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384; *Thacker v. Hubbard*, 122 Va. 379, 94 S. E. 929; *Sutherland v. Wampler*, 119 Va. 800, 89 S. E. 875.

Amendments.—The rule is well recognized, that in granting leave to amend a pleading, the matter rests in the sound discretion of the court, and, where the defendants have no reasonable ground to object to the proposed amendments, an appellate court will not reverse the trial court for allowing pleadings to be amended, unless it appears that the discretion resting in the

trial court has been abused. *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

The admission of a plea amounting to the general issue is a matter within the discretion of the trial court, the exercise of which generally will not be subject to review by the appellate court. *Sutherland v. Wampler*, 119 Va. 806, 89 S. E. 875.

k. New Trial.

The trial court has a discretion when a motion for a new trial is made on the ground of a statement of a juror prior to the trial showing extreme prejudice against the accused, subject to review by the appellate court, which will not be interfered with unless it appears that some injustice has been done. *Allen v. Commonwealth*, 122 Va. 834, 94 S. E. 783.

As a general rule a stronger case must be made in order to justify an appellate court in disturbing an order granting a new trial than where a new trial has been refused; the reason usually assigned for this rule being that the refusal to grant a new trial operates a final adjudication of the rights of the parties, while the granting of a new trial simply invites further investigation. *Vaughan v. Mayo Milling Co.*, 127 Va. 148, 102 S. E. 597; *Star Piano Co. v. Brockmeyer*, 78 W. Va. 780, 90 S. E. 338; *Henderson v. Hazlett*, 75 W. Va. 255, 262, 83 S. E. 907.

This rule in its application must be properly confined to cases where the evidence is not only conflicting; but also against the weight of the evidence, and the evidence is wholly insufficient to support the verdict. *Wilson v. Johnson*, 72 W. Va. 742, 79 S. E. 734.

If the affidavits on which a motion for a new trial for after discovered evidence is based, are rebutted by counter affidavits, it is for the court below exercising a sound judicial discretion to say whether a new trial should be granted, and its judgment should not

be disturbed, except for plain abuse of that discretion. *Duty v. Chesapeake, etc., R. Co., 70 W. Va. 14, 73 S. E. 331.*

In the absence of the evidence, this court can not reverse the ruling of the trial court setting aside a verdict as contrary to the law and the evidence. Although it appears from the record that the sole ground relied on by the defendants for setting aside the verdict was that the court permitted counsel for the plaintiff to refer to a section of the Code which had no possible bearing on the case; yet, where it does not appear what reasons may have controlled the court's action this assignment of error can not be passed upon when the evidence in the case is not certified. *Lemons v. Harris, 115 Va. 809, 80 S. E. 740.*

Granting New Trial. — When in an action for personal injuries the nature and extent of the injuries sustained and whether temporary or permanent is left in doubt by the evidence, and the verdict is large, and possibly excessive, and it appears that the jury may have been misled by too broad an instruction given for plaintiff, the judgment of the trial court setting aside the verdict and awarding the defendant a new trial will not be reversed on writ of error. *Cain v. Kanawha Tract. etc., Co., 81 W. Va. 631, 95 S. E. 88.*

Where, on a motion to set aside a verdict, a conflict of oral testimony of witnesses in the presence of the jury is not alone involved, but conflicting oral testimony is on the one side so corroborated by documentary evidence, uncontroverted facts and circumstances, or some of these, as to show that the verdict is decidedly against the preponderance of the evidence, the court may properly set aside the verdict and award a new trial. *Devericks v. Fair Grounds Imp. Co., 73 W. Va. 174, 80 S. E. 143.*

In an action for personal injuries the amount of damages properly recoverable depends largely on whether the

injuries are permanent or only temporary, and where on the trial of such an action the verdict for plaintiff is large and time enough has not elapsed so as to determine whether such injuries are in fact permanent, and the question of the permanency of the injuries is not very well developed by the evidence, and the evidence tends to show neglect by plaintiff of her injuries, retarding the healing processes, this court will not reverse the judgment of the trial court in awarding defendant a new trial. *Adkinson v. Baltimore, etc., R. Co., 75 W. Va. 156, 53 S. E. 291.*

Abuse of Discretion in Granting New Trial.—In a clear case of abuse of discretion in setting aside a verdict and awarding a new trial, this court will reverse the judgment of the lower court and correct the error. *Henderson v. Hazlett, 75 W. Va. 255, 83 S. E. 907.*

New Trial Granted for Error in Instructions.—Where the trial court has expressly confined its action in granting a new trial to error in the instructions, its action in granting a new trial on this ground will not be sustained by the appellate court, if in fact there was no error in the instructions. *Vaughan v. Mayo Milling Co., 127 Va. 148, 102 S. E. 597.*

1. Receivers.

Appointment of Receiver.—The question whether or not a receiver will be appointed in a case is addressed to the sound discretion of the court under all the circumstances, and this discretion when exercised will not be interfered with on appeal except where the discretion has been manifestly abused. *Lamp v. Homestead Bldg. Ass'n, 62 W. Va. 56, 57 S. E. 249.*

Compensation of Receiver.—The allowance of compensation to a receiver is a matter within the sound discretion of the court having the receivership in charge, and on appeal the decree of allowance will not be disturbed unless it is plainly unwarranted. *Campbell v.*

Charleston St. R. Co., 73 W. Va. 493, 80 S. E. 809.

F. DEFAULT JUDGMENTS AND DECREES.

Necessity of Application to Lower Court.—Where, in a suit against a devisee and others to have sold to pay liens a greater interest in land than was devised to him, codevisees remotely interested therein by executory devise over in default, at his death, of living children or issue of such children, are made defendants solely for the purpose of having said will construed against their contingent interest in said land, and who appear and by their demurrer overruled challenge as matter of law the right of the plaintiff to any relief against them, and on default of answer by them final decree is pronounced that said devisee took by said devise such greater interest, and directing a sale thereof to pay said liens, such final decree is not a decree by default precluding such codevisees from an appeal without motion in the circuit court to correct the error therein against them, provided by § 6, ch. 134, Code (W. Va. Code 1906, § 4037), such error being necessarily involved in the decree overruling their demurrer to the bill. *Dent v. Pickens*, 61 W. Va. 488, 58 S. E. 1029.

Judgment Not Reviewable in Trial Court.—A judgment of the circuit court, rendered in his absence, on appeal by defendant from the judgment of a justice against him, after two appearances, and trial before the justice, and subsequent appearance and continuance obtained on his motion in the circuit court, is not a default judgment within the meaning of § 5, chap. 134, Code 1906, reviewable on motion by the circuit court for errors apparent, judicial in nature, as provided by said section; such error, if any, being reviewable only on writ of error to the supreme court; and the judgment of a circuit court setting aside such judgment, on motion, at a subsequent term, is erroneous, and will be corrected here

on writ of error. *Dadisman v. West Virginia, etc., Tel. Co.*, 69 W. Va. 43, 70 S. E. 855.

G. VOID DECREES.

An appeal by a non-resident whose property has been proceeded against by order of publication and sold, without service of process upon him or appearance, does not lie from alleged void entries and decrees in the proceedings, nor from an order dismissing a motion to correct, set aside and vacate such entries and decrees, nor from erroneous decrees entered in the cause. *Foland v. Brownfield*, 73 W. Va. 270, 80 S. E. 359.

The remedy for excesses of authority and correction of errors in such cases, is in the court below on a rehearing or a bill in equity offering to do equity, or, if the decrees are void, by a collateral proceeding for the recovery of the property sold. *Foland v. Brownfield*, 73 W. Va. 270, 80 S. E. 359.

H. CONSENT DECREE.

An indorsement on a decree, "agreed to," signed by counsel for all the parties to the suit, makes the decree a consent decree so far as it affects the interest of the clients of such counsel. So far as they are concerned, the decree is agreed to as a whole, without reservation. From such a decree no appeal lies, as the consent cures all such errors. *Hounshell v. Hounshell*, 116 Va. 675, 82 S. E. 689.

Showing Nature of Judgment in Appellate Court.—A final judgment of a circuit court dismissing a declaration on demurrer over the express exception of plaintiff, brought here for review on writ of error, can not by affidavits be shown to be a judgment by consent so as to effect a dismissal of the writ of error. *Fox v. Hinton*, 70 W. Va. 654, 74 S. E. 908.

I. JUDGMENT OR DECREE LIABLE TO BE REVERSED OR AMENDED BY TRIAL COURT.

Necessity for Motion in Trial Court.

—Va. Code 1919, § 6334, provides that no appeal, etc., shall be allowed for any matter for which a judgment or decree is liable to be reversed, or amended, on motion as provided in § 6333, by the court which rendered it, or the judge thereof, until such motion be made and overruled in whole or in part.

J. APPEALS FROM CORPORATION COURTS.

Courts of the City of Richmond.—Code of Va., § 5929.

Court of Law and Chancery of Roanoke.—Code of Va., § 5950.

Courts of the City of Norfolk.—Code of Va., § 5938.

K. ACTION COMPELLABLE BY MANDAMUS.

Action which can certainly be compelled by mandamus can not be appealed from. *Richmond Cedar Works, etc., Co. v. Harper*, 129 Va. 481, 106 S. E. 516.

IV. WHO MAY APPEAL.

½A. IN GENERAL.

Accused in Criminal Case. — Va. Code 1919, § 4931; Barnes Code ch. 160, § 3.

Person Deceased.—A writ of error can not be awarded to a person who is dead, and, if inadvertently done, the writ will be dismissed, but a new writ may be applied for by his representative. *Jackson v. Wickham*, 112 Va. 128, 70 S. E. 539.

Debtor of Deceased Judgment Creditor.—Under the practice in this state, where a judgment creditor has died before a writ of error is taken, the debtor may nevertheless prosecute his writ of error without a revival of the judgment, and the writ may be served upon the personal representative, if he is named in the petition. *Whittington v. Jefferson County*, 79 W. Va. 1, 90 S. E. 821.

Pauper.—See post, COSTS.

A. PARTIES ONLY.

One can not appeal a case to the supreme court unless he has been a party to the controversy in the circuit court, or stands in the place of such party as legal representative. *Wade v. Carney*, 68 W. Va. 756, 70 S. E. 770. See *Elkins Nat. Bank v. Simmons*, 57 W. Va. 1, 4, 49 S. E. 893.

Though interested, a party can not for the first time come into a cause after it is ended below and obtain an appeal. *Wade v. Carney*, 68 W. Va. 756, 70 S. E. 770.

The special receiver of a federal court, though authorized by that court, will not be entertained or heard in the supreme court upon an appeal by him from a decree pronounced by a circuit court of this state in a cause pending there, to which he was not a party and whose personal rights are in no way involved or affected by the decree appealed from. *Whyel v. Jane Lew Coal, etc., Co.*, 67 W. Va. 651, 69 S. E. 192.

Petitioners Improperly Refused Right to Become Parties to Pending Suit.—Petitioners, who have been improperly refused the right to file their petition in a pending suit and to become parties thereto, have the same right to appeal to this court as if they had been made parties by the bill. *Anderson v. Bowen*, 77 W. Va. 89, 87 S. E. 186.

Vacation of Judicial Sale—Purchaser's Right of Appeal.—A purchaser at a judicial sale which has been confirmed has acquired such a fixed interest in the property sold as entitles him, though not a party to the original suit, to appeal to a higher tribunal to protect his rights against an improper setting aside of such sale, at least where the resale has been made and confirmed by the court. *Eakin v. Eakin*, 83 W. Va. 512, 98 S. E. 608.

B. WHO ARE PARTIES.

Personal Representative of Deceased Party.—*Jackson v. Wickham*, 112 Va. 128, 70 S. E. 539. *Poff v. Poff*, 128 Va.

62, 104 S. E. 719. See ante, "Parties Only," IV, A.

C. MUST BE AGGRIEVED.

1. General Rule.

In order that an appeal may be successfully prosecuted, it must be shown that the appellant has been aggrieved. *Rowland v. Rowland*, 104 Va. 673, 52 S. E. 366, *Kelner v. Cowden*, 60 W. Va. 600, 55 S. E. 649; *Brown v. Howard*, 106 Va. 262, 55 S. E. 682; *Elkins Nat. Bank v. Simmons*, 57 W. Va. 1, 49 S. E. 893; *Beecher v. Foster*, 66 W. Va. 453, 460, 66 S. E. 643; *Greenlee v. Steelsmith*, 64 W. Va. 353, 62 S. E. 459.

2. Applications of Rule.

The fact that, after a report of debts against a decedent's estate has been confirmed, other creditors come in by petition and are asserting debts against decedent's estate does not prevent a party, whose rights have been prejudiced by the decree confirming the report of indebtedness, from appealing. *Reid v. Windsor*, 111 Va. 825, 69 S. E. 1101.

Where Verdict against Defendant Set Aside.—In an action under the W. Va. Code, to recover damages for the death of a person from wrongful act or neglect, and a verdict for the plaintiff is, on his motion, against the objection of the defendant, erroneously set aside because of smallness of the amount of the verdict, the defendant may have a writ of error. *Hawkins v. Nuttallburg Coal, etc., Co.*, 66 W. Va. 415, 66 S. E. 520.

An infant legatee as to whom a will is declared valid, and whose legacy has been paid in full, has no interest in and can not appeal, from a decree declaring the will void as to all other parties. *Rowland v. Rowland*, 104 Va. 673, 52 S. E. 366.

Special Commissioner.—A special commissioner appointed to make sale of land, but who has no personal interest in the subject-matter of litigation, can not appeal from a decree setting aside the decree of sale. He is a

mere ministerial officer of the court, whose powers and duties cease, ipso facto, upon setting aside the decree of sale. So far as it affects him in his capacity of commissioner, the setting aside of a decree of sale is not an appealable grievance in contemplation of § 3454 of the Virginia Code. (Va. Code 1919, § 6336.) *Brown v. Howard*, 106 Va. 262, 55 S. E. 682.

A widow who has not renounced her husband's will has no interest in land devised by him solely to his children, and can not appeal from a decree adverse to the interest of the children, although a party to the suit in which the decree was rendered. *Givens v. Clem*, 107 Va. 435, 59 S. E. 413.

Guardians—Infants.—A guardian ad litem may appeal in the names of the infants, by himself as such guardian, from a decree adverse to their interest, but if he fails to do so, the infants may appeal by some one as their next friend. *Givens v. Clem*, 107 Va. 435, 59 S. E. 413.

Parties Not Making or Affected by Motion to Quash Attachment Can Not Appeal from Ruling Thereon.—*Elkins Nat. Bank v. Simmons*, 57 W. Va. 1, 49 S. E. 893.

Proceedings before State Corporation Commission.—Va. Code 1919, § 3734.

Defendant in Proceedings to Remove Public Officer.—Va. Code 1919, § 2706.

Forfeiture of Corporate Charter.—Va. Code 1919, § 3831.

Assessment of Insurance Companies.—Va. Code 1919, § 4195.

Person Aggrieved by Order Granting or Refusing Leave to Allow City to Erect Dam in Watercourses.—Va. Code 1919, § 3060.

2½. Error Affecting Only Co-Party.

Where a debtor and another jointly own a life interest in certain property, and a decree is entered in a judgment creditors' suit directing the sale of the entire life interest in satisfaction of the

debts of the debtor, it will not be reversed, though erroneous, where the owner of the other half interest is a party to the suit and does not join in the appeal from the decree. *Bruceton Bank v. Alexander*, 83 W. Va. 573, 98 S. E. 804.

Joint Tort Feasors.—While joint tortfeasors are jointly and severally liable, no right of contribution exists among them, and neither has a remedy over against the other. If they are proceeded against jointly, the plaintiff may dismiss or discontinue his action as to one defendant, without affecting his rights against the other. If judgment is against one, the other can not have a writ of error to review it. *Walton v. Miller*, 109 Va. 210, 63 S. E. 458.

4. Effect of Assignment of Interest.

In *Hilliard v. Union Trust Co.*, 123 Va. 724, 97 S. E. 335, a motion to dismiss writ of error because the plaintiff in error, had previously conveyed all her interest in the subject matter of the litigation to her son, was overruled.

D. THE COMMONWEALTH.

1. In Criminal Cases.

a. In Virginia.

Constitutional Provision—No Appeal Except in Revenue Cases.—Const. of Va., §§ 8, 88. *Commonwealth v. Willcox*, 111 Va. 849, 69 S. E. 1027; *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

Section 4052 of the Code of 1904 providing for appeals on behalf of the commonwealth is unconstitutional except in so far as it refers to appeals in revenue cases. *Commonwealth v. Willcox*, 111 Va. 849, 69 S. E. 1027; *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

Section 88 of the Constitution applies only to cases where the life or liberty of accused is involved, leaving to the legislature, so far as this particular section of the Constitution is concerned, a free hand with reference to appeals in criminal cases where no

other punishment than a fine is prescribed. As to this latter class of cases it is apparent, therefore, that § 4052 of the Code of 1904 is not in conflict with this provision of the Constitution. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

Rule of Former Jeopardy.—Section 8 of the Constitution of 1902 incorporates the well known common law doctrine of former jeopardy. When the purpose of an appeal in a criminal case is to procure on behalf of the State a reversal of the judgment and a new trial of the accused (as distinguished from a mere review and decision of the legal question involved for use as a precedent in future cases) the rule against second jeopardy for the same offense operates *proprio vigore* to destroy the right of appeal. The matter is jurisdictional, and the accused is not obliged to first abide the result of the appeal, and, in the event of a reversal, resort to his plea of *autrefois acquit* or *autrefois convict* to avoid a second trial. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

Prior to the adoption of the Constitution of 1902, there was no express or implied constitutional inhibition upon the right of appeal to the commonwealth, and as the subject was then controlled entirely by the common law, there was no legal reason why the legislature might not, by express statute, have allowed the state a writ of error in any criminal case. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

Provision of United States Constitution Not Applicable to the States.—*Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

Liquor Cases.—Code 1919, § 4645, provides that in all cases arising under chapter 184 relating to intoxicating liquor the state shall have the right to appeal except when forbidden by the Constitution.

b. In West Virginia.

The supreme court of West Virginia

is without jurisdiction to entertain a writ of error by the town or state from the judgment of the circuit court discharging a prisoner from prosecution under a municipal ordinance for public drunkenness and disorderly conduct, even though the validity of such ordinance may be involved. *Philippi v. Kittle*, 56 W. Va. 348, 49 S. E. 238.

Writ of Error to Judgment Quashing Indictment.—*Barnes* W. Va. Code, p. 1156, ch. 135, § 31.

Prohibition Act.—*Barnes* W. Va. Code, p. 409, ch. 32A, § 22, provides that in all cases arising under the state prohibition act the state shall have the right to appeal.

2. In Revenue Cases.

See ante, "In Criminal Cases," IV, D, 1.

The Commonwealth has the right of appeal in all the prosecutions for the violation of a law relating to the state revenue. Va. Const. §§ 8, 88, Va. Code 1919, § 4931.

Where the defense to a prosecution for the unlawful sale of malt liquor is that the defendant had the right to sell it at the place where sold, under the revenue laws of the state, the case involves "a violation of a law relating to the state revenue" and § 4051 and an appeal lies on behalf of the commonwealth. *Commonwealth v. Goodwin*, 109 Va. 828, 64 S. E. 54.

West Virginia.—W. Va. Const. art. S. § 3, ch. 113, § 4, *Barnes* Code, ch. 160, § 3.—The plain purpose of the provision of the constitution and statute was to grant the state a writ of error in matters relating to the revenue. *State v. Hotel McCreery Co.*, 68 W. Va. 130, 132, 69 S. E. 472.

The supreme court of appeals has jurisdiction of a writ of error for the state from a judgment of a circuit court for defendant, a corporation, upon indictment for selling liquor under a license issued to it in violation of § 10, chap. 82, Acts 1907, forbidding license to a corporation. *State v. Hotel*

McCreery Co., 68 W. Va. 130, 69 S. E. 472.

A writ of error lies for the state from the supreme court in prosecutions for offenses under provisions of chap. 32 of the Code relating to licenses, since such cases relate to public revenue. *State v. Hotel McCreery Co.*, 68 W. Va. 130, 69 S. E. 472.

Erroneous Assessment of Taxes in General.—Va. Code 1919, §§ 2389, 2391.

Erroneous Assessments Made by State Corporation Commission.—Va. Code 1919, § 2393.

Appeal from Decision Relating to Merchants' Licenses.—Va. Code 1919, § 2366.

Violation of Act Held Not Violation of State Revenue Law.—The act of March 5, 1900 (Acts 1899-1900, p. 868) entitled "an act for the protection of farmers, etc., in Buckingham county, by requiring licenses of labor agents, and imposing penalties for violation," empowered the board of supervisors to place a license tax upon all labor agents coming into the county for the purpose of inducing local laborers to go elsewhere, and provided that any agent or representative soliciting laborers to leave the county without having in his possession a license or receipt showing that the license had been paid, should be guilty of a misdemeanor and punished on conviction by a fine. Held: That a violation of this act was not a violation of a state revenue law and, therefore, no appeal lies from a judgment of the circuit court quashing and dismissing a warrant issued by a justice of the peace charging accused with "soliciting labor illegally and contrary to" the act. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

5. Other Proceedings.

Proceedings before State Corporation Commission.—Va. Code 1919, § 3734. See post, PUBLIC SERVICE COMMISSIONS.

Forfeiture of Corporate Charter.—Va. Code 1919, § 3831.

Proceedings for Removal of Public Officer.—Va. Code 1919, § 2706.

D $\frac{1}{2}$. COUNTIES AND CITIES.

Counties and cities may sue and be sued, and have the right of appeal from and adverse decision both at law and in equity. *Commonwealth v. Schmeltz*, 116 Va. 62, 81 S. E. 45.

E. JOINT APPEALS.

Consolidation by Consent.—A single appeal may be taken from decrees in two separate suits substantially, though informally, prepared, submitted and heard as one, by agreement of the parties and consent of the court, express or implied. *Kelly v. Wellsburg, etc., Co.*, 74 W. Va. 130, 81 S. E. 712.

Cases Involving Different Issues between Same Parties. — Three several judgments, rendered in three different proceedings, commenced at different times, in which different defenses were made, and never consolidated before the judgments were rendered, though between the same parties, can not be brought to this court by a single writ of error. *Commonwealth v. Round Mountain, etc., Mfg. Co.*, 117 Va. 30, 83 S. E. 1061.

F. ESTOPPEL TO APPEAL.

Accepting Benefits of Decree.—A party availing himself of a decree as far as favorable to him can not appeal from the decree wherein it is not favorable to him if his acceptance of the benefit on the one hand is totally inconsistent with appeal on the other. *Bright v. Mollohan*, 75 W. Va. 116, 83 S. E. 298; *McKain v. Mullen*, 65 W. Va. 558, 64 S. E. 829; *Carpenter v. Camp Mfg. Co.*, 112 Va. 88, 70 S. E. 496; *Eakin v. Eakin*, 83 W. Va. 512, 98 S. E. 608.

Cross errors, assigned on rehearing, can not be considered, where a party who was responsible for the errors had accepted the benefit of the decrees entered in the suit. *Pardee, etc., Lumber Co. v. Odell*, 78 W. Va. 159, 88 S. E. 419.

Same—Exceptions to Rule.—To the general rule that if a party accepts the benefits of a decree in his favor he thereby waives his rights to appeal, there is a well recognized exception, applied in this case, that if he is so absolutely entitled to the benefit received that a reversal of the decree can not affect his right to it, he does not thereby waive error, or lose his right to appeal. *Gay v. Householder*, 71 W. Va. 277, 76 S. E. 450; *McKain v. Mullen*, 65 W. Va. 558, 64 S. E. 829; *Watring v. Gibson*, 84 W. Va. 204, 209, 100 S. E. 68.

Where the parts of a decree are separate and independent, and the receipt of a benefit from one part is not inconsistent with an appeal from another, the party receiving the benefit will not be deemed to have waived his right to appeal. *Eakin v. Eakin*, 83 W. Va. 512, 98 S. E. 608.

Where, after confirmation of a judicial sale, the court later sets it aside because of a higher offer, orders a resale, and directs the return of the money paid and notes delivered by the first purchaser, the portion of the decree directing the return of the money and notes is clearly separable and independent from that part of the decree which totally deprives the purchaser of all his rights under the sale confirmed to him, and the acceptance of the one under protest at the direction of the court can not reasonably be construed into a waiver of his right to appeal the other. *Eakin v. Eakin*, 83 W. Va. 512, 98 S. E. 608.

Conduct Inconsistent with Claim of Right to Review.—No waiver or release of errors operating as a bar to the further prosecution of an appeal or writ of error can be implied except from conduct which is inconsistent with the claim of right to reverse the decree or judgment which it is sought to bring in review. *Eakin v. Eakin*, 83 W. Va. 512, 98 S. E. 608.

Illustrations.—The defendant in a suit by which his tax deed is set aside,

can not unreservedly accept the taxes, interest, and charges tendered by the bill and ordered by the decree to be paid him, and then appeal from the decree. His acceptance is a positively implied waiver of his right to appeal. Nor will an offer to return the money, made long after its acceptance, avail to prevent dismissal of an appeal in such case. *McKain v. Mullen*, 65 W. Va. 558, 64 S. E. 829.

Where a party to a suit for the construction of a testator's will and the administration of his estate under the care of the court not only received what, under the decree construing the will, she was entitled to, but also brought a suit based upon that construction of the will, and procured a sale of a part of the real estate devised by the will, and a distribution of the proceeds among the parties, as ascertained and determined by the decree construing the will, she can not appeal from the last-mentioned decree. The right to bring such suit, and the right to appeal from said decree, are wholly inconsistent, and the election to bring the suit and have the fruits thereof distributed as aforesaid was a renunciation of the right to appeal from the decree which she sought to and did enforce in the other suit. *Walter v. Whitacre*, 113 V. 150, 73 S. E. 984, distinguishing *Southern R. Co. v. Glenn*, 98 Va. 309, 36 S. E. 395.

A party to a cause, who has paid a money decree against him, can not, after the cause has been appealed by the opposite party, cross-assign as error the rendering of such decree. *Waring v. Gibson*, 84 W. Va. 204, 100 S. E. 68.

Agreement of State Auditor as to Claim for Taxes.—An agreement of the State Auditor made in good faith by and with the advice and consent of the attorney general, who represented and conducted the litigation on behalf of the commonwealth to accept the sum awarded by the circuit court in settlement of the claims for taxes against

a certain party, is valid and binding on the state, and deprives the commonwealth of an appeal. *Commonwealth v. Schmelz*, 111 Va. 62, 81 S. E. 45.

Allowing Appeal When Verdict Reduced and Accepted under Protest.—Va. Code 1919, § 6335. See *DuPont, etc., Co. v. Taylor*, 124 Va. 750, 98 S. E. 866.

V. JURISDICTION OF SUPREME COURT OF APPEALS.

1/2A. IN GENERAL.

To What Courts Applicable.—"Mr. Barton, in discussing the jurisdiction of the supreme court of appeals, observes: 'The appellate jurisdiction extends to all matters of the requisite amount determined in the circuit or corporation courts.' 1 Bar. L. Pr. 39." *Southern R. Co. v. Hill*, 106 Va. 501, 566, 56 S. E. 278.

Jurisdiction of Appellate Court Dependent upon Jurisdiction Below.—If a justice or other inferior court or tribunal has no jurisdiction to hear and determine a cause, an appeal from a judgment rendered therein does not confer upon a court of superior rank a jurisdiction not possessed by the former, though it may have had authority in the first instance to adjudicate the matter in controversy in its entirety. *Brotherton v. Robinson*, 85 W. Va. 753, 102 S. E. 700.

The jurisdiction of the court below was limited to the issue made by the pleadings and the same is true of the jurisdiction of the Supreme Court of Appeals on appeal. *Reynolds v. Adams*, 125 Va. 295, 99 S. E. 695.

Dismissal for Want of Jurisdiction.—See post, "Want of Jurisdiction," XI, B, 2.

A. CONSTITUTIONAL AND STATUTORY PROVISIONS.

Va. Const. § 88; W. Va. Const. art. VIII, § 3, Va. Code, 1919, §§ 5864, 5865. Barnes Code, ch. 113, § 4; ch. 114A, § 8.

Virginia and W. Va. Provisions Dis-

tinguished. — *Carskadon v. Board*, 61 W. Va. 468, 56 S. E. 834.

Awarding Injunction. — Va. Code 1919, § 6320.

Where Writ of Error or Supersedeas Awarded to Judgment in Caveat Proceedings.—Va. Code 1919, § 449.

B. JURISDICTION DEPENDENT UPON STATUTE.

It is a fixed rule that unless a statute, pursuant to the constitution, grants a writ of error in the case, none can be entertained in the supreme court of appeals. *McLean v. State*, 61 W. Va. 537, 56 S. E. 884; *State v. Shumate*, 48 W. Va. 359, 369, 37 S. E. 618; *Carskadon v. Board*, 61 W. Va. 468, 56 S. E. 834. Compare *Forbes v. State Council*, 107 Va. 853, 60 S. E. 81.

The jurisdiction of this court rests wholly upon the written law and can be exercised only in obedience to the constitution and laws passed in pursuance thereof. Statutes of limitation are deemed statutes of repose, and this conception of such statutes applies with peculiar force to limitations upon the right of appeal. When the legislature has prescribed the method for the exercise of the right of appeal or supervision, such method is exclusive, and neither court nor judge can modify these rules without express statutory authority, and then only to the extent specified. *Tyson v. Scott*, 116 Va. 243, 81 S. E. 57.

Proceedings of Public Service Commission.—See post, "Appeals from Public Service Commissions," XVI, A, 10½.

C. JURISDICTION MUST APPEAR AFFIRMATIVELY.

The jurisdiction of the appellate court must affirmatively appear from the record. *Ritter Lumber Co. v. Coal Mountain Min. Co.*, 115 Va. 370, 372, 79 S. E. 322; *Jones v. Buckingham Slate Co.*, 116 Va. 120, 81 S. E. 28; *Oppenheimer v. Triple-State Nat. Gas, etc., Co.*, 62 W. Va. 112, 115, 57 S. E. 271.

The jurisdiction of the supreme court of appeals affirmatively appears from the record, when the court can see that the judgment of the lower court necessarily involved the constitutionality of some statute or ordinance, or drew in question some right under the federal state constitution. *Ward Lumber Co. v. Henderson-White Mfg. Co.*, 107 Va. 626, 628, 59 S. E. 476.

Affidavits in Appellate Court Showing Amount in Controversy.—On an appeal, the amount in controversy must, as a general rule, be made to appear affirmatively. If, however, the record is silent on the subject, affidavits may be filed in the appellate court to show the real amount in controversy. *Lamb v. Thompson*, 112 Va. 134, 70 S. E. 507.

Dismissal of Appeal for Failure to Show Jurisdiction. — See post, "Grounds," XI, B.

D. BURDEN OF PROOF.

The burden is upon him who invokes the authority of the supreme court of appeals to establish its jurisdiction over the matter in controversy. *Forbes v. State Council*, 107 Va. 853, 60 S. E. 81; *Lamb v. Thompson*, 112 Va. 134, 70 S. E. 507; *Ritter Lumber Co. v. Coal Mountain Min. Co.*, 115 Va. 370, 79 S. E. 322; *Jones v. Buckingham Slate Co.*, 116 Va. 120, 81 S. E. 28.

"The following qualification of the general rule does not affect this case, namely, that 'on the other hand, when the original demand is pecuniary and i excess of the jurisdictional amount, but is alleged by the appellee to have been reduced below that amount by payment, the onus rests upon him to make that fact appear.'" *Ritter Lumber Co. v. Coal Mountain Min. Co.*, 115 Va. 370, 372, 79 S. E. 322.

E. JURISDICTION WHERE MATTER IN CONTROVERSY IS MERELY PECUNIARY.

1. Provisions Stated.

a. In Virginia.

Former and Present Jurisdictional

Amount.—In the original digest the jurisdictional amount of the supreme court of appeals in matters merely pecuniary is stated to be \$500, but by subsequent constitutional and statutory provisions the appellate jurisdiction of the supreme court of appeals of Virginia has been reduced to \$300. So now where the matter involved is merely pecuniary and less than \$300, the appellate court is without jurisdiction. *Va. Const.* 88; *Va. Code* 1919, § 6337. *Elliott v. Ashby*, 104 Va. 716, 718, 52 S. E. 383; *Allison v. Wood*, 104 Va. 765, 52 S. E. 559; *International Harvester Co. v. Smith*, 105 Va. 683, 685, 54 S. E. 859; *Schermerhorn v. Commonwealth*, 107 Va. 707, 60 S. E. 65; *Holdsworth v. Crowder*, 111 Va. 663, 664, 69 S. E. 935; *Ritter Lumber Co. v. Coal Mountain Min. Co.*, 115 Va. 370, 372, 79 S. E. 322; *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 633, 93 S. E. 684; *Chesapeake, etc., R. Co. v. Williams*, 122 Va. 502, 505, 95 S. E. 417.

"The first duty of this court, on writ of error or appeal, is to test its jurisdiction, by the sum or value in controversy." *Yoho v. Thomas*, 85 W. Va. 593, 102 S. E. 236.

Operation and Effect of Statute.—A judgment for four hundred dollars was rendered by a circuit court in a contested action at law December 8, 1903, but the court did not adjourn till December 19, 1903. The statute reducing the minimum jurisdictional amount of the supreme court of appeals in matters merely pecuniary became operative December 10, 1903. Held, a writ of error lies to said judgment from this court. The judgment did not become final until after the statute became operative. Moreover the statute is remedial in its nature, and its language broad enough to cover judgments rendered before as well as after its passage. *Allison v. Wood*, 104 Va. 765, 52 S. E. 559.

b. In West Virginia.

In order to give the supreme court

of appeals of West Virginia jurisdiction, the constitution and statute provide that in matters merely pecuniary, a sum exceeding one hundred dollars exclusive of costs must be involved. *W. Va. const. art. VIII, § 3*; *Barnes Code ch. 113, § 4*; *Oppenheimer v. Triple-State Nat. Gas. etc., Co.*, 62 W. Va. 112, 114, 57 S. E. 271; *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 627, 57 S. E. 137; *Dickinson v. Mankin*, 61 W. Va. 429, 431, 56 S. E. 824; *McClagherty v. Rumburg*, 71 W. Va. 98, 76 S. E. 137. *Code ch. 113, § 4*; *Carskadon v. Board*, 61 W. Va. 468, 56 S. E. 834.

2. Provisions Construed and Applied.

½a. In General.

Where the effect of a judgment is to draw in question the validity of a claim to an amount of greater value than the jurisdictional sum of the appellate court, although the amount involved in the present action is not as large as the minimum required, a writ of error will lie, if it appears that the judgment conclusively settles the rights of the parties to the larger amount. But this principle will not be extended further than the adjudged cases have gone. *Jones v. Buckingham Slate Co.*, 116 Va. 120, 81 S. E. 28.

Amount in Controversy Can Not Be Increased by Fictitious Counterclaims.

—The amount in controversy before a justice of the peace can not be increased by a fictitious counterclaim, so as to entitle the defendant to an appeal, or to a writ of error in case an appeal is denied him by the justice and the circuit court. *McDonald Colliery Co. v. Crotty*, 69 W. Va. 407, 71 S. E. 568.

Quære, does a defendant in a case before a justice of the peace acquire the right to appeal by filing even a bona fide counterclaim of appellate amount, if he offers no evidence on the trial before the justice in support thereof? *McDonald Colliery Co. v. Crotty*, 69 W. Va. 407, 71 S. E. 568.

When the amount in controversy is sufficient to give appellate jurisdiction, but the plaintiff in error has been prejudiced in a sum less than the jurisdictional amount, the judgment will be reversed, but the costs in this court will be adjudged to the defendant in error as the party substantially prevailing. *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243.

Judgment for More than Claimed in Writ.—Where, in an action of assumpsit, judgment is rendered for a greater sum than the damage laid in the writ and declaration, the appellate court will not review such judgment, when such excess of damages is not sufficient to give said court jurisdiction. *Giboney v. Cooper*, 57 W. Va. 74, 49 S. E. 939.

a. Meaning of Term "Matter in Controversy."

The real matter in controversy is that for which the suit is brought and judgment is rendered, and not that which may or may not come in question. In other words, the sole test of jurisdiction is the amount which the defendant may pay and thereby discharge himself, and if that sum be less than the minimum jurisdiction of the court, the appeal or writ of error should be dismissed. *Elliott v. Ashby*, 104 Va. 716, 717, 52 S. E. 383.

On a writ of error to review the judgment of a justice of the peace dismissing a petition of a subsequent attaching creditor against a prior one, the amount actually in controversy is the amount which the petitioner will lose if the defendant thereto should prevail in his attachment, which may include principal, interest and costs in the defendant's suit against the common debtor. *Bank v. Loeb*, 71 W. Va. 494, 76 S. E. 883.

Upon an inquiry as to whether the amount involved in a pecuniary controversy is sufficient to confer appellate jurisdiction, the amount of the claim asserted on the one side and denied on the other, not the validity

thereof, is the criterion, unless the claim is obviously pretentious and made merely to confer jurisdiction. *Brown v. Brown*, 72 W. Va. 648, 78 S. E. 1040.

b. Costs Not Considered.

The constitutional and statutory provisions expressly exclude the addition of costs to the value or amount in controversy for the purpose of bringing the amount up to the jurisdictional point. Va. const. § 88; W. Va. const. art. VIII, § 3; Va. Code 1919, § 6337; Barnes Code, ch. 113, § 4. *Nutter v. Brown*, 58 W. Va. 237, 239, 52 S. E. 88; *Carskadon v. Board*, 61 W. Va. 468, 470, 56 S. E. 834; *State v. Boner*, 57 W. Va. 81, 82, 49 S. E. 944; *Oppenheimer v. Triple-State Nat. Gas, etc., Co.*, 62 W. Va. 112, 57 S. E. 271.

c. Inclusion of Interest.

In the determination of the question of appellate jurisdiction of a decree for money, interest included therein is not to be excluded. *Murphy v. Fairweather*, 72 W. Va. 14, 77 S. E. 321.

Judgment for the state for \$100 on a scire facias on a recognizance of bail. At a subsequent term an order is made setting aside the judgment. As the principal and interest exceeded \$100 when the order of release was made, the supreme court of West Virginia has jurisdiction of a writ of error sued out by the state. *State v. Boner*, 57 W. Va. 81, 49 S. E. 944.

Interest May Be Waived.—In an action of assumpsit to recover excess freight charges on creosote, it was entirely competent for the plaintiffs to claim interest or not as they chose, and the trial court was powerless to make them claim it on demand of defendant, there being no evidence of a purpose to defeat the jurisdiction of a court of record by the release of a part of a demand previously asserted. Consequently, where the amount in controversy, without interest, was beneath the jurisdictional limit of the Supreme Court of Appeals, a writ of error must

be dismissed as improvidently awarded, unless jurisdiction can be shown on some other ground than the amount in controversy. *Chesapeake, etc., R. Co. v. Williams*, 122 Va. 502, 95 S. E. 417.

g. Test Where Plaintiff Below Is Appellant.

Amount Claimed Controls.—The test of appellate jurisdiction in the supreme court of appeals, when the plaintiff below is the plaintiff in error, and the matter in controversy is pecuniary, is the amount actually demanded in the court below and not merely the amount which he shows himself to be entitled to recover. *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243; *Longacre Colliery Co. v. Creel*, 57 W. Va. 347, 50 S. E. 430; *Patterson v. Clem*, 79 W. Va. 666, 91 S. E. 654. *Oppenheimer v. Triple-State Nat. Gas, etc., Co.*, 62 W. Va. 112, 57 S. E. 271.

"But a different rule applies where off-sets or claims are made by the defendant. Then the amount to be looked to, to ascertain whether this court has jurisdiction, is the amount claimed by the plaintiff, and, if his claim has been wholly disallowed, and a recovery taken against him in favor of the defendant, to also add to the amount claimed by the plaintiff in his summons the amount of the judgment rendered against him in favor of the defendant." *Longacre Colliery Co. v. Creel*, 57 W. Va. 347, 349, 50 S. E. 430.

"It makes no difference that the claim of the plaintiff in his declaration or that of the defendant in his plea or set-off is found, in the end, not sustained by the evidence to the amount claimed, or for anything. This is a subsequent question, not pertinent to the jurisdiction of the appeal. That is a question which the appellate court will proceed to inquire into after it has determined that it has jurisdiction to inquire." *Longacre Colliery Co. v. Creel*, 57 W. Va. 347, 349, 50 S. E. 430.

When Amount Claimed Does Not Control.—When it appears without conflict or doubt from the record, in a

purely pecuniary action, that the sum for which plaintiff was entitled to judgment, if entitled at all, did not exceed one hundred dollars, a writ of error can not lie to a denial of judgment to him, even though he declared for a sum sufficient to call for appellate jurisdiction. *Lawson v. Hersman*, 67 W. Va. 636, 69 S. E. 191; *Oppenheimer v. Triple-State Nat. Gas, etc., Co.*, 62 W. Va. 112, 114, 57 S. E. 271; *Dickinson v. Mankin*, 61 W. Va. 429, 430, 56 S. E. 824.

h. Test Where Defendant Below Is Appellant.

As to a defendant, the jurisdiction of the supreme court is tested by the amount of the judgment or decree of the court below against him, and not by the amount sued for. *Johnson v. Wheeling Lumber Co.*, 69 W. Va. 539, 72 S. E. 470; *Longacre Colliery Co. v. Creel*, 57 W. Va. 347, 50 S. E. 430.

j. Application of Rule in Particular Suits.

(1) Suits to Subject Property to Lien of Judgment.

Special Liens.—The appellate court of West Virginia has no jurisdiction to review the decree of a circuit court in a suit to enforce the payment of laborers' mechanics' or materialman's lien, where such liens are separate and distinct and arise out of separate and distinct contracts, either upon the petition of the owner of the property or of such lienors, except as to those liens decreed each of which exceeds the sum of \$100. *Wees v. Elbon*, 61 W. Va. 380, 56 S. E. 611. See *Virginia Supply Co. v. Calfee*, 71 W. Va. 300, 76 S. E. 669.

In a suit to subject land to the payment of a judgment, the amount in controversy is to be determined by the amount of the judgment, and the title or boundary of land is not involved. The jurisdiction of the court on an appeal by the defendant is regulated by the amount decreed against him, or declared to be a lien on the land.

Steinman v. Clinchfield Coal Corp., 121 Va. 611, 633, 93 S. E. 684.

(3) Consolidated Claims.

Where several parties unite in an appeal, and it appears that there is no joint interest or community of interest among them; that their respective claims each had for its foundation an independent contract which each had the right to enforce without regard to the other, and the interest of no one of them amounts to as much as \$500, the appeal will be dismissed as improvidently awarded. *White v. Valley Bldg., etc., Co.*, 96 Va. 270, 31 S. E. 20.

(5) Miscellaneous Instances.

A bastardy proceeding is a civil case, from its very nature involving a matter in controversy of greater value or amount than one hundred dollars, and may be appealed by the prosecutrix when dismissed erroneously. *Bratt v. Cornwell*, 68 W. Va. 541, 70 S. E. 271.

Costs.—An appeal will lie to the supreme court for an error as to costs which have been made the subject of agreement, when the amount thereof exceeds one hundred dollars. *Castle v. Castle*, 69 W. Va. 400, 71 S. E. 385.

Cases Involving an Office.—This court has jurisdiction, upon writ of error, to review the final order of a circuit court in an election contest for a county office, where it is shown that the value of the office is greater than one hundred dollars. *Williamson v. Musick*, 60 W. Va. 59, 53 S. E. 706.

In an action of detinue by the owner to recover possession of the property, the amount in controversy is the value of the property, although the claim for compensation is set up as ground of defense and title to the property disclaimed. *Caroway v. Cochran*, 71 W. Va. 698, 77 S. E. 278.

Forcible Entry and Detainer.—In West Virginia in an action of unlawful entry and detainer a writ of error lies but if upon consideration thereof it is found there is no error in the judgment giving recovery for the possession of

the property sued for, the action of the court in allowing damages for the detention thereof will not be reviewed unless the amount of such damages, exclusive of costs, exceeds the sum of one hundred dollars. *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S. E. 137.

Injunctions.—In West Virginia, an appeal does not lie from an order, overruling a motion to dissolve and perpetuating an injunction, where purely pecuniary interests are involved, unless the amount in controversy, exclusive of costs, exceeds one hundred dollars. *Carskadon v. Board*, 61 W. Va. 468, 56 S. E. 834.

The appellate court is without jurisdiction to entertain an appeal from a decree of a circuit court perpetually enjoining a board of education from letting a public school house for an alleged illegal purpose, where the amount in controversy does not exceed one hundred dollars, exclusive of costs. *Carskadon v. Board*, 61 W. Va. 468, 56 S. E. 834.

Judicial Sale.—Where a decree fixes upon a defendant a personal liability for whatever balance of a debt remains unpaid after crediting thereon the proceeds of the sale of a tract of land decreed to be sold to pay the debt, the amount of defendant's liability can not be ascertained until the land has been sold; and where, as in this case, the liability of the defendant is merely pecuniary, he has no right of appeal until the extent of his pecuniary liability has been fixed, which can only be done after a sale of the land. This is not a case where a fixed pecuniary liability has been reduced by subsequent payments. *Ritter Lumber Co. v. Coal Mountain Min. Co.*, 115 Va. 370, 79 S. E. 322.

A decree in such suit in favor of the plaintiff's attorney, for \$75.00, to be paid out of the proceeds of the sale of the property as a part of the costs, being insufficient in amount to give this court jurisdiction, is not reviewable.

ble here. *Westinghouse Lamp Co. v. Ingram*, 70 W. Va. 664, 74 S. E. 941.

A **set-off** is equivalent to an action, and where the amount of a set-off disallowed by the trial court exceeds three hundred dollars, the amount in controversy is within the jurisdiction of the supreme court. *Norfolk, etc., R. Co. v. Potter*, 110 Va. 427, 66 S. E. 34.

Taxes.—A tax is nothing more than a debt due by the citizen to the taxing power, and unless the right to impose the tax or the construction of the statute under which it is imposed is called in question, or necessarily passed upon in the trial court, no appeal lies to the supreme court of Virginia from the judgment of the trial court imposing a tax, if the aggregate amount of the tax imposed is less than three hundred dollars. *Schermerhorn v. Commonwealth*, 107 Va. 707, 60 S. E. 65. See *Cohen v. Wolford*, 111 Va. 812, 70 S. E. 850.

If an assessor assesses land, which is not liable for taxes, the party aggrieved has a right to appear before the board of review and equalization and have such erroneous assessment corrected by said board, in the manner provided by § 18 of chap. 29, Code 1906, as amended by chap 80, acts 1907. If said board should refuse to make the correction he can appeal to the circuit court. In the matter of such appeal, the circuit court acts judicially when it decides the question of the liability, or nonliability, of the property to taxation, and the judgment of the circuit court is subject to review, upon writ of error, by the supreme court, when the taxes levied on such property amount to \$100, or more. *Copp v. State*, 69 W. Va. 439, 71 S. E. 580. See post, TAXATION.

Trespass.—In an action of trespass *quare clausum fregit*, the only damage claimed being the cutting of timber, and the plaintiff giving evidence of no other damage, and his evidence showing the value of the timber, at most, to be under \$100, the appellate court has

no jurisdiction of a writ of error. *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824.

In an action of trespass on the case for injury to real estate, where plaintiff and defendant agreed before trial that if plaintiff is entitled to any damages at all it shall be twenty-five dollars, and there is a verdict and judgment for defendant, there is no jurisdiction by writ of error in the supreme court. *Clark v. Dower*, 67 W. Va. 298, 68 S. E. 369.

Validity of Stock Subscription.—Where the validity of a stock subscription for more than \$300 is drawn in question by a judgment for an assessment upon said stock for less than \$300, the appellate court of Virginia has jurisdiction of a writ of error to said judgment. *Elliott v. Ashby*, 104 Va. 716, 52 S. E. 383, cited in *International Harvester Co. v. Smith*, 105 Va. 683, 54 S. E. 859.

Action on Note.—Where a suit on a note for less than \$300 involves the plaintiff's right to recover also on two other notes given for parts of the same debt as the note sued on and together with it amounting to more than \$300, so that judgment in the suit would be decisive as to the plaintiff's rights with respect to a sum greater than \$300, the amount in controversy is sufficient to give the Virginia appellate court jurisdiction on writ of error. *International Harvester Co. v. Smith*, 105 Va. 683, 54 S. E. 859.

Suit for Protection of Lien.—When the record plainly discloses that the pecuniary interest of the party adversely affected by a decree is not greater than one hundred dollars, he can not appeal, though the suit is not directly for money but merely for protection of a lien by injunction and otherwise. *McClagherty v. Rumburg*, 71 W. Va. 98, 76 S. E. 137.

Where the boundary between two tracts of land is incidental to the ownership of the royalties on slate taken from the land, this court has not juris-

diction of an appeal from a decree determining the ownership of such royalties where they amount to less than three hundred dollars. *Jones v. Buckingham Slate Co.*, 116 Va. 120, 81 S. E. 28.

Judgment Not Calling in Question Any Action of Corporation Commission.

The State Corporation Commission had prescribed no rate on creosote oil in steel drums. The commission had, however, provided that "articles not enumerated will be classified with analogous articles." In an action of assumpsit to recover excess freight charges on creosote shipped from Richmond to Norfolk, the only question settled by the judgment was to which of two different classes the creosote oil in drums belonged. Held: That the judgment did not in any way call in question any action of the State Corporation Commission and accordingly was not in contravention of § 156 of the Constitution. If it be conceded that the court plainly erred in its classification, it was an error of judgment in the determination of the rights of the parties, which can not be reviewed by the Supreme Court of Appeals when the amount in controversy is less than \$300. *Chesapeake, etc., R. Co. v. Williams*, 122 Va. 502, 95 S. E. 417.

Loss Occasioned by Failure to Present Check.—Where the decree of the trial court decides that the holder of a certified check on a suspended bank had accepted it as a payment on a debt, and that, by reason of failure to present it in a reasonable time, he must sustain any loss occasioned by the failure of the bank to pay in full, the amount in controversy in the supreme court, on appeal by such holder, is the amount of such loss, which is measured by the amount of the check less any dividends which may be declared out of the assets of the bank. When it was decreed that the holder was the owner of the check, he became at once the owner of the interest represented by that check in the fund in the hands

of the receivers of the bank for distribution among its creditors. If this interest reduces the amount due on the check to less than \$300, then the supreme court has no jurisdiction to review decree of the trial court. *Lamb v. Thompson*, 112 Va. 134, 70 S. E. 507.

3. Controversy of Jurisdictional Amount Must Be Continued in Appellate Court.

"The matter in controversy in the lower court must not only equal the jurisdictional amount, but the controversy in relation to matters of that value must be continued by the appeal." 1 Enc. Digest Va. & W. Va. 489." *McClagherty v. Rumburg*, 71 W. Va. 98, 99, 76 S. E. 137.

F. JURISDICTION WHERE MATTERS NOT MERELY PECUNIARY.

1/2. In General.

Va. Const. § 88; W. Va. Const. art. VIII, § 3; Va. Code 1919, § 6337; Barnes Code, ch. 113, § 4.

Disbarment of Attorney.—The Supreme Court of Appeals has jurisdiction of a writ of error to a judgment of a circuit court disbarring or suspending an attorney from the practice of his profession. *State v. Smith*, 84 W. Va. 59, 99 S. E. 332.

Controversies Involving "The Life or Liberty of Any Persons."—A judgment imposing a fine upon a party for a contempt of court and giving him a reasonable time within which to pay it, but providing that if it is not paid, he shall be imprisoned, does not involve "the life or liberty of any persons," within the meaning of § 88 of the Virginia constitution. The judgment being for a fine from which the party may relieve himself, does not deprive the party of life or liberty. *Forbes v. State Council*, 107 Va. 853, 60 S. E. 81.

Controversy Concerning a Way.—If, in an action of trespass on the case for injury to real estate, defendant does not plead the general issue, but sets

up by special plea the right to a private way by prescription over plaintiff's land, such plea does not convert the plaintiff's action into a controversy concerning a way, within the meaning of § 3 of art. 8, Const. of West Virginia, so as to entitle him to a writ of error to the supreme court, when the damages claimed for the trespass is less than one hundred dollars. *Clark v. Dower*, 67 W. Va. 298, 68 S. E. 369. See ante, "Constitutional and Statutory Provisions," VII.

The validity of a by-law of a corporation purporting to make the holders of its fully paid and nonassessable shares of the capital stock liable to periodical assessments for payment of its debts and operating expenses, is a subject of controversy within the appellate jurisdiction of the supreme court of appeals. *Roush v. Longdale Tel. Co.*, 78 W. Va. 136, 88 S. E. 623.

3. Controversies Touching the title or Boundaries of Land.

a. In General.

The statutes give to any person who thinks himself aggrieved by any judgment, decree, or order "in a controversy concerning the title to or boundaries of land" the right to appeal regardless of the amount in controversy. Va. Code 1919, § 6337; Barnes Code ch. 113, § 4. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 632, 93 S. E. 684.

The statute means "involving title or boundaries directly in issue and directly affected by the judgment." *Clark v. Dower*, 67 W. Va. 298, 306, 68 S. E. 369.

Illustrative Cases.—A decree for sale of land in a partition suit, or for the appointment of a receiver, whereby change is made in possession or control of property, judgments in actions of unlawful entry and detainer, and decrees in suits relating to trust deeds upon real estate securing less than the minimum pecuniary jurisdiction of the court, all concern the title of land.

Steinman v. Clinchfield Coal Corp., 121 Va. 611, 633, 93 S. E. 684.

Boundary of Land.—See ante, "Constitutional and Statutory Provisions," VII; "Miscellaneous Instances," V, E, 2, j, (5).

Trespass. — An action of trespass *quare clausum fregit* is not a controversy concerning the title or boundary of land, giving jurisdiction in this court for a writ of error therein. *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824. See ante, "Miscellaneous Instances," V, E, 2, j, (5).

Condemnation of Land.—A proceeding to condemn land for public use is a controversy concerning the title of land, so as to give jurisdiction for a writ of error. *Bluefield v. Bailey*, 62 W. Va. 304, 57 S. E. 805, overruling *Wheeling Bridge, etc., Co. v. Wheeling Steel, etc., Co.*, 41 W. Va. 747, 24 S. E. 651, and *White Oak R. Co. v. Gordon*, 61 W. Va. 519, 56 S. E. 837.

b. Unlawful Detainer.

An appeal lies in an action of unlawful detainer, which is an element of title. *Dickinson v. Mankin*, 61 W. Va. 429, 434, 56 S. E. 824.

h. Suits to Enforce a Lien on Land.

See ante, "Suits to Subject Property to Lien of Judgment," V, E, 2, j, (1).

A suit to subject land to the lien of a judgment is not a suit for the recovery of land. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 633, 93 S. E. 684.

4. Right to Levy Tolls or Taxes.

See ante, "Miscellaneous Instances," V, E, 2, j, (5).

5. Controversies Touching the Constitutionality of a Law.

Va. Const. § 88; W. Va. Const. art. VIII, § 3; Va. Code 1919, § 6336; Barnes Code chap. 113, § 3.

The appellate jurisdiction of the supreme court of appeals is not determined by the value of the subject matter of the controversy, in cases "involving the constitutionality of a law,"

Baer v. Gore, 79 W. Va. 50, 90 S. E. 530; *Ward Lumber Co. v. Henderson-White Mfg. Co.*, 107 Va. 626, 628, 59 S. E. 476; *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 535, 55 S. E. 664.

Instances. — *Ward Lumber Co. v. Henderson-White Mfg. Co.*, 107 Va. 626, 59 S. E. 476.

Where the trial court, at the instance of the plaintiff in error, instructed the jury that a city ordinance, under which he sought to justify his action, was valid and constitutional, and no exception was taken to that instruction, all question as to the validity of the ordinance was claimed from the case, and he was left with its full protection as a defense. To a judgment rendered in such case, no writ of error lies on the ground that the constitutionality of the ordinance is drawn in question. *Holdsworth v. Crowder*, 111 Va. 663, 69 S. E. 935.

Election Controversy. — Where a just determination of a controversy between opposing candidates, arising out of a canvass of primary election returns, appealed to the circuit court under § 2622a, ch. 3, Barnes Code, virtually depends on the proper interpretation of a law charged to be invalid as in violation of the constitution, this court has jurisdiction to review the proceedings on writ of error. *Baer v. Gore*, 79 W. Va. 50, 90 S. E. 530.

A judgment founded upon an erroneous construction of a statute, which makes its enforcement conflict with constitutional guaranties, involves the constitutionality of a law, and is, therefore, reviewable, without regard to the amount in controversy. *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S. E. 664.

Constitutionality Already Established.—Where the only ground of jurisdiction of this court is the constitutionality of a statute, the validity of which as been established by former decisions of this court, the writ of error will be dismissed for want of juris-

diction. *Western Union Tel. Co. v. White*, 113 Va. 421, 74 S. E. 174.

Jurisdiction to Decide Case on Merits.—Under the provision of § 88 of the constitution of Virginia, where the jurisdiction of the supreme court depends solely on the fact that the constitutionality of a statute is involved, the supreme court can not decide the case upon its merits, unless the contention of the appellant upon the constitutional question is sustained. *Norfolk, etc., R. Co. v. Dixie Tobacco Co.*, 111 Va. 813, 69 S. E. 1106; *Adams Exp. Co. v. Charlottesville Woolen Mills*, 109 Va. 1, 63 S. E. 8.

Where the trial court has held an act of assembly to be constitutional, and the only ground of appeal is the unconstitutionality of the act, if the appellate court finds the act to be constitutional, that is the only question it can consider under the express mandate of the constitution. *Western Union Tel. Co. v. Chiles*, 107 Va. 60, 57 S. E. 587.

Error committed in the construction and interpretation of a statute will not of itself confer jurisdiction upon this court, but the constitutionality of the statute, as distinguished from its interpretation, is the source of appellate jurisdiction. *Hulvey v. Roberts*, 106 Va. 189, 55 S. E. 585, cited in *Ward Lumber Co. v. Henderson-White Mfg. Co.*, 107 Va. 626, 59 S. E. 476.

Question Must Be Raised in Trial Court.—*Hulvey v. Roberts*, 106 Va. 189, 55 S. E. 585.

Justice's Judgment.—No appeal lies directly to the supreme court of appeals from a judgment of a justice of the peace involving the constitutionality of a law. *Southern R. Co. v. Hill*, 106 Va. 501, 56 S. E. 278.

7. Controversies Touching the Probate of Wills.

Va. Const. § 88; W. Va. Court Act, VIII, § 3; Va. Code 1919, § 6336; Barnes Code ch. 113, § 4.

8. Controversies Touching Mills, Roads, Ferries or Landings.

Va. Const. § 88; W. Va. Court Act, VIII, § 3; Va. Code 1919, § 6336; Barnes Code ch. 113, § 4.

9. Mandamus, Habeas Corpus, and Prohibition Cases.

Va. Const. § 88; W. Va. Court Act, VIII, § 3; Va. Code 1919, § 6336; Barnes Code ch. 113, § 5.

VI. LIMITATIONS.

A. LAW GOVERNING.

The right of appeal depends upon the law in force at the time the appeal is granted, and not when the judgment was rendered. *Allison v. Wood*, 104 Va. 765, 769, 52 S. E. 559.

B. CHANGES IN LAW.

See ante, "In Virginia," V, E, 1, a.

C. STATUTES MANDATORY.

The statutes fix the time within which bills of review may be filed or appeals taken, and if litigants permit this time to elapse without availing themselves of the remedies provided for their relief, they are without remedy. The case is not different from any other where a remedy is barred by the statute of limitations. *Johnson v. Merritt*, 125 Va. 162, 99 S. E. 785.

"Statutes of limitation are deemed statutes of repose, and this conception of such statutes applies with peculiar force to limitations upon the right of appeal. *Tyson v. Scott*, 116 Va. 243, 81 S. E. 57.

F. PERIOD OF LIMITATION.

1. Final Decrees and Judgments.

a. In Virginia.

One Year.—Va. Code 1919, §§ 6337, 6355.

Under the provisions of § 3474 of the Code (Va. Code 1919, § 6355), if the decree appealed from is a decree refusing a bill of review to a final decree rendered more than six months prior thereto, the party aggrieved

has six months from the date of the decree refusing such bill of review within which to perfect his appeal, but if the bill of review is refused within six months after the final decree, the time for perfecting an appeal from the final decree is the same as if no bill of review had been refused. The right of appeal from a final decree within one year is not diminished or impaired by the refusal of a bill of review thereto within six months. *Adams v. Booker*, 114 Va. 796, 77 S. E. 611.

b. In West Virginia.

Present Rule—Eight Months.—W. Va. Acts 1921. Reg. Sess. p. 168 amending Code, ch. 135, § 3.

Former Rule—One Year.—Under Barnes Code, ch. 135, § 3, the period of limitation was one year.

The filing in the clerk's office of the circuit court of a petition for an appeal or writ of error and a bond, pursuant to section 5, chapter 135, of the Code, within the period of one year, will not excuse compliance with the provision of section 3, of said chapter, or stop the running of the statute of limitations. Such petition must be presented to this court or to a judge thereof in vacation within one year from the date of the decree or judgment complained of. *Spangler v. Vermillion*, 80 W. Va. 75, 92 S. E. 449.

A decree rendered in a partition suit, establishing a last deed and setting a question of disputed title can not be reviewed by this court on an appeal from a final decree, taken more than a year after the former was rendered. *Wright v. Pittman*, 73 W. Va. 81, 79 S. E. 1091.

A decree construing a deed, and adjudicating that the widow of the grantor took and held thereunder the exclusive use and enjoyment of personal estate for her natural life, and that upon her death the plaintiff as surviving grantee was entitled in remainder to said property and had the

exclusive right to the possession and enjoyment thereof, and referring the cause to a commissioner to report upon the necessary facts to carry such decree into execution is an appealable decree; and the appellate court has no jurisdiction after two years, upon an appeal from a subsequent decree adjudging the plaintiff not entitled to the relief prayed for and dismissing the bill, to review such former decree. *Roush v. Hyre*, 62 W. Va. 120, 57 S. E. 368.

A decree in a suit by an executor against devisees to convene creditors and administer the assets for their payment made on a report of debts by a commissioner, which decrees debts against the estate and subjects its lands to their payment, must be appealed from within two years. *Trail v. Trail*, 56 W. Va. 594, 49 S. E. 431.

2. Interlocutory Decrees and Judgments.

While it is permissible, it is not necessary to appeal from certain interlocutory decrees at the time they are rendered. The party may appeal at any time within a year after a final decree has been rendered in the cause, if all the other requisites for appeal exist. *Hess v. Hess*, 108 Va. 483, 62 S. E. 273.

3. Calculation of Period.

The time between the presentation of a petition for appeal and the date of the order granting the appeal must be excluded from the one year given appellant, under Code 1904, § 3474 (Va. Code 1919, § 6385), after final decree, within which to perfect an appeal. *Adams v. Booker*, 114 Va. 796, 77 S. E. 611.

Under subsection 8 of § 1 of chapter 135 of the West Virginia Code, a decree overruling a motion to quash an attachment is an interlocutory but appealable decree, and does not preclude a renewal of the motion at the same or any subsequent term before

final decree, and in a suit in which an attachment is sued out and some of the defendants appear and move to quash the attachment, and their motion is overruled, a creditor who files a petition under § 23, chapter 106, of the Code, disputing the validity of the plaintiff's attachment, and stating a claim to or interest in the property attached, and is made a formal party thereto, has the right to move to quash said attachment, and the statute of limitations as to his right to appeal begins to run at the date of the decree, overruling his motion. *Elkins Nat. Bank v. Simmons*, 57 W. Va. 1, 49 S. E. 893.

Excluding First Day in Computing Time.—*School Board v. Alexander*, 126 Va. 407, 101 S. E. 349.

Same—Change of Rule.—Under Code 1919, § 5, cl. 8, restoring Code 1904, § 5, as it read prior to amendment by Acts 1916, c. 290, the first day is to be counted in computing the time. *School Board v. Alexander*, 126 Va. 407, 101 S. E. 349.

G. NO INQUIRY INTO MERITS AFTER STATUTORY PERIOD ELAPSED.

See ante, "Statutes Mandatory," VI, C.

VI½. RAISING AND RESERVING GROUNDS OF REVIEW.

A. IN GENERAL.

See post, "Objections Not Raised Below," XIV, F, 16; EXCEPTIONS, BILL OF.

Theory of Case.—See post, "Theory of Case in Lower Court," XIV, E½.

Demand for Greater Detail in Bill of Particular.—To be available as ground of error in the appellate court, for refusal of the trial court to grant it, a demand for greater detail and specification in a bill of particulars, must be certain and definite. *Parkersburg, etc., Paper Co. v. United States Fidelity, etc., Co.*, 81 W. Va. 749, 95 S. E. 783.

B. MOTION PRESENTING OBJECTION.

Necessity of Motion Presenting Objection.—The plaintiff, on filing by defendant of his counter affidavit under section 46, chapter 125 of the Code, is then entitled to judgment for the sum thereby acknowledged to be due him, but if he does not then or at any time before trial elect to do so, he can not when the pleadings do not warrant and recovery by him assign his neglect to take judgment as ground for reversal on writ of error prosecuted by him in this court. *Philadelphia Co. v. Shackelford*, 83 W. Va. 280, 98 S. E. 568.

Evidence was admissible for the purpose of showing a local custom or usage, and if followed by evidence sufficient to charge the party with knowledge thereof, would have affected the contract in question. It was not so followed, nor was any motion made to strike it out, nor any instruction asked to disregard it. When offered it was admissible for the purpose for which it was offered. The objection to its admissibility was general. No grounds were stated. Held: That under these circumstances, appellant could not be permitted to say that the reception of the evidence might have affected the verdict. *Rosenberg v. Turner*, 124 Va. 769, 98 S. E. 763.

Judgment on Demurrer to Evidence.—A judgment rendered upon a demurrer to evidence, where no motion was made in the court below to set aside the verdict, will not be reversed by this court for excessiveness of the jury's verdict. *Bond v. National Fire Ins. Co.*, 83 W. Va. 105, 97 S. E. 692.

Motion to Exclude Evidence—Waiver.—Where testimony is admitted proving that plaintiff, several months after his injury, was confined to his bed for two or three weeks, and there is no testimony showing such confinement to be the natural and direct result of the injury, a motion to ex-

clude it should be sustained. Such motion is not waived by failure to renew it after the taking of evidence is concluded, where the point is saved by a special bill of exceptions. *Bartley v. Western Maryland R. Co.*, 81 W. Va. 795, 95 S. E. 443.

Objection to Question Eliciting Improper Evidence and Exception to the Overruling Thereof.—A proper foundation is laid for an assignment of error, as to admission of improper evidence, by an objection to the question eliciting the evidence and an exception to the overruling of the objection. To make the error available, it is not necessary to move to strike out the answer and except to the overruling of the motion to strike it out. *Fisher v. Flanagan Coal Co.*, 86 W. Va. 460, 103 S. E. 359.

C. MOTION FOR NEW TRIAL.

Not Necessary in Virginia.—Va. Code 1919, § 6254.

Motion at Law and In Chancery.—The verdict of a jury on the law side of the court was certified to the chancery side. A motion was made before the law judge to set aside the verdict and for new trial. Held, such motion confers jurisdiction on the supreme court of appeals on a writ of error issued to the circuit court. *Norfolk, etc., R. Co. v. Allen & Sons*, 122 Va. 603, 95 S. E. 406.

In West Virginia.—In order to obtain a review of the action of a circuit court upon a trial had before a jury it is necessary that the record in the court below show that the complaining party made a motion to set aside the verdict of the jury, that the same was overruled, and that he took proper exception thereto. *Payne v. Riggs*, 80 W. Va. 57, 92 S. E. 133.

D. MOTION FOR CORRECTION OF ERROR IN SAME COURT.

Va. Code 1919, § 6334; Barnes Code, ch. 134, § 6.

VII. TRANSFER OF CAUSE.

A. IN GENERAL.

Premature Appeal. — See ante, "Necessity for Existence of Real Controversy," I, B.

In case either party desires to appeal a chancery case heard in open court he shall, within 90 days after final or appealable decree, require the transcript of evidence which, when furnished, shall have the force and effect now accorded to depositions in chancery causes. West Va. Code Supplement 1918, § 4908a.

B. STAY OF PROCEEDINGS.

The court or judge allowing an appeal or writ of error may award supersedeas to stay proceedings in whole or in part. Va. Code 1919, §§ 4935, 6348 amended by Acts 1920, p. 416 (Pollard's Code 1920, p. 308), 6349; Barnes Code, ch. 135, §§ 4, 12. See post, "Rejection of Appeal," VII, E½.

The clerk of the supreme court of appeals shall issue any supersedeas which may be awarded. Va. Code 1919, § 4936.

How Person Presenting Petition for Appeal, etc., May Procure Suspension of Execution of Judgment.—Va. Code 1919, § 6338.

West Virginia Statute. — Barnes Code, ch. 160, sec. 6, provides: "A writ of error, awarded under this chapter to any judgment, shall operate as a stay of proceedings in the case, until the decision of the court of appeals therein."

Same—Discretion of Court—Requisites.—A stay of proceedings in a suit provided by § 6, chapter 136, W. Va. Code, rests in the sound discretion of the court. To warrant the stay it must be essential to justice, and it must be that the judgment of decree by the other court will have legal operation and effect in the suit in which the stay is asked, and settle the matter of controversy in it. *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

Order Not Staying Proceedings.—An order of a judge, endorsed on a petition for an appeal from, and supersedeas to, an order refusing to dissolve an injunction, the prayer of which is "that an appeal and supersedeas may be allowed" the petitioner "staying said injunction," reading as follows: "Appeal and supersedeas allowed as prayed for in the foregoing petition," does not, upon a proper construction thereof, purport to be an order staying the injunction. Its legal purport is merely the granting of an appeal and supersedeas. *Powhatan Coal, etc., Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257.

In Criminal Case.—Va. Code 1919, § 4930, amended by Acts 1920, p. 241. Pollard's Code 1920, p. 219. Barnes Code, ch. 160, sec. 2.

Staying Execution of Judgment after Demand in Habeas Corpus Proceedings.—Barnes Code, ch. 111, sec. 12.

C. NOTICE OF APPEAL.

Notice of an appeal is necessary. *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

D. PETITION FOR APPEAL, ETC.

½. In General.

Nature.—The petition for a writ of error is in the nature of a pleading. *American Locomotive Co. v. Hoffman*, 105 Va. 343, 54 S. E. 25; *Worley v. Mathieson Alkali Works*, 119 Va. 862, 89 S. E. 880; *Sutherland v. Wampler*, 119 Va. 800, 89 S. E. 875.

Petition for Appeal in Lower Court and Order of Rejection Sufficient in Supreme Court of Appeals.—By section 20, chapter 25, Acts 1907, where upon appeal the judge of the circuit court deems the judgment or order of the intermediate court plainly right, and rejects the appeal on this ground, the petition of the appellant to the circuit court, and such order of rejection, may be presented to this court for an appeal from such order of re-

jection with the same effect as upon original petition to this court therefor and no other petition is required. *Rosin Coal Land Co. v. Martin*, 81 W. Va. 33, 94 S. E. 358.

Time for Presenting Petition.—See ante, "Period of Limitation," VI, F.

2. Form and Requisites.

a. In General.

Should State Grounds for Reversal.—A ground of error intended to be relied on for reversal should be mentioned in the petition for the writ. *City Gas Co. v. Webb*, 117 Va. 269, 84 S. E. 645.

Where Appeal Has Been Previously Dismissed.—When an appeal and supersedeas have been dismissed under rule 3, of the West Virginia supreme court, a new petition reciting the fact of the former petition and allowance and dismissal and referring to the assignment of error contained in the former petition and making them a part of the new petition is sufficient upon which to allow an appeal, although such new petition prays "That said order of dismissal may be set aside, that said appeal and supersedeas heretofore allowed may be renewed." *Swiger v. Swiger*, 58 W. Va. 119, 52 S. E. 23.

c. Assignment of Error.

(1) Necessity and General Consideration.

A petition for an appeal, writ of error, or supersedeas shall assign errors. Va. Code 1919, §§ 4933, 6346. Barnes Code, ch. 135, § 8.

The purpose of the statutory requirement is to enable the court and opposing counsel to see on what points the petitioner's counsel intend to seek a reversal of the judgment or decree and to limit the discussion of the case on appeal to those points. *First Nat. Bank v. Trigg Co.*, 106 Va. 327, 56 S. E. 158; *Norfolk, etc., R. Co. v. Bondurant*, 107 Va. 515, 59 S. E. 1091. *Bel-*

mont v. McAllister, 116 Va. 285, 290, 81 S. E. 81.

The appellate court will not search the record for errors not pointed out in the petition. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Only Points Raised by Assignments Considered.—Where an instruction is not free from all exception, but is not open to the objection urged against it in the assignments of error, the objection made in the assignments of error is the only objection which the supreme court of appeals will consider. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

A demurrer to the evidence and its incident, excepted to, but not assigned as error, can not be considered on appeal. *Cooper v. Norfolk, etc., R. Co.*, 125 Va. 73, 99 S. E. 606.

Awarding Mandamus.—Objection can not be made in the appellate court to the awarding of a mandamus where not mentioned in the petition for the writ of error. *Rinehart, etc., Co. v. McArthur*, 123 Va. 556, 96 S. E. 829.

"When the appeal is from the whole decree, errors in it, not assigned in the petition for the appeal, may be assigned in the briefs, and may even be noticed by the court and acted upon without any assignment thereof." *Dent v. Pickens*, 59 W. Va. 274, 276, 53 S. E. 154.

"But when the appeal allowed does not extend to the whole decree, the court has before it, and within its jurisdiction, only those matters as to which the appeal was allowed. All adjudications as to which no appeal was allowed remain in the court below, within its jurisdiction, and constitute proper subjects for its further action." *Dent v. Pickens*, 59 W. Va. 274, 276, 53 S. E. 154.

Dismissal of Appeal.—Where there are no assignments of error within the meaning of the statute the appeal will be dismissed. *Moore v. Harrison*, 114 Va. 424, 76 S. E. 920.

Errors Assigned for First Time in Reply Brief.—Errors assigned for the first time in the reply brief of the plaintiff in error will not be considered by the appellate court. *American Locomotive Co. v. Hoffman*, 105 Va. 343, 54 S. E. 25; *Newport News, etc., Elect. Co. v. Bickford*, 105 Va. 182, 183, 52 S. E. 1011; *Sands v. Stagg*, 105 Va. 444, 452, 52 S. E. 633, 54 S. E. 21; *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

A suggestion in the petition that other errors are to be assigned is ineffectual to reserve the right to assign errors in a reply brief. *American Locomotive Co. v. Hoffman*, 105 Va. 343, 54 S. E. 25.

By Whom Assigned.—The supreme court will not consider errors assigned by a party who has not appealed nor been made a party to an appeal taken by another. *Virginia Iron, etc., Co. v. Bond*, 111 Va. 319, 68 S. E. 1005.

On appeal by trust creditors, from a decree denying them relief, parties defendant served with process or who appeared in the case prior to the decrees of sale, confirmation and foreclosure, but made no defense, and who did not apply to the court below for relief, pursuant to §§ 5 and 6, of chapter 134, Code 1913, within the time limited thereby, will not be heard to complain of supposed errors in such prior decrees, affecting property not covered by such deed of trust. *Gebhart v. Shrader*, 75 W. Va. 159, 83 S. E. 925.

(2) Sufficiency.

(a) In General.

A petition for a writ of error is sufficient if the points upon which reliance is had for a reversal are clearly stated and leave no doubt as to the questions presented for consideration, although it does not specifically state that the ruling of the trial court on this point or on that is assigned as error. *Norfolk, etc., R. Co. v. Bondurant*, 107 Va. 515, 59 S. E. 1091.

A petition for writ of error which points out specifically the errors claimed to have been committed by the court below, and in such manner as to enable the appellate court and the opposing counsel to see on what points counsel for the petitioner intends to seek a reversal, is sufficient. *Belmont v. McAllister*, 116 Va. 285, 81 S. E. 81.

Errors Must Be Pointed Out Clearly and Distinctly.—A petition for a writ of error is in the nature of a pleading, and must state clearly and distinctly the errors relied on to reverse the judgment. *Worley v. Mathieson Alkali Works*, 119 Va. 862, 89 S. E. 880; *Ewell v. Brock*, 120 Va. 475, 91 S. E. 761; *Sutherland v. Wampler*, 119 Va. 800, 89 S. E. 875; *Washington, etc., R. Co. v. Cheshire*, 109 Va. 741, 65 S. E. 27; *American Locomotive Co. v. Hoffman*, 105 Va. 343, 54 S. E. 25; *First Nat. Bank v. Trigg Co.*, 106 Va. 327, 341, 56 S. E. 158.

Parties who complain of errors in the trial court must point them out with such certainty as will enable this court to say from the assignment as made whether or not the alleged error has been duly assigned. The supreme court of appeals will neither presume error nor enter upon a voyage of discovery through the record to ascertain whether or not error has been committed. *Virginia Iron, etc., Co. v. Odle*, 128 Va. 280, 105 S. E. 107.

Substantial Compliance with Statute.—Section 3464 of the Va. Code of 1904 (section 6346, Code of 1919) provides that a petition for an appeal, writ of error, or supersedeas shall assign errors. The petition in the instant case did not in specific terms comply with the section, but it contained a very clear and comprehensive discussion of the various rulings of the court upon the admission and exclusion of evidence, the granting and refusing of instructions, and a motion to set aside the verdict and grant a new trial. These rulings were shown and chal-

lenged by separate bills of exceptions appearing in the record and specifically referred to in the petition. Held: That the petition substantially complied with the statute, and a motion for dismissal was accordingly denied. *Jeffress v. Virginia R., etc., Co.*, 127 Va. 694, 104 S. E. 393.

Same—Right Barred by Limitations.—The discussion in a petition for a writ of error may be treated as a substantial compliance with the statute requiring errors to be assigned in the petition, when the motion to dismiss for failure to comply with the statute is not made until after the right of appeal is barred by limitation. *New York Life Ins. Co. v. Franklin*, 118 Va. 418, 87 S. E. 584.

Must Be Based on Matters in the Record.—See *Moore v. Harrison*, 114 Va. 424, 427, 76 S. E. 920.

Assignments Must Correspond to Those Made in Lower Court.—A party to a suit in chancery can not except to a commissioner's report on one ground in the trial court, and rely upon a wholly different ground in the appellate court, unless the objection made in the appellate court is apparent upon the face of the report. *Walter v. Whitacre*, 113 Va. 150, 73 S. E. 984.

Where both parties to an action of ejectment proceed with the case in the trial court upon the theory that it is a case of common source of title, the defendant will not be permitted, on a writ of error awarded the plaintiff, to deny that it was a case of "common source." *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742.

A defendant can not assign one objection to the mode of service of process in the trial court and in different one in the appellate court where the latter could have been corrected in the trial court if attention had been called to it. *Water Front Coal Co. v. Smithfield Marl, etc., Co.*, 114 Va. 482, 76 S. E. 937.

(b) In Particular Instances.

Assignments Held Insufficient.—A statement in a petition for a writ of error, relating to fourteen alleged errors, that the petitioner "is advised that errors were committed to its prejudice by said rulings of said court" is not a compliance with the rule that a petition for a writ of error, being in the nature of a pleading, must state clearly and distinctly the errors relied on to reverse the judgment. *Honaker Lumber Co. v. Call*, 119 Va. 374, 89 S. E. 506.

A statement in a petition for a writ of error that "without discussing in detail the instructions asked for and refused by the court, it is submitted that they expressed correctly the several propositions stated in them, and that there was evidence supporting or tending to support them," is not a sufficient assignment of error, either under § 3464 of the Code, or Rule 2 of the supreme court. *Washington, etc., R. Co. v. Cheshire*, 109 Va. 741, 65 S. E. 27.

Specification of Evidence Objected to.—To obtain the benefit of errors in rulings upon evidence admitted or rejected, the complaining party must specify them. The court will not search the transcript of the evidence for them. *Angrist v. Burk*, 77 W. Va. 192, 87 S. E. 74; *McKinney v. McKinney*, 77 W. Va. 58, 87 S. E. 928.

An assignment of error that the court below erred, "in admitting, over defendant's objections, certain illegal evidence offered by the plaintiff," will not be considered, where neither in the petition nor in brief for defendant is such evidence pointed out. *Adams Exp. Co. v. Allen*, 125 Va. 530, 100 S. E. 473.

Where a stenographic report of evidence is made part of the certificate of evidence upon a motion for a new trial, and it shows objections to questions or evidence, and rulings of the

court thereon, and that such rulings were excepted to, and the particular question or evidence complained of is specified distinctly in the motion for a new trial, or in an assignment of error, or in brief of counsel, so that the appellate court can readily and safely find the particular question or evidence to which the exception relates, the appellate court will consider the matter excepted to, though there is no formal bill of exceptions thereto; but such matter will not be considered without such specification, even though such report of evidence notes such objection and exception. *Bond v. National Fire Ins. Co.*, 77 W. Va. 736, 88 S. E. 389.

A certificate of exception to the testimony of a witness showed in general terms that counsel objected to the introduction of the witness's testimony. As there were fifteen questions and answers, this was entirely insufficient to sustain the exception. The exceptor should designate the particular questions and answers his exceptions relate to. *White Sewing Mach. Co. v. Gilmore Fur. Co.*, 128 Va. 630, 105 S. E. 134.

Question to Witness.—It is not sufficient to say that the trial court erred in permitting a designated question to be asked a witness, unless the error is manifest, or it is pointed out wherein the error consists. *Virginia Iron, etc., Co. v. Odle*, 128 Va. 280, 105 S. E. 107.

Instructions.—Where the grounds of objections to instructions are not set forth with sufficient certainty, they will not be considered by the appellate court. *Rust v. Reid*, 124 Va. 1, 97 S. E. 324. *Columbia Amusement Co. v. Pine Beach Inv. Corp.*, 109 Va. 325, 63 S. E. 1002.

An assignment of error that the verdict of the jury should be set aside because the court erred in giving instructions 1 and 12, inclusive, for the proponents, for

reasons apparent on the face of those instructions and because the instructions were not applicable to the evidence in the case, will not be considered because it does not point out the error complained of. *Rust v. Reid*, 124 Va. 1, 97 S. E. 324.

The question of whether a particular feature of an instruction is erroneous is not presented for decision to the appellate court, where no objection is made to the instruction on this ground by the assignments of error. *Swift & Co. v. Hatton*, 124 Va. 426, 97 S. E. 788.

An assignment of error, upon the refusal of an instruction, as follows: "The petitioner submits that this instruction should have been given," was held insufficient. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

An assignment of error that the evidence in the case did not support the latter parts of four lengthy instructions, and stating that the evidence had been so fully discussed that petitioner deemed it unnecessary to discuss it again under each instruction, is insufficient. It is not sufficient to say of an instruction simply that the latter part of it is not justified by the evidence, and to make the same objection in gross to four lengthy instructions aggravates the difficulty. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

To say that the "evidence in this case did not justify the instructions" is an admission that there was evidence in the cause upon which the trial court based its instructions, but a denial of its sufficiency. The petition should have set out the evidence and pointed out wherein it was insufficient as a basis for the instructions. The supreme court of appeals will not undertake that burden. The fact that the greater part of the evidence had already been discussed in the petition in another connection does not relieve the petitioner from the neces-

sity of showing that there was not sufficient evidence to support the instructions. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Refusal of Amended and Supplemental Bill.—While the assignment of error relied on in the petition for an appeal in this cause is not as specific as it might have been, it is clear that the error complained of is the refusal of the trial court to permit an amended and supplemental bill to be filed, and is sufficient. The petition gives a history of the proceedings in the cause, the substance of the allegations of the original and amended bills and of the evidence rejected because of a supposed variance at the trial of an issue awarded on the original bill, and then "submits" that in the light of the evidence there was no such variance sought to be set up by the amendment as justified the trial court in refusing the amendment and dismissing the bill. *Laskey v. Burrill*, 105 Va. 480, 54 S. E. 23.

d. Certificate of Counsel.

A petition for appeal, etc., shall not be presented until some counsel or attorney of the appellate court shall certify that, in his opinion, it is proper that the decision should be reviewed by such court. Va. Code 1919, § 6346; Barnes Code, ch. 135, § 8.

Defects in Certificate.—An appeal will not be dismissed as having im-providently awarded for mere formal defects in the attorney's certificate appended to the petition. *Murphy v. Fairweather*, 72 W. Va. 14, 77 S. E. 321.

Though the attorney's certificate is limited in terms to only decree and misdescribes it, giving a wrong date, it will be taken as having been intended to cover all the assignments of error in the petition. *Murphy v. Fairweather*, 72 W. Va. 14, 77 S. E. 321.

2¼. Transcript of Record.

Must Accompany Petition.—Va. Code 1919, § 4933.

Same—Notice to Opposite Party or

Counsel—Certificate of Clerk.—Va. Code 1919, § 6339.

Costs and Fees.—See post, "Preparation and printing of Record," VII, G, 6.

2½. To Whom Petition Presented — Endorsement of Judge.

To Supreme Court of Appeals or a Judge Thereof.—Va. Code 1919, §§ 4934, 6347; Barnes Code, ch. 135, §§ 2, 9.

E. ALLOWANCE OF APPEAL AND WRITS OF ERROR.

1. When and by Whom Allowed.

When Writ of Error Allowed—If Denied by Judge in Vacation Court May Allow It.—Va. Code 1919, § 4935.

When Appeal, etc., Allowed.—Va. Code 1919, § 6349.

West Virginia.—W. Va. Const. Act VIII, § 6. Barnes Code, ch. 135, § 12, provides: "The court or judge to whom a petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal, writ of error or super-sedeas."

Barnes Code, ch. 160, § 5, provides: "In vacation of the supreme court of appeals, a writ of error may be awarded by any judge thereof."

Under the civil law, unlike the practice in West Virginia, when appeal was taken, it was done at the same term, upon application to the trial court, and when done, the decree never became final. *Wingfield v. Neall*, 60 W. Va. 106, 113, 54 S. E. 47.

E½. REJECTION OF APPEAL.

When to Be Rejected.—Va. Code 1919, § 6348, amended by Acts 1920, p. 416.

Effect of Rejection.—Barnes W. Va. Code, p. 1152, ch. 135, § 11, provides: "In a case wherein the court shall deem the judgment, decree or order complained of, plainly right, and reject it on that ground, no other petition therein shall afterward

be entertained. But the rejection of such petition by a judge in vacation, shall not prevent the presentation of such petition to the court when in session."

F. SERVICE OF PROCESS UPON APPEAL, WRIT OF ERROR OR SUPERSEDEAS.

Va. Code 1919, § 4936. Barnes W. Va. Code, p. 1152, ch. 135, § 13.

Necessity.—The supreme court of appeals exercises its appellate jurisdiction by appellate process only, and where no such process has been allowed, the appellate court is without power to review for error. *Robinson v. Goldman*, 59 W. Va. 145, 53 S. E. 12.

Correction of Appellate Process. — The process of this court awarded upon a petition from a circuit court erroneously reciting the date of the judgment of the intermediate court instead of the date of such order of rejection of the circuit court as the judgment or order appealed from constitutes a mere clerical error, correctible by the record. *Rosin Coal Land Co. v. Martin*, 81 W. Va. 33, 94 S. E. 358.

Waiver of Process.—Where an appellee appears by two or more counsel, who file briefs on the merits of the cause, and by letter to the clerk, join in requesting a submission of the cause, service of appellate process will be treated as waived, although one of the counsel in his brief may present the question of such want of service. *Dent v. Pickens*, 61 W. Va. 488, 58 S. E. 1029.

Where the Commonwealth is defendant in error, if the case be in the supreme court of appeals, process shall be served on the attorney-general. Va. Code 1919, § 4936.

Where Condemned Felon in Penitentiary Obtained Writ of Error—Notice to Be Served on Superintendent of Penitentiary.—Va. Code 1919, § 4944.

G. THE RECORD.

1. In General.

How Record Made Up.—Va. Code 1919, § 6340. Barnes Code, ch. 135, § 6.

Where Parties Differ Judge to Decide.—Section 6341 of the Va. Code of 1919, providing that where the parties are unable to agree, the judge shall decide what part of the record should be copied, has reference only to what is already a part of the record, and merely authorizes selections from the record as already completed. It does not authorize any additions to the record, and instructions which were not certified by the judge of the trial court within the period of sixty days fixed by statute (section 6252 of the Code of 1919) can not be made a part of the record under the provision of this section. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684.

Parties May Agree Upon What Shall Be Copied or May Agree for the Facts to Be Copied in Lieu of the Complete Record.—Va. Code 1919, § 6342.

Court of Appeals May Change Rules for Making Out and Printing. — Va. Code 1919, § 6343.

If Part of Record Unnecessarily Copied, Who to Pay for It.—Va. Code 1919, § 6344.

When Appeal Is of Right from State Corporation Commission Record to Be Delivered of Clerk of Court of Appeals.—Va. Code 1919, § 6354.

Transmission of Record—Time for Presenting.—Barnes W. Va. Code, p. 1150, ch. 135, § 5.

Barnes Code, ch. 135, § 17, amended by Acts 1921, p. 168.

Where a party complaining of a judgment or decree files his petition with the clerk of the court below within one year from the date of the entry of such judgment or decree and procures said petition together with the original record to be transmitted to the clerk of this court and filed in

his office within one year from such date, an appeal allowed thereon within one year and two months from the entry of the judgment or decree complained of will not be dismissed because a transcript of the record is not filed within such time. *Snuffer v. Spangler*, 79 W. Va. 628, 92 S. E. 106.

2. Record at Law.

a. What Constitutes.

(1) Generally.

Statutory Provision.—Va. Code 1919, § 6340. Barnes W. Va. Code, p. 1151, ch. 135, § 6.

Grounds Justifying Order.—Where the entire record of the proceedings had in the trial court is brought up, an order setting aside the verdict of a jury will be reversed as erroneous, unless sufficient grounds appear in the record justifying such order. *Adams v. Adams*, 79 W. Va. 546, 92 S. E. 463.

Motion to Strike from Record.—Where defendant in due time filed its plea to the jurisdiction and the same became a part of the record, it could only be expunged from the record on a motion to strike out, and an order of the court, on an objection of plaintiff to the plea, not rejecting the plea, but merely holding that the plea was not good, can not be held to have supplied the place of the necessary motion to strike out. If there had been a formal motion to reject, such a motion would have been inappropriate because the plea had already become a part of the record. *Bank v. Ashworth*, 122 Va. 170, 94 S. E. 469.

(2) Illustrations.

Orders.—Orders appended to a brief of counsel are not part of the record. *Dunfee v. Childs*, 59 W. Va. 225, 231, 53 S. E. 209.

No particular form of identification of a bill of exceptions in an order, designed to make it a part of the record, nor, in the bill, of a paper intended to

be made a part of it, is necessary. Any terms of description indicating, with reasonable certainty, intention to make a paper part of a judicial record is sufficient. *Marshall v. Stalnaker*, 70 W. Va. 394, 74 S. E. 48.

Filing Exhibit with Demurrer.—It is an unusual practice to file an exhibit with a demurrer to a bill, and it is not approved. Where the complainant has filed with his bill as an exhibit a selected portion of another record, and it is necessary, in order to show the real facts established by such selected portion and the real value thereof, to file an additional paper from such record, the proper practice is to move the court to require the complainant to file with the bill such additional part as may be necessary from the other record. Practically the same result was accomplished in the trial court by treating the exhibit filed with the demurrer as though it had been filed with the bill, and while this method of procedure is not approved, it would be a vain and useless thing to remand the cause to have the exhibit brought into the cause in a regular way, and as there was no objection made to the mode of procedure in the trial court, it will be considered in this court as a part of the record. *Old Dominion Iron, etc., Co. v. Chesapeake, etc., R. Co.*, 116 Va. 166, 81 S. E. 108.

Demurrer to Evidence—Act Abolishing Bills of Exception.—Acts 1916, chapter 406, page 708, abolishing bills of exception, has no application to the pleadings which are per se a part of the record. A demurrer to the evidence is as much a part of the record as any other pleading, and hence is not affected by the act aforesaid. *Lynchburg Foundry Co. v. Dalton*, 121 Va. 480, 93 S. E. 587.

A statement of costs in the trial court attached to a petition for an appeal to this court is no part of the record, and hence can not be consid-

ered by this court. *Hall v. White*, 114 Va. 562, 77 S. E. 475.

Plea to the Jurisdiction.—Where defendant in due time filed its plea to the jurisdiction, and it was accepted and filed by the clerk at rules in the exercise of a ministerial and mandatory duty, it became thereby as much a part of the record as the declaration itself. *Bank v. Ashworth*, 122 Va. 170, 94 S. E. 469.

Ruling on Plea.—An order of court holding that a plea to the jurisdiction was bad, is clearly a judgment upon the pleadings, and requires no exception to be stated in the order and no bill of exception to preserve the rights of the defendant thereunder. *Bank v. Ashworth*, 122 Va. 170, 94 S. E. 469.

Rejected Plea.—Where a plea is tendered, and objection thereto is sustained, and an exception is taken, and the record shows the ruling and exception and identifies the plea, such plea is a part of the record. *Brown v. Cook*, 77 W. Va. 356, 87 S. E. 454.

Striking Special Plea.—When a special plea, regularly filed at rules, is at a subsequent term of the court on motion struck out, and the order of the court shows an exception by defendant to this action, such plea thereby becomes a part of the record, and the action of the court thereon may be reviewed here on writ of error. *Miller v. Starcher*, 86 W. Va. 90, 102 S. E. 809.

A plea never authoritatively in the record or expressly stricken out, must be made the subject of a bill of exceptions or an express order of the court, to make it a part of the record on appeal. *Bank v. Ashworth*, 122 Va. 170, 94 S. E. 469.

A plea that is stricken out by the court is as though it had never been tendered, unless it is made a part of the record by a bill of exception, or by an express order of the court, and if it is not a part of the record, then the action of the court in striking it out

is not a subject of review in the appellate court, as nothing outside of the record can be looked to or considered. An entry on the order book that the defendant excepted to the action of the court in striking out his pleas can not perform the function of a bill of exception, and does not make the pleas a part of the record. Such entry amounts to nothing more than saving the point. *Leary v. Briggs*, 114 Va. 411, 76 S. E. 907.

Opinion of Trial Judge.—It is commendable in the judge of a circuit court to file in a cause his written opinion therein, and it is not reversible error to make the same a part of the record in the case. In such case, however, the appellant or plaintiff in error is not bound to include such opinion in the record with his application for appeal or writ of error. *Stover v. Stover*, 60 W. Va. 285, 54 S. E. 350.

The entry of record, required by statute, of the inability of a judge to sit in a case, is not an order or decree in the case, and the failure of the transcript of the record for an appeal to disclose such an entry is no evidence that the entry was not made, although certified by the clerk to be "a true and correct transcript and copy of all papers, evidence, certificates, orders and decrees as appear of record in my office." Where the court is one of general jurisdiction, having jurisdiction of the subject matter and the parties, and the presiding judge is one authorized to sit in the place of the disqualified incumbent, it will be presumed that the presiding judge acted under proper authority if the contrary does not affirmatively appear of record. *Smith v. White*, 107 Va. 616, 59 S. E. 480.

Bill of Exceptions.—See post, EXCEPTIONS, BILL OF.

Evidence.—See post, EXCEPTIONS, BILL OF.

Evidence given on the trial of an action at law is no part of the record, unless made so by a proper bill of

exceptions. *Colby v. Reams*, 109 Va. 308, 63 S. E. 1009.

This court can not review the action of the trial court in fixing the compensation allowed in a condemnation proceeding, when the evidence upon which the trial court acted is not made a part of the record. *Virginia, etc., R. Co. v. Nickels*, 116 Va. 792, 82 S. E. 693.

Where an assignment of error complains of the action of the court in refusing to allow a witness to answer a question, the failure of the record to disclose by avowal or otherwise what answer the witness would have made, or what knowledge he had on the subject, is fatal to the assignment. *Fardis v. DuPont, etc., Co.*, 123 Va. 88, 96 S. E. 164.

To make the evidence in action at law part of the record, it is only necessary to use such means of identification in the bills of exception and orders as make the adoption thereof reasonably certain. *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083.

The evidence in an action of debt, dependent upon the same issues of fact as those involved in another action of assumpsit, is made part of the record in the latter by the following agreement filed therein: "The parties hereto agree that the facts in this case are as follows: (Here insert the transcript of the evidence as certified by Henry Garfield Chaney, the official stenographer of this court, as reported in the same styled case, marked Debt No. 1., tried at the September Term of this court, 1908.)" *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083.

As to necessity that record show expected answer to question not permitted to be answered, see post, EXCEPTIONS, BILL OF.

The instructions are no part of the record in an action at law unless made so by bill of exceptions or certificate in accordance with the statutory requirements on that subject. Acts

1916, p. 722, now Code 1919, § 6252, or Acts 1916, p. 708, now Code 1919, § 6253. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684. See post, EXCEPTIONS, BILL OF.

This court will not reverse a judgment for the refusal to give an apparently good instruction, when the record does not appear to contain all the instructions given and does not show that the refusal to give such instruction was not justified on the ground that the point of the instruction was completely covered by some other instruction given but not brought up with the record. *Teter v. Franklin Fire Ins. Co.*, 74 W. Va. 344, 346, 82 S. E. 40.

The judgment of a trial court setting aside a verdict because contrary to the law and the evidence can not be reviewed in the appellate court when the instructions given by the trial court are not made a part of the record. This court can not assume that such instructions were free from error, nor pass at all upon that ground for setting aside the verdict. *Foreman v. Norfolk, etc., Co.*, 106 Va. 170, 56 S. E. 805.

If the record does not show what instructions were given by the trial court an exception to the ruling of the court refusing to give a single instruction will not be considered by the appellate court, as the rejected instruction may have been covered by other instructions given. *Kecoughtan Lodge No. 29 v. Steiner*, 106 Va. 589, 56 S. E. 569.

Judge's Certificate.—A vacation order of a judge certifies the presentation to him of bills of exception and a transcript of all the evidence, and certifies that for identification the bills were numbered as bills of exception by a number to each, and that the certificate of evidence was marked "Certificate of Evidence," and certifies that the bills were signed, and that the certificate of evidence was also signed

by the judge, and the order says that bills and certificates were ordered to be made a part of the record. The bills refer to the "Certificate of Evidence" as part of them. The "Certificate of Evidence" is part of the record, and brings the evidence before this court. *Gross v. Gross*, 70 W. Va. 317, 73 S. E. 961.

Affidavits supporting a motion for new trial are not included in record unless made part of the record by proper bills of exception. *Smith v. Withrow*, 129 Va. 668, 106 S. E. 694.

The appeal bond is no part of the record. *Harrison v. Harman*, 76 W. Va. 412, 85 S. E. 646.

b. Effect of Certificate of Clerk.

The certificate of the clerk of the trial court to a record brought to the Virginia supreme court of appeals, made up and signed by him, is a verity as to the clerk, and can not be impeached, modified or changed by the subsequent ex parte affidavit of said clerk. Furthermore, rule 1 of this court provides that the court will not read any affidavit in support of, or opposition to any motion hereafter made to the court, unless reasonable notice in writing be given to the opposing party of the time and place of taking the same. *Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612, 62 S. E. 358.

c. Papers Merely Copied into the Record.

Want of Identification of Bill of Exceptions.—A judgment will be affirmed for want of identification in the record of necessary bills of exceptions. *Lambert v. Gallipolis*, 64 W. Va. 105, 60 S. E. 1099.

d. Conclusiveness of Record.

Where the record clearly shows that the case was submitted upon the general issue as well as others, and that the trial court found upon the general issue, as well as others, in favor of the defendant, that fact can

not be called in question by the plaintiff on a writ of error, and if no objection was made to the judgment in the trial court, it is binding and conclusive, and no informality in the record can be taken advantage of in this court. *Sinclair v. Fairfax*, 119 Va. 245, 89 S. E. 1070.

Although counsel for the defendant suggested in his brief and in the oral argument that the record before the court was inadequately and imperfectly made up and was not just to the defendant, it is obvious that the court must dispose of the case on the record as it came before it. *Brenard Mfg. Co. v. Brown*, 120 Va. 757, 92 S. E. 850.

Where objection is made to an instruction as modified by the court, and exception is duly taken to the action of the court in giving it, this court must deal with the instruction as it appears in the bill of exception, disregarding any "verbal amendment" made by the court, especially when made in the absence of the jury; and the fact that the court certifies that no amendment "verbal or otherwise" to the instruction was made or asked, does not deprive the party excepting of the right to complain here of the error in the instruction as it appears in the record. *Honaker Lumber Co. v. Call*, 119 Va. 374, 89 S. E. 506.

e. Conflict in Record.

A recital in a bill of exception of a caution to counsel, by the court, against comment in argument upon a matter not in evidence, given in response to an objection, sufficient to cause him to desist, and a judicial declaration that the matter was not in evidence, contradicts and disproves a stated conclusion therein that the remark went to the jury, over the objection made. *Hodge v. Charleston*, etc., R. Co., 79 W. Va. 174, 90 S. E. 601.

Bill of Exceptions Not Contradict-

ing Court's Order.—A bill of exceptions taken and properly signed showing that the accused was not present when a view was had by the jury of the scene of the tragedy does not contradict the court's order showing that he left the court house with the jury, and returned with it after the view was had. The bill of exceptions simply supplies facts not shown by the order. *State v. McCausland*, 82 W. Va. 525, 96 S. E. 938.

3. Record in Chancery.

See ante, "Record at Law," VII, G, 2.

An answer, filed at rules, is a part of the record of the cause, and presumed to be a part of the foundation of the final decree, though not mentioned in any order in the cause, if process has been executed and sufficient time to regularly mature the cause has elapsed, and nothing to the contrary appears in the record. *Towner v. Towner*, 65 W. Va. 476, 64 S. E. 732.

Record. — A demurrer incorporated in the body of an answer, but not mentioned or referred to in the caption thereof, or in any decree or order in the cause, will be regarded as not having been brought to the attention of the court, and treated as a fugitive paper. *McGaw v. Trader's Nat. Bank*, 64 W. Va. 509, 63 S. E. 398; *Cross v. Gall*, 65 W. Va. 276, 64 S. E. 533.

Summons.—"In equity causes, we think, the summons is a part of the record for all purposes. Section 6, chapter 135, Code 1906, relating to the making up of records for appeal to this court so implies. In *Pickens v. Stout*, 67 W. Va. 422, 439, 68 S. E. 354, on the question of the statute of limitations then involved, we looked to the process to ascertain the fact of its date and service, as constituting a part of the record." *Wildasin v. Long*, 74 W. Va. 583, 82 S. E. 205, citing also, *Lambert v. Ensign Mfg. Co.*, 42 W. Va.

813, 817, 26 S. E. 431. See generally, post, SUMMONS AND PROCESS.

4. Amendment of Record after Term Ended.

The record upon which a judgment or decree is brought into the appellate court on a writ of error or appeal, can not be amended or altered as to matter upon which it is based. *DeBoard v. Camden Interstate R. Co.*, 62 W. Va. 41, 50, 57 S. E. 279.

A nunc pro tunc order may be made by the trial court, notwithstanding the pendency of the case in the supreme court on writ of error, and when such order is for the purpose of recording a decision made by the court prior to the granting of the writ of error, it can be used to supplement the record in the supreme court. *Scott v. Newell*, 69 W. Va. 118, 70 S. E. 1092.

A final judgment, rendered but not entered by reason of inadvertency of the clerk, may be entered by a nunc pro tunc order at a term of the court subsequent to the one at which it was rendered and a writ of error to such a judgment awarded and perfected before entry thereof may be sustained by the filing of a supplemental record in the appellate court, showing amendment by such nunc pro tunc order. *Schoonover v. Baltimore, etc., R. Co.*, 69 W. Va. 560, 73 S. E. 266.

6. Preparation and Printing of Record.

Statutory Provisions. — Va. Code 1919, §§ 6357, 6360.

Barnes Code, ch. 135, §§ 18, 19 amended by Acts 1921, Reg. Sess., p. 169. See ante, "In General," VII, G, 1.

Suing in Forma Pauperis—Action under Federal Statute. — Under the statute of this state the costs of printing the record in this court must be paid by the appellant, or plaintiff in error before the printing is done; and as to this, there is no provision for suing in forma pauperis. It is immaterial that the action is brought un-

der the federal employers' liability act, as the state follows its own modes of procedure though enforcing a right under a federal statute. *Going v. Norfolk, etc., R. Co.*, 119 Va. 543, 89 S. E. 914.

Time for Deposit for Printing Record.—"The other ground relied upon for dismissal of the appeal is that the money for printing the record was not deposited with the clerk within six months after the case was docketed. The record shows that the case was docketed on the 2d of June, 1916, and that the deposit for printing the record was made on the 23d day of October, 1916. This deposit seems to have been made within six months from the time the appeal was docketed, and to be a clear compliance with the provision of § 18 of chapter 135 of the Code (§4998). The motion to dismiss the appeal is therefore overruled." *Snuffer v. Spangler*, 79 W. Va. 628, 92 S. E. 106, 107.

Deposit to Defray Indexing of Record, Fees, etc.; Mere Security Insufficient.—The provision of sec. 5 of ch. 135 of the W. Va. Code, requiring a litigant seeking an appeal or writ of error from a decree or to a judgment of a circuit court, before transmission of the petition and record to the clerk of the Supreme Court of Appeals or a judge thereof, "to deposit with the clerk of the circuit court a sufficient sum of money to defray the expenses of the preparation and indexing of the record, fees for filing the petition and making and certifying necessary copies of orders, costs of transmission and return of the record, and the making of a transcript of the record, or file with the clerk a bond conditioned to pay the same, in a penalty and with surties to be fixed and approved by said clerk," and the clerk to "endorse on the petition that such deposit has been made or such bond filed," contemplates such procedure as a prerequisite to action upon the petition by

the appellate court or its judges and prompt and unembarrassed filing of the transcript after allowance of the appellate process, and not mere security of payment of the fees and other compensation of the clerk of the circuit court. *State v. Skeen*, 85 W. Va. 222, 101 S. E. 249.

Same—Right of Clerk of Circuit Court to Withhold Transcript for Non-payment of His Fees.—If clerk of circuit court certifies that the required deposit has been made, when in fact it has not been nor the required bond given, he can not withhold the transcript for non-payment of his fees and compensation, by reason of an agreement on the part of the appellant to make a further deposit or pay his charges in full before the delivery of the transcript, or his legal right to collect such fees and compensation. *State v. Skeen*, 85 W. Va. 222, 101 S. E. 249.

7. Costs and Fees.

See ante, "Preparation and Printing of Record," VII, G, 6.

H. CERTIORARI.

See post, CERTIORARI.

VIII. BONDS.

A. SUSPENSION BONDS.

Va. Code 1919, § 6338; Barnes Code, ch. 135, § 4.

B. APPEAL BOND.

½. In General.

If the bond is regular and sufficient, the cause will not be reversed for objections thereto. *Clinchfield Coal Co. v. Wheeler*, 111 Va. 265, 68 S. E. 1001.

1. Necessity.

a. General Rule.

Bond Necessary.—Va. Code 1919, § 6351; Barnes Code, § 1, ch. 135 (§§ 14-17). See post, "Effect of Failure to Give Bond," VIII, B, 3.

b. Exceptions.**(1) Statutory Provisions.**

The exceptions to the requirement of bond are limited to cases "where an appeal, writ of error or supersedeas is proper to protect the estate of a decedent infant, convict or insane person, or to protect the interest of any county, city or town of this commonwealth." Va. Code 1919, § 6351.

Section 6351 of the Va. Code of 1919 in effect provides that where an appeal is "proper to protect the estate of a decedent," no appeal bond is required. After an appeal has been taken by a party himself, in due time so far as the appeal is concerned, and he thereafter dies before the expiration of the statutory period within which an appeal bond would have had to have been given had he lived, leaving the appeal pending unaffected by the mere fact of his death, the continued pendency of the appeal being in such case unquestionably necessary to protect his estate after his death, the case falls within the reason of § 6351. *Poff v. Poff*, 128 Va. 62, 104 S. E. 719.

Criminal Cases.—No bond shall be required of any accused person as a condition of appeal, but a supersedeas bond may be required where the only punishment imposed in the court below is a fine. Const. of Va., § 88.

2. Nature and Effect.

A supersedeas bond is one of indemnity, the object of which is to secure to a successful litigant the ultimate fruits of his recovery, in whole or in part, and to insure him against loss from the possible insolvency of his debtor, or from other cause, pending the appeal. *National Surety Co. v. Commonwealth*, 125 Va. 223, 99 S. E. 657.

3. Effect of Failure to Give Bond.

Va. Statutory Provision.—Va. Code 1919, § 6351.

West Virginia.—The statute, § 17, c. 135, W. Va. Code requiring the appeal

to be dismissed whenever it appears that 1 year and 2 months have elapsed since the date of the decree and no bond, as required, has been given, is mandatory, and the appellate court is bound to dismiss for failure to file the bond in the time prescribed. *Harrison v. Harman*, 76 W. Va. 412, 85 S. E. 646.

And this is true although the bond has been given after the expiration of such period. *Scott v. Coal, etc., R. Co.*, 70 W. Va. 777, 74 S. E. 992.

On a motion to dismiss an appeal on the ground that the appeal bond was not filed with the clerk of the circuit court within a year and two months from the date of the decree appealed from, it may be shown by affidavits filed in this court, in resistance to said motion, that bond was filed with said clerk in time and approved by him, and was subsequently lost or mislaid. *Harrison v. Harman*, 76 W. Va. 412, 85 S. E. 646.

4. Time of Execution.

Barnes Code, ch. 135, § 17, amended by Acts 1921, Reg. Sess. p. 169.

"Instead of the appeal bond being executed, as required, within one year from January 6, 1911, the date of the final decree, it was not executed for more than fourteen months after that date, so that so far as the final decree of January 6, 1911, is concerned, the appeal was plainly not perfected in time." *Adams v. Booker*, 114 Va. 796, 798, 77 S. E. 611.

5. Where and by Whom Taken.

Va. Code, 1919, § 6352.

6. By Whom Given.

"It is not essential that the appellant sign the appeal bond. It may be given by another." *Grant v. Wyatt*, 61 W. Va. 133, 138, 56 S. E. 187.

6½. Necessity of Acknowledgment.

An appeal bond need not be acknowledged by the obligors. *Jacobs v. Williams*, 67 W. Va. 377, 67 S. E. 1113.

8. Obligee.

Va. Code 1919, § 287, provides that

any bond required by law to be given upon an appeal, etc., may be made payable to the party entitled to the benefit thereof.

By Barnes W. Va. Code, p. 118, ch. 10, § 5, any bond given upon an appeal, may be made payable to the State or to the party entitled to the benefit thereof.

9. Penalty.

Statutory Provisions. — Va. Code 1919, § 6351; Barnes Code, ch. 135, ch. 14.

10. Conditions.

Va. Code 1919, § 6351; Barnes Code, ch. 135, § 14.

As a general rule, conditions precedent to the allowance of an appeal, prescribed by the statute, for instance that an appeal bond must be for twice the amount of the judgment, are regarded jurisdictional, and must be strictly complied with. *Smith v. West Virginia Cent. Gas. Co.*, 65 W. Va. 216, 217, 63 S. E. 1096.

The language of § 3479 of the Code (1904 Va. Code 1919, § 6351), declaring that the condition of every supersedeas bond shall be for the payment of all damages, costs, and fees, and all actual damages incurred in consequence of the supersedeas (where the judgment or decree appealed from is affirmed) is to be read in every statutory supersedeas bond taken since its enactment, whether inserted in the bond or not, and is broad enough to cover the depreciation in the value of state bonds between the date when they were directed to be delivered by the decree appealed from and the date of their actual delivery, upon the affirmance of said decree by the appellate court. *Bemiss v. Commonwealth*, 113 Va. 489, 75 S. E. 115, distinguishing the case of *Cardwell v. Allen*, 28 Gratt. (69 Va.), 184, 191, which construed § 13 of chapter 178 of the Code of 1873.

11. Sureties.

Indemnity to Surety. — Va. Code 1919, § 6353; Barnes Code, ch. 135, § 16.

The limit of the liability of a surety on an appeal bond given under § 164, chapter 50, West Virginia Code 1906, conditioned that the appellant will perform and satisfy any judgment which may be rendered against him by the circuit court on such appeal, is the penalty of the bond *Grant v. Wyatt*, 61 W. Va. 133, 56 S. E. 187.

Release as to Surety.—When upon trial of an action upon appeal there is found to be due to the appellee a sum not exceeding the amount of a justice's jurisdiction, but greater than the penalty, of such appeal bond, and judgment for such sum is entered against the appellant and his surety on the bond, and the appellee at the time of judgment is allowed to file a remittitur or release, as to the surety, of the excess above the penalty of the bond, the judgment allowing the remittitur is not void, or prejudicial to the appellant or his surety. *Grant v. Wyatt*, 61 W. Va. 133, 56 S. E. 187.

Judgment "Affirmed."—Section 3485, Code of 1904, authorizes a partial reversal, and the entry by the appellate court of a judgment, the effect of which must be to affirm in part and reverse in part the original judgment. It must follow that to the extent to which the judgment is affirmed, it is still valid and binding upon the original judgment debtor, and also upon the sureties in the supersedeas bond, who will be held to have entered into their contract with knowledge that their liability under it was to be controlled by the provisions of § 3485. *National Surety Co. v. Commonwealth*, 125 Va. 223, 99 S. E. 657.

By order of the supreme court of appeals, after a conditional reversal, plaintiff was allowed to enter a remittitur as to the interest, in which event it was declared that the judgment should stand affirmed. Defendants insisted that this order released the sureties on the supersedeas bond conditioned to perform and satisfy the judgment in case the judgment be affirmed. It did

not appear whether the principal debtor was or was not solvent; but, if insolvent and defendants' plea prevailed, plaintiff would lose the principal of a demand to which the jury, the trial court, and the supreme court of appeals had adjudged it entitled. Held, that in reason defendants' position could not be sustained. *National Surety Co. v. Commonwealth*, 125 Va. 223, 99 S. E. 657.

The only modification that resulted in the judgment of the lower court from the appeal was not due to any change made therein by the supreme court of appeals or by the trial court, but was made by the plaintiff itself. And in no proper sense could that be said to constitute a change in the judgment. It recognized the continued existence of the judgment as originally rendered, but refrained from exacting a part of it. That was not a judicial ascertainment by this court that the judgment, or any part of it, was void or voidable, but was an affirmation of the judgment in toto, if the plaintiff should elect to enter a remittitur as to the interest. *National Surety Co. v. Commonwealth*, 125 Va. 223, 99 S. E. 657.

It would be anomalous to hold the sureties bond for the entire judgment in the event of an absolute affirmance, but not for a lesser sum in case of a partial affirmance in conformity to the statute, on the supposition that the latter constitutes a new and different judgment. It is in no correct sense a new judgment, but an amendment of the old judgment, with the erroneous part of it expunged, made in contemplation of the statute and in obedience to its mandate. It does not nullify the old judgment, but amends it, and as amended affirms it. *National Surety Co. v. Commonwealth*, 125 Va. 223, 99 S. E. 657.

12. Defective Bond.

Procedure Where Bond Insufficient.—Where a justice takes and approves an appeal bond, and allows the appeal, though the penalty of the bond be less

than double the amount of the judgment appealed from, as required by § 2115, Code 1906, the court should not dismiss the appeal as improvidently awarded, or pronounce the judgment prescribed by statute, without first ordering a new bond in sufficient penalty to be given by the appellant, within the time to be specified in such order, as provided by § 2121, Code 1906. *Smith v. West Virginia Cent. Gas Co.*, 65 W. Va. 216, 63 S. E. 1096.

13. Action on Bond.

In an action on a supersedeas bond to recover damages by reason of the suspension of a decree subsequently affirmed for by the delivery of state bonds in kind, the plaintiff is entitled to recover the depreciation in the market value of the bonds between the date of the suspension and the date of delivery, together with the difference between the interest (less taxes) he could have made on the money and that actually received on the bonds. The fact that he received the bonds in kind makes no difference, as he had to take them in a depreciated condition. *Bemiss v. Commonwealth*, 113 Va. 489, 75 S. E. 115.

IX. EFFECT OF APPEAL.

C. WRIT OF ERROR.

Alteration of Record — Restoration and Certification.—Where the original order, showing a conviction by a jury composed of less than the constitutional number, is altered by some person without authority, after the case of the term at which the conviction was had, by interlining therein the name of an additional jurymen, defendant may, notwithstanding the pendency of the case on writ of error, upon proceedings duly had for that purpose in the trial forum, have the record restored to its original condition, and, as restored, certified to the appellate court for consideration in determining the merits of the case. *State v. Wyndham*, 80 W. Va. 482, 92 S. E. 687.

D. APPEAL AND SUPERSEDEAS.

See ante, "Stay of Proceedings," VII, B.

"Where an appeal was taken, the judgment or decree did not become operative until the cause was finally tried and determined in the appellate court, as the appeal was taken at the same term at which final judgment or decree was entered in the lower court, and upon taking the appeal, the judgment or decree thereby became vacated." *Wingfield v. Neall*, 60 W. Va. 106, 112, 54 S. E. 47.

A supersedeas does not take effect until the bond required has been given, and, on the giving thereof, it becomes effective only from the time of the filing thereof, not from the date of the allowance of the writ. If, between the allowance of the writ and the giving of the bond, the receiver, appointed by the decree appealed from, has taken possession of the property, his possession thereof will continue during the pendency of the appeal. *Sult v. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S. E. 307.

The perfecting of an appeal from an order refusing to dissolve an injunction, together with a supersedeas, does not stay the operation of the injunction, nor deprive the court below of power to punish a party for his contempt in refusing to obey it. *Powhatan Coal, etc., Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257.

Restoration of Dissolved Injunction.—An injunction which has been dissolved by a circuit court is restored to full force and effect by the granting and making effective of an appeal and supersedeas to the decree dissolving the same. *State v. Barrick*, 80 W. Va. 63, 92 S. E. 234.

Appointment and Proceedings of Receiver.—The effect of an appeal and supersedeas granted by the supreme court of appeals, or a judge thereof, to a decree of a circuit court appointing a receiver, is to reserve the status quo existing at the time such appeal and

supersedeas is made effective, and if at said time such receiver has taken charge of a railway company's property and is operating the same, he is authorized to retain possession of such railroad and continue the operation thereof. *State v. Bell*, 80 W. Va. 663, 93 S. E. 806.

If in such case it is desired to have the possession and control of such railroad withdrawn from the said receiver, or the operation of it by him discontinued, an order to this end may be procured upon a proper showing under the latter clause of § 12 of ch. 135 of the Code, authorizing the entry of an order staying proceedings under a decree appealed from, either in whole or in part. *State v. Bell*, 80 W. Va. 663, 93 S. E. 806.

Curator's Bill of Conformity—Supersedeas in Collateral Suit.—A bill of conformity filed by the curator of an estate, praying the instructions and guidance of the court in the discharge of its duties as curator with respect to matters affecting the estate, to which special attention is directed and which complainant alleges can not be safely disposed of except by the direction of the court, in no wise contravenes a supersedeas order in a collateral suit involving the estate. *Gooch v. Old Dominion Trust Co.*, 121 Va. 29, 92 S. E. 846.

E. INTEREST PENDING APPEAL.

Payment Into Court.—A defendant against whom a judgment or decree has been rendered, desiring further to contest and resist his liability by appellate procedure, is not entitled to be relieved of the burden of interest on the amount of the judgment and responsibility for the fund, during the pendency of the appellate proceedings, by payment of the amount thereof to the general receiver or into court, and, under such circumstances, a refusal of leave to pay it to the general receiver is proper, but a grant of leave to pay it into court is erroneous. *Cresap v. Brown*, 82 W. Va. 467, 96 S. E. 66.

X. ABATEMENT OF APPEAL.

½A. IN GENERAL.

Va. Code 1919, § 6167, provides: "If, during the pendency of an appeal, writ of error, or supersedeas, the death of a party, or any other fact, which, if it had occurred after verdict in an action, would not have prevented judgment being entered, be suggested or relied on in abatement in the appellate court, the said court may, in its discretion, enter judgment or decree in the case, as if such death or other fact had not occurred.

A. BY DEATH OF PARTY.

½. Generally.

Where the death of a party to a suit occurs before an appeal is allowed or writ of error is awarded, the suit or action abates as to the deceased party. If an appeal or writ of error is sought in behalf of the estate of such deceased party, the application must be made by petition of his representative. *Poff v. Poff*, 128 Va. 62, 104 S. E. 719.

1. Pending Appeal.

a. Generally.

Where an appeal is allowed or writ of error awarded before the death of a party to a suit or action, the case is from that moment a case pending in the appellate court, and under the statute (Code of 1887, § 3307, Code of 1904, § 3307, Code of 1919, § 6167) there is no abatement in the appellate court because of the death. The same was very nearly true at common law. The statute effected no other change in the procedure than that it expressly leaves it to the discretion of the appellate court, where the death is made known to such court and is suggested on its record, to proceed with the case and enter judgment or decree as if such death had not occurred; whereas prior to the statute a practice had grown up requiring, in case of death of either party, if made known to the appellate court and suggested on its record, a revival of the appeal or writ of error

by consent of scire facias. *Poff v. Poff*, 128 Va. 62, 104 S. E. 719.

b. Death of Appellant.

By a decree of the lower court appellant was "perpetually enjoined from practicing medicine and exercising his profession as a practicing physician within a radius of fifteen miles from Laurelfork." After the cause was argued and submitted in the supreme court of appeals, appellant died. The issue upon which the cause came to the supreme court of appeals became a purely moot question, and nothing remained for it to do except to enter an order dismissing the cause without costs to either party. *Branscome v. Cunduff*, 123 Va. 352, 96 S. E. 770.

It was insisted by counsel for the appellant that in the instant case the controversy ought to be decided in order to settle the question of costs. Held: That the controversy in the case at bar having ceased to exist, leaving only moot questions, there could be no recovery for costs in the supreme court of appeals, where such a judgment depends upon the substantial result of the litigation, and that the case must, therefore, be dismissed without costs to either party. *Branscome v. Cunduff*, 123 Va. 352, 96 S. E. 770.

On the death of a nonresident distributee of the estate of one dying intestate in this state, pending a writ of error brought by him to the supreme court, though such death be suggested on the record of the supreme court, and order be made reviving the cause in the name of his next of kin or next friend by whom the writ of error is prosecuted, the case may be heard and disposed of here on its merits, upon the writ of error as originally awarded, without reference to such death, as provided by § 3900, Code 1906. *Butcher v. Kunst*, 65 W. Va. 384, 64 S. E. 967.

c. Death of Appellee.

A suit for divorce by a wife against her husband, the trial court decreed a

divorce to the husband on his cross-bill. The husband died pending appeal by his wife after the case was argued and submitted to the supreme court of appeals. As the husband's death would render inoperative a decree granting the wife a divorce or allowing her alimony, no decree will be entered on those subjects by the supreme court of appeals, except to reverse the original decree under review in such of its holdings as are found to be erroneous. To this extent the decree of the supreme court of appeals will still be effective, for there can be no abatement of the original decree by reason of the death of any party to the cause after the appeal had been allowed; and by virtue of the statute (Code 1919, § 6167) the appellate court may, in its discretion, enter its decree dealing with the adjudications of the original decree as if no death of any party to the cause had occurred. *Cumming v. Cumming*, 127 Va. 16, 102 S. E. 572.

XI. DISMISSAL OF APPEAL.

A½. VOLUNTARY DISMISSAL.

"A plaintiff in error has a right at any time to dismiss his writ of error so long as no right of the adverse party will be affected thereby, but he also has the right at any time before such motion is made and sustained by this court to change his mind and withdraw the same." *Price v. Fitzpatrick*, 85 W. Va. 76, 81, 100 S. E. 872.

"All three of the Dansers have appealed, and an appeal can not be dismissed at the instance of some of the parties over the protest or objection of others, whose interests have not been extinguished. *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. 38." *First Nat. Bank v. Danser*, 70 W. Va. 539, 531, 74 S. E. 623.

B. GROUNDS.

1. In General.

Improvidently Awarded.—An appeal will be dismissed where it has been improvidently awarded. *Robinson v.*

Goldman, 59 W. Va. 145, 148, 53 S. E. 12; *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824; *Oppenheimer v. Triple-State Nat. Gas, etc., Co.*, 62 W. Va. 112, 57 S. E. 271; *Yoho v. Thomas*, 85 W. Va. 593, 102 S. E. 236.

An appeal will be dismissed as improvidently awarded when not allowed from any order or decree in the cause. *Robinson v. Goldman*, 59 W. Va. 145, 53 S. E. 12.

A writ of error allowed to a judgment of dismissal not final should be dismissed as improvidently awarded. *Armentrout v. Lambert*, 79 W. Va. 602, 91 S. E. 452.

A judgment in an action is final when it is a termination of the particular action or suit, although it is not a final determination of the rights of the parties. In the case at bar, if the order complained of is final it is barred by the act of limitations, if it is not final no writ of error lies, so in either event the writ of error must be dismissed as improvidently awarded. *Brown v. Carolina, etc., R. Co.*, 116 Va. 597, 83 S. E. 981.

Where the only complaint of a defendant is that the judgment rendered against him is a personal judgment, but he took no exception to any of the rulings of the trial court, a writ of error awarded in his favor should be dismissed as having been improvidently awarded. *Bernard v. McClanahan*, 115 Va. 453, 79 S. E. 1059.

Lack of Bill of Exceptions.—On discovery of a lack of a bill of exceptions after submission, the court will dismiss the writ of error sua sponte, as having been improvidently awarded. *Spindler v. Hamilton*, 70 W. Va. 262, 73 S. E. 820.

Upon a motion in the appellate court to dismiss a writ of error as improvidently awarded upon the ground that "there is, and was, no legal bill of exceptions signed and sealed by the trial judge in said cause," the writ of error will not be dismissed for such reason, where the bill of exceptions as

it appears in the record as certified is sufficient on its face. *Schwarzchild, etc., Co. v. Chesapeake, etc., R. Co.*, 59 W. Va. 649, 53 S. E. 785.

Same—Completion of Record. — A motion to dismiss a writ of error was based upon the fact that the petition, when presented to the judge awarding the writ, was not accompanied by a complete transcript of the record, as by some inadvertence the bills of exception were omitted. Afterwards and before the motion was presented to the court, the plaintiffs in error applied to one of the judges of the supreme court of appeals under § 3463, of the Code of 1904, for a writ of certiorari, requiring the clerk to transmit such portions of the record as had been theretofore omitted from the transcript. In response to this writ, the record was completed long before the motion was made, and was amply sufficient to present for the consideration of the court all of the errors which were assigned in the petition. The motion to dismiss the writ was therefore overruled. *Bowen v. Bowen*, 123 Va. 1, 94 S. E. 166.

Where an appeal is premature because taken before a final termination of the case the appeal will be dismissed because improvidently awarded. *Foland v. Brownfield*, 73 W. Va. 270, 80 S. E. 359.

Prior to the entry of final orders and payment of compensation in condemnation proceedings a writ of error and supersedeas will not lie, and if granted will be dismissed as improvidently awarded. *Panhandle Tract. Co. v. Schenk*, 73 W. Va. 226, 80 S. E. 345.

Formal Defects in Petition or Attorney's Certificate.—An appeal will not be dismissed as having been improvidently awarded for mere formal defects in the petition therefor or the attorney's certificate appended thereto. *Murphy v. Fairweather*, 72 W. Va. 14, 77 S. E. 321.

Failure to Assign Error in Petition.

—See ante, "Necessity and General Consideration," VII, D, 2, c. (1).

Failure to Give Appeal Bond.—See ante, "Effect of Failure to Give Bond," VIII, B, 3.

Certificate of Error Antedating Allowance of Bill of Exception.—That a certificate of error appended to a petition for a writ of error antedates the allowance of a bill of exception in the transcript is immaterial and constitutes no ground for dismissal of the writ. *Fielder v. Adams Exp. Co.*, 69 W. Va. 138, 71 S. E. 99.

Maturing Case.—Where there is no error in maturing a case, it will not be dismissed on appeal on that ground. *Clinchfield Coal Co. v. Wheeler*, 111 Va. 265, 68 S. E. 1001.

Death of Appellant. — See ante, "Death of Appellant," X, A, 1, b.

Failure to Pay Attorney's Fee.—Failure to pay an attorney's fee decreed against the husband in a suit for divorce, where he has intimated an intention to appeal from a decree denying him a divorce, is no ground for dismissal of the husband's appeal. The decree for the fee can be enforced by execution or other legal proceeding, but not by a denial of the husband's constitutional and statutory right of appeal. *Hairston v. Hairston*, 117 Va. 207, 84 S. E. 15.

2. Want of Jurisdiction.

The appellate court of its own motion will dismiss an appeal when the fact is clear that it has no jurisdiction. *McClagherty v. Rumburg*, 71 W. Va. 98, 76 S. E. 137; *Lawson v. Hersman*, 67 W. Va. 636, 69 S. E. 191; *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824; *Carskadon v. Board*, 61 W. Va. 468, 56 S. E. 834; *Rose v. O'Brien*, 77 W. Va. 316, 319, 87 S. E. 378; *Spangler v. Ashwell*, 114 Va. 325, 76 S. E. 281.

Where Amount in Controversy Does Not Give Jurisdiction.—Where it fully appears from the record that the sum or value in controversy is not sufficient

in amount to give this court jurisdiction, the court will of its own motion dismiss the writ of error or appeal as having been improvidently awarded. *Yoho v. Thomas*, 85 W. Va. 593, 102 S. E. 236; *Cox v. Shay*, 76 W. Va. 768, 86 S. E. 880; *Shelton v. Shrader*, 73 W. Va. 237, 80 S. E. 344.

Where Amount Can Not Be Ascertained.—If the jurisdiction is determined by the pecuniary amount involved, and this can not be ascertained, the appeal will be dismissed. *Ritter Lumber Co. v. Coal Mountain Min. Co.*, 115 Va. 370, 79 S. E. 322; *Lamb v. Thompson*, 112 Va. 134, 70 S. E. 507.

No Failure of Appellate Jurisdiction.—If, after a decree denying relief on a bill to foreclose a mortgage, and before submission of an appeal therefrom in the appellate court, the mortgagee convey the mortgaged premises to a stranger to the record, verbally agreeing with the grantee to refund the purchase money in case the property shall be sold in the pending suit, and not purchased by the grantor, no failure of appellate jurisdiction is thereby wrought, and a motion to dismiss the appeal, predicated only on these facts, will be overruled. *Shields v. Simon-ton*, 65 W. Va. 179, 63 S. E. 972.

3. Want of Actual Controversy.

See ante, "Necessity for Existence of Real Controversy," I, B.

4. Appeal Barred by Limitations or Laches.

Where Appeal, etc., Barred by Limitations.—Va. Code 1919, § 6355.

Decree Rendered Unappealable by Lapse of Time.—When the error, if any, in an interlocutory decree dissolving an injunction has been merged in a final decree denying relief and dismissing the bill, an appeal from the former alone will be dismissed if it appears that the latter is unappealable by lapse of time. *Birch River Boom, etc., Co. v. Glendon Boom, etc., Co.*, 71 W. Va. 139, 76 S. E. 167.

B½. MOTION TO DISMISS.

W. Va. Acts 1912, amending Code, ch. 135, § 26.

A motion to dismiss an appeal pending in an appellate court should be in writing and should state specifically the grounds therefor. The notice of such motion, however, is not necessarily the motion itself. If the ground stated therein be too general, yet if in the briefs of counsel filed the grounds be specifically set forth, this will amount to a substantial compliance with the rule. *Whyel v. Jane Lew Coal, etc., Co.*, 67 W. Va. 651, 69 S. E. 192.

The facts which are proper to be considered on a motion to dismiss a pending appeal may be shown by reference to the prior or subsequent proceedings in the cause, or by affidavit, or other legal competent evidence. *Whyel v. Jane Lew Coal, etc., Co.*, 67 W. Va. 651, 69 S. E. 192.

On such motion to dismiss an appeal questions involving the merits thereof, or matters to be considered at the hearing can not, as a general rule, be considered, nor such as require an examination of the whole appeal record. *Whyel v. Jane Lew Coal, etc., Co.*, 67 W. Va. 651, 69 S. E. 192.

Though under § 26, ch. 135, Barnes Code, the appellate court may consider the merits of a cause on a motion to dismiss an appeal, the investigation thereof will be extended only far enough to ascertain whether there is involved a question of law or fact that demands a formal and mature inspection of the record as in determining the rights of the parties upon a submission for final hearing of the appeal on the merits of the cause. *Amherst Coal Co. v. Prockter Coal Co.*, 80 W. Va. 171, 92 S. E. 253.

Submission Not a Bar to Motion to Dismiss.—Submission of a case in the appellate court does not bar a motion to dismiss it for lack of bills of exception necessary to bring into the record the subject-matter of the as-

signments of error. *Spindler v. Hamilton*, 70 W. Va. 262, 73 S. E. 820.

D. EFFECT OF DISMISSAL.

See post, "Successive Appeals," XIII.

"When a writ of error is taken from a circuit court to the supreme court, and it is simply dismissed, without hearing, the circuit court judgment still stands without action by the supreme court affirming it, because it takes reversal to affect it, the writ of error resting on error in the record, and is not a new trial." *Chenowith v. Keenan*, 61 W. Va. 108, 55 S. E. 991.

In *Chenowith v. Keenan*, 61 W. Va. 108, 55 S. E. 991, the court said: "Where the party taking the appeal dismisses it, of his own motion, what is the effect? If the plaintiff is the appellant, it seems to me that his dismissal dismisses not merely his appeal, but his suit. The appeal is not the suit that is tried. Its only function is to transfer the case from the justice's court to the circuit court for a new trial. It has brought up the action and if abandoned, the action goes with it and the judgment for the defendant stands revived, as it were. There is no longer any complaint against it. If the defendant took the appeal and he dismisses it, the judgment in favor of the plaintiff stands good, because he has ceased to complain of it."

The dismissal of an appeal from an interlocutory decree, not deciding the merits of the case, but simply refusing to permit pleading to be amended, on the ground that the appeal was improvidently awarded, is in no sense an affirmance of said decree, but leaves open the question therein decided. *Hobson v. Hobson*, 105 Va. 394, 53 S. E. 964.

When Dismissal Final — Statutory Provisions.—Va. Code 1919, § 6356.

Date of Order of Dismissal.—When an appeal is dismissed by an order of the supreme court of appeals, it stands dismissed and ended on the actual date

of such order, and does not continue to exist as an appeal to the end of the term of the supreme court of appeals. *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

XII. REINSTATEMENT.

See post, "Successive Appeals," XIII.

When Appeal, etc., May Be Reinstated.—Va. Code 1919, § 6356.

XIII. SUCCESSIVE APPEALS.

"The dismissal of an appeal for failure to comply with some requirement of the law governing appeals does not bar a second appeal, nor a writ of error, taken in due time." *Kelner v. Cowden*, 60 W. Va. 600, 604, 55 S. E. 649.

"A party may, after an appeal has been dismissed for informality, if within five years, bring up the case again." *Kelner v. Cowden*, 60 W. Va. 600, 640, 55 S. E. 649.

When an appeal has been dismissed for failure on the part of the appellant to deposit with the clerk of the appellate court within six months after his case has been docketed, a sufficient amount to pay for printing the record, as provided by § 18, chapter 135, West Virginia Code, such appeal may be renewed at any time within two years from the date of the judgment, order or decree appealed from. *Kelner v. Cowden*, 60 W. Va. 600, 55 S. E. 649.

XIV. PROCEEDINGS ON REVIEW IN COURT OF APPEALS.

½A. IN GENERAL.

Docketing Appeal.—*Barnes W. Va. Code*, p. 1152, ch. 135, § 10.

Docketing and Hearing of Case.—Va. Code 1919, §§ 4936, 6361, 6350. *Barnes Code*, ch. §§ 13, 14.; ch. 135, §§ 13, 20.

Process and Order of Publication.—Va. Code 1919, §§ 4936, 6073, 6350. *Barnes Code*, ch. 124, §§ 15-17.

Where Writ of Prohibition and Mandamus Issued and Tried.—Va. Code 1919, § 5872.

Reason for Decision to Be in Writing.

—The reasons for the reversal or affirmance of a case by the Supreme Court of Appeals shall be stated in writing and preserved with the record of the case. Va. Const. § 90; W. Va. Const. Art. VIII, § 5; Barnes Code, ch. 135, § 22.

The above provision is directory only. *Horner v. Amick*, 64 W. Va. 172, 61 S. E. 40.

Syllabus.—It shall be the duty of the Supreme Court of Appeals to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case. W. Va. Const. Art. VIII, § 5; Barnes W. Va. Code, p. 1154, ch. 135, § 22.

Bill Demurred to Cannot Be Amended or Treated as Amended on Appeal.—To avoid the consequence of a demurrer well taken and overruled, the bill can not be amended in the appellate court or there treated as having been amended. *Roberts v. Huntington Devel., etc., Co.*, 85 W. Va. 484, 102 S. E. 93.

Nature of Action as Dealt with in Lower Court.—Where a declaration contained three counts, neither of which consisted of the single charge of false arrest and imprisonment, and the gravamen of each count rested upon a charge of malicious prosecution, and the case below was proceeded with by court and counsel as an action for malicious prosecution, the Supreme Court of Appeals will deal with the case as an action for malicious prosecution. *Clinchfield Coal Corp. v. Redd*, 123 Va. 420, 96 S. E. 836.

Designation of Parties.—Barnes W. Va. Code, p. 1155, ch. 135, § 24.

In the absence of necessary parties this court will not enter upon the consideration of other points of error in the decree appealed from. *Hayhurst v. Hayhurst*, 71 W. Va. 735, 77 S. E. 361.

Parol Testimony.—Barnes W. Va. Code, p. 1155, ch. 135, § 25 provides: "The Supreme Court of Appeals shall not hear parol testimony except in cases

in which it has original jurisdiction."

Loss of Record in Appellate Court.—Barnes Code, ch. 130, § 14.

A. TRANSFER OF CASE TO ANOTHER PLACE OF SESSION.

Va. Code, 1919, § 5871.

A notice of intention to insist upon the hearing of a cause, at a certain term of the appellate court, at a place outside of the grand division to which the cause belongs, and to ask that it be placed in the argument list and set for hearing at said term, is sufficient. *Jacobs v. Williams*, 67 W. Va. 377, 67 S. E. 1113.

B. TAKING UP CAUSES OUT OF TURN.

What Causes Heard Out of Turn.—Va. Code, 1919, § 6362.

Motion for Submission—Denial.—A motion by appellant to submit a pending appeal for decision on the merits, in advance of the date regularly fixed therefor upon the docket of the appellate court, will be denied when based upon affidavits touching the merits of the cause, and made without leave of court or notice to the appellee. *Amherst Coal Co. v. Prockter Coal Co.*, 80 W. Va. 171, 92 S. E. 253.

D. RULE OF STARE DECISIS.

See post, STARE DECISIS.

D½. NUMBER OF JUDGES NECESSARY TO DECISION.

Const. of Va. § 88; W. Va. Const. Art. VIII, § 4; Va. Code 1913, § 6365. Barnes Code, ch. 135, § 1.

Affirmed by Concurrence of Three Judges.—Decree of lower court affirmed by the concurrence therein of three judges, one of them voting to affirm for one reason and two for another. *Batten v. Hope Natural Gas Co.*, 71 W. Va. 481, 76 S. E. 889.

E. EFFECT OF EQUAL DIVISION OF COURT.

The affirmance of the judgment of a trial court by an equal division of the judges of the Virginia Supreme Court

of Appeals results from necessity, and independently of statute. The former statute in this state on that subject was simply declaratory of a well-settled pre-existing rule of necessity which is not changed by the omission from the present statute of anything on the subject. Charlottesville, etc., R. Co. v. Rubin, 107 Va. 751, 60 S. E. 101. See also, Auditor v. Chevallie, 5 Call. (9 Va.) 107.

E½. THEORY OF CASE IN LOWER COURT.

Where a case is tried throughout in the court below and presented in the Supreme Court of Appeals upon the assumption of a certain fact, that assumption must be taken as a concluded fact in the case. Nelson County v. Loving, 126 Va. 283, 101 S. E. 406.

Where an action having for its basis the alleged negligence of the defendant is tried in the court below, upon the theory that such negligence arises from defendant's failure in a particular regard, which turns out to be unsupported by any competent evidence, a verdict and judgment rendered thereon cannot be supported because it may appear that the defendant might be negligent upon another theory not presented at this trial. Alford v. Kanawha, etc., R. Co., 84 W. Va. 570, 100 S. E. 402.

F. SCOPE.

1. In General.

Every Point Fairly Arising.—When a judgment of decree is reversed or affirmed by the Supreme Court of Appeals, every point fairly arising upon the record of the case shall be considered and decided. W. Va. Const. Art. VIII, § 5; Barnes Code ch. 35, § 22.

This Provision is Directory Only.—Horner v. Amick, 64 W. Va. 172, 61 S. E. 40.

Confined to the Record.—The appellate court is limited to the consideration of errors which are apparent upon the face of the record. Southern R. Co. v. Hill, 106 Va. 501, 56 S. E. 278; Dunfee

v. Childs, 59 W. Va. 225, 231, 53 S. E. 209; Norfolk, etc., Tract. Co. v. Norfolk, 115 Va. 169, 178, 78 S. E. 545; Townley Bros. v. Crickenberger, 64 W. Va. 379, 63 S. E. 320; Hilliard v. Union Trust Co., 123 Va. 724, 97 S. E. 335.

Nothing outside of the record can be looked to or considered by the appellate court. Leary v. Briggs, 114 Va. 411, 76 S. E. 907.

It is the function of the appellate court to pass upon the very case which was before the lower court. United States Mineral Co. v. Camden, 106 Va. 663, 664, 56 S. E. 561.

The jurisdiction of the Supreme Court of Appeals is in the main appellate, and when acting in that capacity it does not search the record to ascertain if any error may perchance have inadvertently crept into it, but it reviews the rulings and judgments of trial courts on matters brought to their attention and decided by them. Lorillard Co. v. Clay, 127 Va. 734, 104 S. E. 384.

Record by Former Appeal.—While this court may, for some purposes, look to the record on a former writ of error in the same case, the question of whether or not the verdict of the jury upon the last trial should be set aside because contrary to the evidence can only be determined by a consideration of such evidence as was before the jury. Spriggs v. Jamerson, 115 Va. 250, 78 S. E. 571.

Where the record is incomplete the court will only deal with the objections presented in a general way. Bowles v. Virginia Soapstone Co., 115 Va. 690, 699, 80 S. E. 799.

Evidence Must Be in Record.—Assignments of error as to the overruling or sustaining of objections to the reception of testimony, cannot be considered in the appellate court where they are not presented in the record either by bill's of exceptions or by certificates of exception provided for by the act approved March 21, 1916 (Acts 1916, p. 708). Walters v. Norfolk, etc., R. Co.

122 Va. 149, 94 S. E. 182. See *Ramsay v. Harrison*, 119 Va. 682, 89 S. E. 977; *State v. Booker*, 68 W. Va. 8, 69 S. E. 295; *State v. Jones*, 77 W. Va. 635, 88 S. E. 45.

Scope—Presumptions.—If the evidence is not made a part of the record, the Supreme Court will not reverse the judgment of the trial court setting aside the verdict of a jury and entering judgment for the defendants, on the trial of issues properly made by the pleadings; but will presume that the court was justified in doing so. *Scott v. Newell*, 69 W. Va. 118, 70 S. E. 1092.

Where neither the evidence introduced on the trial nor the facts proved are before the Supreme Court of Appeals, either by bill of exceptions or other certification, an objection that the verdict is contrary to the evidence cannot be considered by that court. *Wilkerson v. Commonwealth*, 122 Va. 920, 95 S. E. 388.

In the absence of the evidence, this court can not re-reverse the ruling of the trial court setting aside a verdict as contrary to the law and the evidence. Although it appears from the record that the sole ground relied on by the defendants for setting aside the verdict was that the court permitted counsel for the plaintiff to refer to a section of the Code which had no possible bearing on the case; yet, where it does not appear what reasons may have controlled the court's action this assignment of error can not be passed upon when the evidence in the case is not certified. *Lemons v. Harris*, 115 Va. 809, 80 S. E. 740.

Effect of Agreement of Counsel.—Upon an appeal to the Supreme Court, the case must be heard and determined upon the record considered and passed upon in the trial court, and hence an agreement between counsel for the respective parties that, in order to determine the rights of all parties in-

terested in the funds in the cause, it shall be heard and determined in the Supreme Court as if certain persons who were not parties in the trial court were parties to the record, must be ignored. Nor will an agreement between counsel, as to the effect of a former decree entered in the cause, be considered. *Brown v. Western State Hospital*, 110 Va. 321, 66 S. E. 48.

The effect of a decision in a particular case upon other possible litigation between the same parties can only be determined when that question arises. *Norfolk, etc., R. Co. v. Allen*, 118 Va. 428, 87 S. E. 558.

Former Adjudication or Res Judicata.—Plaintiffs' bill of exception stated that after the introduction of certain evidence, the plaintiff moved to be exonerated from the payment of the taxes in question on the ground that the court had already passed upon the question at issue in a controversy about the taxes of a previous year and had ascertained and determined that the trust funds upon which the taxes were levied "were not subject to taxation in Virginia and that the question then presented was res judicata, but the court overruled the motion and refused the relief sought." Held: that the record did not sustain the contention, that the liability of the trust fund for the taxes of the previous year was passed upon directly or indirectly in the former proceedings, and therefore no question of res judicata could arise in the present proceedings. *Wise v. Commonwealth*, 122 Va. 693, 95 S. E. 632.

Questions Not Assigned in Petition for Appeal.—See ante, "Necessity and General Consideration," VII, D, 2, c, (1).

Matters Relied on in Appellate Court.—Although there was a demurrer in the trial court to an indictment as a whole and to each of the sixteen counts thereof, the appellate court will consider only the demurrer to the counts

relied on in the latter court. *Fletcher v. Commonwealth*, 106 Va. 840, 56 S. E. 149.

Continuance.—A judgment overruling a motion to continue a case will not be reversed or reviewed here where the bill of exceptions or order of the court does not show that the affidavit in support of the motion was all the evidence introduced and considered by the court on such motion. *Queen v. Westfall*, 86 W. Va. 298, 103 S. E. 115.

Disqualification of Juror.—Presumably by some oversight a juror was sworn and served who had served as juror in a previous trial of the case. After verdict for plaintiff defendant's counsel moved the court to set aside the verdict because of this—which motion the court overruled. The bill of exceptions set forth the foregoing facts and no others. There was nothing whatever in the certificate of the trial judge indicating whether it was or was not known before the verdict was rendered that the juror had served on the former jury. Held: That taking the bill of exceptions alone, there was no ground upon which the Supreme Court of Appeals could interfere with the finding of the trial court, as error will not be presumed. *Sands & Co. v. Norvell*, 126 Va. 384, 101 S. E. 569.

Failure to File Affidavit.—Counsel for plaintiff called the attention of the court to the failure of the defendant to file with his plea the proper affidavit under section 3280, Code of 1904, denying the partnership. Thereupon, on the motion of counsel for the defendant and over the objection and exception of the plaintiff, the court permitted the counsel for the defendant to prepare and file such an affidavit. Plaintiff went on with the trial and did not ask a continuance. Held: Under these circumstances, where neither the evidence nor the facts were certified to the Supreme Court of Appeals so that that court had no facts showing that plaintiff's rights had been injuriously affected, the judgment in

favor of the defendant should be affirmed. *Dean v. Dean*, 122 Va. 513, 95 S. E. 431.

Instructions Not Certified.—Before the Supreme Court of Appeals can hold that the giving of an isolated instruction constituted reversible error, in a case where all the instructions are not certified, it will have to clearly appear that the instruction in itself was vitally wrong, and that other instructions could not have cured the error. *Lysle Milling Co. v. Holt & Co.*, 122 Va. 565, 95 S. E. 414.

What Evidence May Be Considered by the Appellate Courts.—See post, EXCEPTIONS, BILL OF.

Any evidence in the record may be considered by the appellate courts, if certified in any bill of exception, as though certified in each. Va. Code 1919, § 6364.

Same—On Exclusion of Evidence.—On a motion to exclude the evidence, sustained by the trial court, an appellate court on writ of error may, if the record discloses it, consider all the evidence including any improperly rejected, in reaching a conclusion on the merits of such motion. *Carter v. United States Coal, etc., Co.*, 84 W. Va. 624, 100 S. E. 405.

Answer Expected of Witness.—Any error complained of must appear to have been prejudicial, and it is, therefore, ordinarily true that when a witness is asked a question to which an objection is sustained, if the record does not show by necessary implication, or by a statement of the witness, or by an avowal of counsel, what answer was expected, the exception cannot be availed of in the appellate court because the court cannot tell whether the answer would have been favorable or unfavorable to the party excepting. *Jeffress v. Virginia R., etc., Co.*, 127 Va. 694, 104 S. E. 393.

Where the trial court refuses to allow a witness to answer a question, and exception is taken to the ruling,

the usual practice is to allow the witness to answer the question in the absence of the jury, or for counsel to state what answer is expected, and even where the argument on the admissibility of the evidence discloses the character of the answer, it has been held to be a sufficient avowal. But where the relevancy or materiality of the answer expected is not made to appear in some satisfactory way, the exclusion of the question can not be reviewed. *Stewart v. Rogers*, 117 Va. 836, 86 S. E. 161.

Fairness to the lower court and the due and proper administration of justice demand that the trial judge himself should know before the case goes to the jury what the party excepting to his ruling expected to prove by the evidence excluded. *Jeffress v. Virginia R., etc., Co.*, 127 Va. 694, 104 S. E. 393.

Excluded Questions Considered Though Answers Not in Record.—In the instant case it was contended that the Supreme Court of Appeals could not consider the exceptions to the rulings of the court upon the admission of evidence, because the record did not show what the answers of the witnesses on the question at issue would have been. But as there was no ground to imagine that the trial court had the least doubt as to what these witnesses were expected to show, and would not have ruled just as it did if express avowals had been made at the trial, the contention was without merit. *Jeffress v. Virginia R., etc., Co.*, 127 Va. 694, 104 S. E. 393.

Verdict—Reconciling Conflicting Testimony.—In considering an assignment of error that the trial court erred in its refusal to set aside the verdict and grant the defendant a new trial, the Supreme Court of Appeals cannot enter upon any attempt to reconcile the conflicts in the evidence, its sole function being to determine whether the record discloses sufficient evidence of probative value to support the verdict, if such evidence was

found credible by the jury. *Hunter v. Burroughs*, 123 Va. 113, 96 S. E. 360.

Order Awarding a New Trial—Error in Pleas, Evidence or Instructions.—Upon a writ of error to an order of a trial court setting aside the verdict of a jury and awarding a new trial, the plaintiff in error cannot, for the purpose of having such order reversed, complain in the appellate court that the trial court admitted illegal evidence, or gave the jury improper instructions, or erred in the reception of a special plea of the defendant on which the jury gave no recovery over against the plaintiff. But the general rule of the preceding syllabus is applicable only where it is clear that the plaintiff in error has not been prejudiced by the rulings of the court with respect to these matters, and therefore is not applicable to the instant case, where the trial court set aside the verdict for plaintiff upon evidence as to the truth of the defamatory words, when there was no issue and no evidence whatsoever on that subject which could have been properly considered by the trial. *White v. White*, 129 Va. 621, 106 S. E. 350.

1½. Matters Not Necessary to Decision.

Matters Not Necessary In General.—Upon a proceeding in resistance of a state license tax upon a business or occupation, a portion of which is not interstate in such sense, it is not necessary to determine whether other portions thereof are interstate, in order to maintain the state's right of taxation. *Winkelman & Co. v. Blue*, 79 W. Va. 518, 92 S. E. 124.

Where the judgment complained of has to be reversed for errors in granting and refusing instructions, it is inexpedient or unnecessary to consider an assignment of error that the judgment was contrary to the evidence. *Honaker Lumber Co. v. Call*, 119 Va. 374, 89 S. E. 506.

"As the case has to be remanded for a new trial for the reasons hereinbefore

stated, it would be improper for this court to consider the ruling of the trial court on the motion of appellants to set aside the verdict because contrary to the evidence as the evidence may be different on another trial." *Rust v. Reid*, 124 Va. 1, 27, 97 S. E. 324.

As no objection was made in the court below to the admission of the evidence on the ground of the lack of such pleading, the question could not be raised for the first time on appeal. Moreover, as, in the instant case, the exclusion of the evidence was sustained on other grounds, it was unnecessary to determine the question. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

On appeal from an order in mandamus proceedings directing respondent to give relators preference for the renewal of their leases of market stalls, where the issue had become moot by the execution of the leases by respondent, it appeared that prior to the time of the leases to plaintiffs, a lease of the same property had been made by respondent to two other parties, and the Supreme Court of Appeals was asked to construe a provision in the latter lease. Held: The lessees not being parties in the court below, and no issue having been made by the pleadings involving that subject, any decision as to the proper construction of the lease could not be carried into effect against such lessees. Such a decision would be merely an opinion upon a moot question not in issue. *Levy v. Kosmo*, 129 Va. 446, 106 S. E. 228.

The appellate court will not pass upon a question where its decision is immaterial to the proper disposition of the case. *House v. Universal Crusher Corp.*, 115 Va. 558, 559, 79 S. E. 1049.

Affirming the judgment of the lower court, that the illegality of county warrants themselves was an insuperable obstacle to their payment, the Supreme Court of Appeals did not deem it necessary to consider what was the effect of the forging of the indorsements of the payee on the warrants. *Leachman v.*

Board of Super's, 124 Va. 616, 98 S. E. 656.

Question Conceded in Counsel's Brief.—While the Supreme Court of Appeals might have refrained from passing upon a question conceded in counsel's briefs, if the question had been between private persons or corporations, yet as the question was one of a public nature, the court felt that it should answer it. *Mann v. Lynchburg*, 129 Va. 453, 106 S. E. 371.

Matters Unlikely to Arise on Another Trial.—A case being reversed on certain grounds it is unnecessary to consider or pass upon the other assignments of error where none of them are likely to arise on a new trial of the case. *Camp v. Christo Mfg. Co.*, 122 Va. 439, 445, 95 S. E. 424; *Spencer v. Loony*, 116 Va. 767, 771, 82 S. E. 745; *Garnett v. Commonwealth*, 117 Va. 902, 83 S. E. 1083; *Rust v. Reid*, 124 Va. 1, 24, 97 S. E. 324.

Where Verdict Bad for One Tenable Ground No Inquiry into Sufficiency of Another Ground.—If a verdict is erroneous and an additional reason, and the latter ground is tenable, the appellate court will not enter upon an inquiry as to whether an effort to cure the first named defect, by a remittitur, is sufficient or was made in time. *Browning v. Hoffman*, 86 W. Va. 468, 103 S. E. 484.

After Finding that Verdict Properly Set Aside Sufficiency of Evidence Will Not Be Considered.—On a writ of error to a judgment awarding a new trial, the appellate court, after having ascertained that the verdict for the plaintiff was properly set aside for an error in the trial, other than refusal to direct a verdict for the defendant, if any, will not ordinarily enter upon an inquiry as to the sufficiency of the evidence to sustain the verdict returned and set aside. *Browning v. Hoffman*, 86 W. Va. 468, 103 S. E. 484.

Instructions.—Notwithstanding that some of the criticisms by appellants of

instructions given by the trial court at the request of the appellee might be justified, it is unnecessary for the Supreme Court of Appeals to consider or discuss these alleged errors, where upon the undisputed facts of the case, the appellants failed to establish the defense set up by them so that upon proper instructions the appellee was entitled to recover in any event. *Smith Co. v. Bernard*, 124 Va. 518, 98 S. E. 677.

Evidence Other than that Objected to Sufficient to Sustain Verdict.—Where the evidence in the case, independent of testimony drawn in question by two assignments of error, was sufficient to sustain the verdict of the jury it is unnecessary for the appellate court to pass upon the questions raised by these assignments of error. *Chesapeake, etc., R. Co. v. Ware*, 122 Va. 246, 95 S. E. 183.

When Matters Not Necessary to a Decision Considered.—The Supreme Court will pass on the weight and effort of oral evidence on a motion for a new trial when the justice of the case, in its opinion, demands it, though there be other grounds of reversal. *Clark v. Beard*, 69 W. Va. 313, 71 S. E. 188.

"The conclusion reached under the first assignment of error will result in a reversal of the cause, but it is proper that we should pass upon the other assignments, because the same questions may arise at the next trial." *Turner v. Hall*, 128 Va. 247, 255, 104 S. E. 861.

Conditional Cross-Assignment of Error.—If a defendant's demurrer to evidence is well taken and sustained, and, upon a writ of error obtained by the plaintiff, the defendant cross assigns, as error, the overruling of his demurrer to the declaration, the judgment will be affirmed without inquiry as to the sufficiency of the declaration, the cross assignment of error being regarded as conditional only. *State v. Mankin*, 68 W. Va. 772, 70 S. E. 764.

Certification of Question.—Upon a certification of the overruling of a general demurrer to a bill in equity under

the last clause of § 1 ch. 135 of the Code, the appellate court, on finding one part of the bill sufficient, will affirm the decision, without inquiry as to the sufficiency of the other parts. *Wheeling v. Chesapeake, etc., Tel. Co.*, 82 W. Va. 208, 95 S. E. 653.

Determination of Validity of Claims for Damages in Suit to Impose Condition upon Defendant's Relief from Forfeiture.—On the reversal of a decree adjudicating rightful possession of property in one who claims it by re-entry for condition broken, on his bill for an injunction to restrain interference with his possession and cancel the instrument under which he re-entered as a cloud upon his title, on the ground of wrongfulness of the re-entry, the appellate court will not enter upon an inquiry as to the validity of claims for damages set up in the suit for ascertainment and imposition as conditions upon the right of the defendant to be relieved from the alleged forfeiture. *Peerless Carbon Black Co. v. Gillespie*, 87 W. Va. 441, 105 S. E. 517.

2. Matters Not Acted on by Lower Court.

The Supreme Court will not consider questions not yet acted upon by the circuit court in the case. *Nuzum v. Nuzum*, 77 W. Va. 202, 87 S. E. 463; *Bartlett v. Boyles*, 66 W. Va. 327, 66 S. E. 474.

Where on demurrer to the evidence the court below has not ruled on the question of excessiveness of the conditional verdict of the jury, the Supreme Court will consider only the question whether the evidence sustains plaintiff's right to damages. *West Va., etc., Builders v. Stewart*, 68 W. Va. 506, 70 S. E. 113.

Though, in a suit to dissolve, settle and wind up the business of a mining partnership, special receiver be prayed for, and a proper case be presented therefor, yet if neither party has moved the court to appoint a receiver,

and there has been no decree appointing or refusing to appoint, no error is presented reviewable here on appeal; and no appeal lies to the Supreme Court from an order or decree refusing to appoint a receiver. *Bartlett v. Boyles*, 66 W. Va. 327, 66 S. E. 474.

Where Questions Are Certified Points Not Raised Are Reviewed.—A demurrer to a bill raises the question of its sufficiency for any reason apparant on its face, and where the demurrant states his grounds therefor, omitting to mention a material defect, and the court overrules the demurrer and certifies the question decided by it for the decision of this court, this court will consider and pass upon the sufficiency of the bill, regardless of whether or not some particular point rendering it defective was decided by the lower court. *Brown v. Smith*, 84 W. Va. 429, 100 S. E. 279.

2½. Decree or Order Not Appealed from.

This court will not review or reverse a decree or order of the circuit court, or any part thereof, not appealed from. *Sulzberger & Sons Co. v. Fairmont Packing Co.*, 86 W. Va. 361, 103 S. E. 121.

3. Previous Appealable Decrees.

Barred by Statute.—An appeal in a cause, within time as to one decree therein, does not bring up for review other decrees which were appealable, but as to which the time fixed by law for appeal has expired. *Hornor v. Life*, 76 W. Va. 231, 85 S. E. 249; *Trail v. Trail*, 56 W. Va. 594, 49 S. E. 431; *Morrison v. Leach*, 75 W. Va. 468, 84 S. E. 177.

After the expiration of the period of limitation of appeals an order can not be reviewed, and a cross-assignment of error therein made in a brief filed on a writ of error to a later judgment in the case, obtained after the expiration of the limitation of the right of appeal from such order, is unavailing. *Clark v. Lee*, 76 W. Va. 144, 85 S. E. 64.

When an order is appealed from, within the time provided by the statute, and the error complained of is based solely on an appealable order not reversed or appealed from, entered more than two years before the appeal is taken, such error cannot be reviewed. *Kelner v. Cowden*, 60 W. Va. 600, 55 S. E. 649.

When an order for the payment of money is so appealed from and is based solely on a former order making an allowance to attorneys to be paid from the estate of a decedent which former order is null and void, although entered more than two years, before the appeal is allowed, the order so appealed from will be reversed. *Kelner v. Cowden*, 60 W. Va. 600, 55 S. E. 649.

4. Previous Decrees Not in Themselves Appealable.

Where a decree having finality is appealed from within the time fixed by statute, the appeal brings up for review every former interlocutory order entered in the cause not appealable. *Harper v. South Penn Oil Co.*, 77 W. Va. 294, 87 S. E. 483, 487.

A decree prematurely entered, pending exceptions to a commissioner's report undisposed of, and which does not finally adjudicate the controversies between the parties to the cause is interlocutory, and not appealable, but a subsequent decree disposing of such exceptions, and finally adjudicating all matters in controversy, brings with it, for review on appeal, all errors in the former decree. *Kerfoot v. Dandridge*, 69 W. Va. 337, 71 S. E. 396.

4½. Appeal from Specific Parts of a Decree.

"A party cannot assign as error a particular part of a judgment as to which he has not appealed." *Allen & Co. v. Maxwell*, 56 W. Va. 227, 243, 49 S. E. 242.

Where a party takes an appeal from specified parts of a decree, giving notice to all parties to the suit, that he will only have such parts of the record

copied into the transcript as will present to the appellate court such matters so specified as he desires to have reviewed, and that it is not his purpose or intention to appeal from any other part of the decree; the appellate court will not consider an assignment of error by one of the appellees long after the submission of the cause, concerning another part of the final decree, and having no relation to the parts of the decree appealed from. *Allen & Co. v. Maxwell*, 56 W. Va. 227, 49 S. E. 242.

When an appeal is taken from specified parts of a decree set out in a written notice which states that no other part of the decree will be appealed from by the appellant, and such specified parts are independent and involve only the rights of the appellees named, in such specified parts of the decree, such appeal does not bring up for adjudication the whole decree. *Allen & Co. v. Maxwell*, 56 W. Va. 227, 49 S. E. 242.

In *Dent v. Pickens*, 59 W. Va. 274, 276, 53 S. E. 154, it is said: "When the appeal is from the whole decree, errors in it, not assigned in the petition for the appeal, may be assigned in the briefs, and may even be noticed by the court and acted upon without any assignment thereof. But when the appeal allowed does not extend to the whole decree, the court has before it, and within its jurisdiction, only those matters as to which the appeal was allowed. All adjudications as to which no appeal was allowed remain in the court below, within its jurisdiction, and constitute proper subjects for its further action. A proposition so obviously deducible from the terms of the order requires no citation of authority for its support; but, as the contrary thereof seems to be relied upon with confidence, reference is here made to 3 Cyc. 220, where a number of decisions in which the rule has been enforced are cited. The only exception is a case in which the matter, as

to which the appeal was allowed, is so connected with all others as to render it impossible to act upon it without affecting them."

6. Judgment Sustaining Demurrer to One Count.

Where a demurrer to one count of a declaration has been sustained, and issue taken on other counts, and there has been a verdict and judgment for the plaintiff, a writ of error awarded to the defendant does not bring up the action of the trial court, in sustaining the demurrer to that count, nor can that count be looked to by the appellate court in order to sustain the verdict and judgment complained of. *Jenkins v. Chesapeake, etc., R. Co.*, 61 W. Va. 597, 57 S. E. 48.

7. Proceedings Subsequent to Appeal.

An appeal from an interlocutory decree does not bring up for review a subsequent final decree though the latter was entered prior to the appeal. *Birch River Boom, etc., Co. v. Glendon Boom, etc., Co.*, 71 W. Va. 139, 76 S. E. 167.

Award Made Subsequent to Final Decree.—An award made under a submission subsequent to a final decree in a cause can not be relied upon in the Supreme Court when introduced for the first time in the form of a "reply brief." *Solenberger v. Strickler*, 110 Va. 273, 65 S. E. 566.

9. Appeal from Order Dissolving or Refusing to Dissolve Injunction.

An order refusing to entertain and decide a motion to dissolve an injunction on the sole ground that the movant is under the ban of contempt, and has not purged himself thereof, is not an order refusing to dissolve an injunction, within the meaning of § 1, Ch. 135, Code 1913 (§ 4981), and is, therefore, not appealable. *Hissam v. Moorehead*, 78 W. Va. 662, 90 S. E. 106.

Order Dissolving Injunction—Rein-

statement and Remand.—Upon an appeal from an interlocutory order dissolving an injunction upon bill and answer accompanied by affidavits, this court does not consider the pleadings and informal proof further than is necessary to enable it to determine the propriety and correctness of the dissolution order. It will not in this manner determine the rights of the parties, but will reinstate the injunction and remand the cause for formal proof by the usual and regular procedure, where it appears the injunction was dissolved prematurely. *Amherst Coal Co. v. Prockter Coal Co.*, 81 W. Va. 292, 94 S. E. 145.

Judicial Discretion.—If the defendant in a bill to enjoin a trespass to real estate, upon which such an injunction has been awarded, without proof of the allegations of the bill and without notice of the application to the defendant, instead of moving a dissolution of the injunction for alleged defectiveness of the bill or on an answer denying the allegations, has demurred to the bill and procured an erroneous dismissal thereof, the appellate court, on the reversal of the decree, will not enter upon an inquiry as to whether the award of the injunction was, under the circumstances, the exercise of a sound judicial discretion, for the trial court has had no fair opportunity to pass upon the question. *Columbia Gas, etc., Co. v. Moore*, 81 W. Va. 164, 93 S. E. 1051.

9¼. Appeal from Decree Appointing Receiver.

When a case is properly before the appellate court on appeal from a decree appointing a receiver, all decrees and proceedings in the case are subject to consideration and review. *Virginia Passenger, etc., Co. v. Fisher*, 104 Va. 121, 51 S. E. 198.

10¼. Where There Have Been Two Trials.

See post, "Where There Have Been Two Trials Below," XIV, G, 5.

12¼. Appeal from Interlocutory Decrees.

In *Hopkins v. Prichard*, 59 W. Va. 363, 366, 53 S. E. 557, the court, citing 3 Cyc. 229, said: "While an appeal from an interlocutory, as well as from the final judgment or decree, brings up for review all the proceedings in the cause anterior to the final judgment or decree, an appeal from an interlocutory order or decree alone brings up for review only the order or decree appealed from."

When an interlocutory decree is rendered in a cause which so far settles the principles of the cause as to make the decree appealable, and subsequent decrees carrying out the principles so settled, are entered in the cause, an appeal from such interlocutory decree alone, will not bring up for review such subsequent decrees, although the same were entered long prior to the granting of such appeal. *Hopkins v. Prichard*, 59 W. Va. 363, 53 S. E. 557.

12½. Appeal from Decrees Confessed.

An appeal from a decree upon a bill taken for confessed, after a motion to correct the same, under § 5 of chapter 134 of the West Virginia Code, specifying certain errors therein and charging generally the existence of others, has been overruled, brings before the appellate court all the errors of law in the decree. *George v. Zinn*, 57 W. Va. 15, 49 S. E. 904.

13. Adjudication of Rights of Parties Not Appealing.

a. Where Parties Stand upon Same Ground.

Where the parties appealing and those not appealing stand upon the same ground, and their rights are involved in the same question, and equally affected by the same judgment or decree, the court will consider the whole case, and settle the rights of the parties not appealing as well as those who bring up their case by appeal. *Roanoke v. Blair*,

107 Va. 639, 60 S. E. 75, citing *Allen & Co. v. Maxwell*, 56 W. Va. 227, 243, 49 S. E. 242.

In the absence of necessary parties this court will not enter upon the consideration of other points of error in the decree appealed from. *Hayhurst v. Hayhurst*, 71 W. Va. 735, 736, 77 S. E. 361.

b. Where Parties Stand on Different Grounds and Rights Are Separated.

(1) General Rule.

Under the statutes of this state and the rule of this court, the rule of decision is that where the parties stand on distinct and unconnected grounds, where their rights are separate and not equally affected by the same decree or judgment, the appeal of one will not bring up for adjudication the rights or claims of the others. *Roanoke v. Blair*, 107 Va. 639, 60 S. E. 75, and *Gebhart v. Shrader*, 75 W. Va. 159, 83 S. E. 925, citing *Allen & Co. v. Maxwell*, 56 W. Va. 227, 243, 49 S. E. 242.

(2) Joint Judgments.

"When the interest of the parties are several and independent, so that a proper decision as to one is not dependent on the judgment of the other, the judgment may be reversed as to one and affirmed as to the other." *State v. McCoy*, 61 W. Va. 258, 261, 57 S. E. 294.

Thus where parties are tried together for murder and convicted, and one judgment rendered against all, the appellate court may affirm as to one, and reverse and grant a new trial as to another. *State v. McCoy*, 61 W. Va. 258, 57 S. E. 294.

14. Correction of Errors against Appellee.

a. On Cross Assignment of Error.

Appellees can not assign as cross-errors objections not made in the trial court concerning matters not made the

subject of investigation and enquiry in that court, and not asked to be investigated. *Quigley Furniture Co. v. Rhea*, 114 Va. 271, 76 S. E. 330.

Under rule 9 the Virginia appellate court will not consider cross-errors assigned by a defendant in error which do not look to the reversal, modification or correction of the judgment under review, but which merely present for decision questions which may or may not arise at a subsequent trial of the case. *Singer Mfg. Co. v. Bryant*, 105 Va. 403, 405, 54 S. E. 320.

Practice of Dividing Case Disapproved.—*Wheeler v. Thomas*, 116 Va. 259, 81 S. E. 51.

16. Objections Not Raised Below.

a. General Rule.

(1) Irregularities Not Going to Merits.

The general rule is that objections not shown to have been made in the trial court can not be considered in the appellate court. *South, etc., R. Co. v. Commonwealth*, 104 Va. 314, 51 S. E. 824; *Swan v. Washington-Southern R. Co.*, 108 Va. 282, 61 S. E. 750; *Norfolk, etc., Tract. Co. v. Norfolk*, 115 Va. 169, 78 S. E. 545; *Virginia, etc., R. Co. v. Nickels*, 116 Va. 792, 82 S. E. 693; *Hilliard v. Union Trust Co.*, 123 Va. 724, 97 S. E. 335; *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 509, 49 S. E. 378; *Oceana v. Cook*, 63 W. Va. 296, 60 S. E. 145; *Townley Bros. v. Crickenberger*, 64 W. Va. 379, 63 S. E. 320.

Parties are not permitted to make one objection to evidence in the trial court and a different one in the appellate court. *Conrad v. Ellison-Harvey Co.*, 120 Va. 458, 91 S. E. 763.

Errors Other than Apparent in Pleadings.—If error or supposed error of any sort, except errors in the pleadings appearing on the record, are committed by a court during the trial of a case by a jury, the appellate court will not review such rulings, unless they were objected to and excepted to when made as shown by the record.

Hinton Milling Co. v. New River Milling Co., 78 W. Va. 314, 88 S. E. 1079.

Constitutional Question.—The statute evidently contemplates that cases in which the right of drainage may be granted shall depend upon the facts of each case, and the facts not being certified, it is very doubtful whether the constitutional question can be considered at all when raised for the first time on appeal. *Hodges v. Richmond Cedar Works*, 120 Va. 492, 91 S. E. 644.

Sufficient Objections.—In an action at law, if it appears in the orders or judgment of the court, or in any other proper manner by the record, that a motion to set aside the verdict and award a new trial has been made, overruled and exception taken, it is not essential that there be other objections to such ruling of the court in order to entitle the defendant to review thereof by the appellate court. *Chadister v. Baltimore, etc., R. Co.*, 62 W. Va. 566, 59 S. E. 523.

(2) Substantial Defects.

Anything which is good cause for arresting a judgment is as good for reversing it, though no motion in arrest is made. *State v. Dolan*, 58 W. Va. 263, 52 S. E. 181.

b. Applications of Rules in Particular Instances.

(2) Want of Jurisdiction or Venue.

Jurisdiction.—The rule that a question not made in the trial court can not be raised in the appellate court has no application where the question involves the jurisdiction of the trial court of the subject matter of litigation. The lack of such jurisdiction may be taken notice of by the appellate court of its own motion. *South, etc., R. Co. v. Commonwealth*, 104 Va. 314, 51 S. E. 824; *Wayt v. Glasgow*, 106 Va. 110, 120, 55 S. E. 536; *Hanger v. Commonwealth*, 107 Va. 872, 874, 60 S. E. 67; *Lovell v. Jamison*, 113 Va. 624, 75 S. E. 80; *Hilliard v. Union Trust Co.*,

123 Va. 724, 97 S. E. 335; *Commonwealth v. Lorillard Co.*, 129 Va. 74, 105 S. E. 683; *Thompson v. Adams*, 60 W. Va. 463, 55 S. E. 668; *Buskirk v. Ragland*, 65 W. Va. 749, 65 S. E. 101.

If, in a suit in equity for partition of land, in which the pleadings and proofs introduce issues of title proper for jury determination, arising out of claims made under strange and hostile titles, no objection is made by any of the parties, on the ground of lack of jurisdiction, and the trial court by its decree determines such questions, the appellate court, on an appeal from the decree, will reverse it, *ex mero motu*, and remand the cause. *Arnold v. Mylius*, 87 W. Va. 727, 105 S. E. 920.

Venue.—Objection to venue can not be raised for the first time on appeal after waiver in the lower court. *Commonwealth v. Carter*, 126 Va. 469, 102 S. E. 58.

(3) Objections as to Parties.

The want of necessary parties is not waived by failure to assign it specially as a ground of demurrer; and when a demurrer has been interposed and overruled and a decree entered, without such special assignment either on the demurrer or at the hearing, it may nevertheless be relied upon in the appellate court. *Thompson v. Hern*, 62 W. Va. 497, 59 S. E. 504.

Where there is such a defect of parties that injustice may be done if the absent parties be not before the court, the Supreme Court of Appeals will remand the case in order that proper parties may be brought before the court, although no objection on that ground was made either in the trial court or on appeal. *Jeffries v. Jeffries*, 123 Va. 147, 96 S. E. 197.

Want of Capacity of Plaintiff to Sue.—If a defendant intends to rely, on appeal, on the objection that the complainant is incapable of maintaining a suit in proper person, the objection should be made in the trial court

in such manner that it will specifically and affirmatively appear in the record. The question is of too technical a nature to receive serious consideration when raised for the first time on appeal. *Crawley v. Glaze*, 117 Va. 274, 84 S. E. 671.

Right of Legatee to Maintain Suit against Personal Representative and Debtor of Deceased.—A legatee or creditor of a decedent's estate can not maintain a suit against the personal representative of the decedent and another who is a debtor to the estate, except under special circumstances, but where a suit was brought by a legatee to subject land to the payment of a legacy which the complainant claimed was a lien upon the land, and all of the parties in interest were before the trial court, and no demurrer was filed and no objection raised as to the right of the complainant to maintain her suit, and the cause was heard and determined on its merits in the trial court, the right of the complainant to maintain her suit can not be raised in the supreme court for the first time, and the objection will be deemed to have been waived. *Harris v. Shield*, 111 Va. 643, 69 S. E. 933.

Waiver of Objection.—Where land charged with the payment of a legacy has been conveyed by the devisees to a third person, and a suit is brought to subject the land to the payment of the legacy after the death of the devisees, and their personal representatives are not made parties, and there is no demurrer to the bill nor objection made in the trial court on that ground, and there is no suggestion that the devisees left any personal estate out of which the legacy could be paid even if their personal estate, under the facts of the case in judgment, would be liable for its payment, the supreme court will not reverse the decree of the trial court subjecting the land to the payment of the legacy, on account of the absence of such personal representa-

tives. *Wingfield v. McGhee*, 112 Va. 644, 72 S. E. 154.

Where the appearance of a party to an action was voluntary and without objection on the part of the appellant, it is too late upon appeal for either of the parties to make any objection to that procedure. *Armour Fertilizer Works v. Taylor*, 129 Va. 1, 105 S. E. 574.

(4) Form of Action.

It was urged by the defendant, that as the action was based upon a wrongful discharge, the plaintiff should have declared specially upon the contract and its breach, whereas his declaration contained only the common counts in assumpsit; and, that, therefore, his action must fail. Held, that as this point was not made in the lower court, it could not be successfully raised for the first time in the appellate court. *Conrad v. Ellison-Harvey Co.*, 120 Va. 458, 91 S. E. 763.

(6) Process.

If a defendant has not been served with process, and has not made defense, and a decree has been erroneously pronounced against him, he can not before application to the circuit court to correct the error, pursuant to § 5, ch. 134, Code 1906, be heard in the supreme court on an appeal to correct such error. *Blue v. Poling*, 68 W. Va. 547, 70 S. E. 279.

(7) Pleadings.

(a) Bill or Declaration.

Amended Bill Not Filed in Time.—An order was entered at the August term of the lower court, reciting that an amended bill was filed by leave of court, and while the record indicated that it was not in fact filed until September following, this discrepancy, though indirectly adverted to, in the brief of counsel, was immaterial, as the amended bill was recognized and passed upon by the court at a still later term, and no objection based

upon the time of filing, appeared anywhere in the record. *Matney v. Yates*, 121 Va. 506, 93 S. E. 694.

Informal Statement in Justice's Court.

—If the parties proceed to trial without other formal pleading, either oral or written, and plaintiff obtains a verdict and judgment both in the justice's court and on appeal in the circuit court, and defendant, though noting upon the trial therein the absence of such a complaint, yet does not demand or insist upon it or upon the filing of a bill of particulars, despite plaintiff's offer to file either the complaint or a bill of particulars, but without further objection allows the trial to proceed to judgment, such failure to conform to the requirements of section 50, chapter 50, Code, considered in the light of the informalities allowable in proceedings originating before justices, does not constitute reversible error. *Tingler v. Lahti*, 87 W. Va. 499, 105 S. E. 810.

(b) Plea, Answer or Subsequent Pleading.

Rejection of Plea.—The rejection of a plea will be waived, if no exception is taken thereto. In such case, the rejected plea is no part of the record. *United States Oil, etc., Co. v. Gartlan*, 65 W. Va. 689, 64 S. E. 933.

Objection and exception to answer because it is unsigned by the defendant or by his counsel will not be considered by this court, unless it appears such was made a specific ground of objection in the court below. *Johnson v. Todd*, 86 W. Va. 24, 102 S. E. 697.

A general denial in an answer of such allegations of a bill as are not admitted suffices, in the absence of specific exceptions to the denial on account of its generality, pointing out the particular allegations as to which admissions or denials are insisted upon. *Huntington, etc., Supply Co. v. Harvey Coal, etc., Co.*, 73 W. Va. 527, 80 S. E. 871.

In the instant case, a suit to set up a will alleged to have been destroyed

there was no exception to the answer, and the case was heard, not upon the bill and answer, but upon the bill, answer and depositions. There was no direct and specific denial of the one-time existence and subsequent destruction of the alleged will, and in this particular the complainants (appellants), contended that the answer was not sufficient. Held: That if the objection made to the answer would have been good as an original proposition, it was not available on appeal. *Wright v. Wright*, 124 Va. 114, 97 S. E. 358.

Objection to duplicity in a replication filed in answer to a plea of set-off can not thereafter be made in this court for the first time. *Stimmel v. Benthall*, 108 Va. 141, 60 S. E. 765.

(c) Indictment, Information or Presentment.

Although no demurrer was interposed, or motion in arrest of judgment made, if the indictment is so defective that it could not be properly prosecuted, a judgment thereon will be reversed. *State v. Dolan*, 58 W. Va. 263, 52 S. E. 181.

(d) Rulings on Demurrer—Causes of Demurrer Not Assigned Below.

A defendant is bound by the grounds of demurrer assigned in the trial court, and can not present new grounds for the first time in the appellate court. *Hot Springs, etc., Mfg. Co. v. Revercomb*, 110 Va. 240, 65 S. E. 557.

Section 29, chapter 125, Barnes Code representing failure to assign grounds of demurrer, does not apply to equity causes. *Anderson v. Anderson*, 78 W. Va. 118, 68 S. E. 653.

Sustaining Demurrer to Plea in Abatement. — A plea in abatement filed in a case is a part of the record, and it is not necessary to except to the action of the court in sustaining a demurrer thereto in order to claim the benefit of error alleged to have been committed in sustaining the demurrer.

State v. Wetzel, 75 W. Va. 7, 20, 83 S. E. 68.

Filing Exhibit with Demurrer.—*Old Dominion Iron, etc., Co. v. Chesapeake, etc., R. Co.*, 116 Va. 166, 81 S. E. 108.

A demurrer incorporated in the body of the answer, but not mentioned or referred to in the caption thereof or any decree or order in the cause, will be disregarded as not having been brought to the attention of the court and treated as a fugitive paper. *Pheasant v. Hanna*, 63 W. Va. 613, 60 S. E. 618.

Specification of Grounds of Demurrer.—Where the grounds of a demurrer were called for in the trial court, and were given in writing, only those pointed out in the written specification filed in the trial court can be considered in the appellate court. A general specification of "divers other causes" is ineffectual." *United States Mineral Co. v. Camden*, 106 Va. 663, 56 S. E. 561.

A general demurrer not specifying the absence of purported exhibits with the bill, will not, after answer filed not challenging the existence of such exhibits or the validity thereof, justify reversal of a final decree upon the issues presented by the pleading. *Sizemore v. Lambert*, 78 W. Va. 243, 88 S. E. 839.

Where the objections on demurrer to certain counts in the declaration do not appear from the record to have been made in the court below by being specifically stated in the grounds of demurrer, but it does not appear from the record that any motion was there made by the plaintiff to require or that the court on its own motion required, the grounds of demurrer relied on to be stated (section 3271, Code of 1904), and no objection is made by the plaintiff to the consideration of the assignments of error by the Supreme Court of Appeals, such assignments will be

considered by that court. *Hunter v. Burroughs*, 123 Va. 113, 96 S. E. 360.

(8) Nonjoinder of Issue.

Where there has been no formal joinder of issue on a plea, but it appears that the court to which the parties had submitted all matters of law and fact, and the plaintiff and defendant, dealt with the case as though the pleadings had been perfected; and the evidence was introduced and the case argued by counsel, and decided by the court as though the utmost formality in pleading had been observed, the plaintiff is estopped to raise the objection of the want of such joinder in the appellate court for the first time, as it is manifest that no injury has resulted to him from the omission. *Deatrick v. State Life Ins. Co.*, 107 Va. 602, 59 S. E. 489.

In *habeas corpus*, the want of a replication to the return is not ground for reversal when the court or judge has heard the matter on evidence as though the return was denied. *Hurley v. Hurley*, 71 W. Va. 269, 76 S. E. 438. See post, *HABEAS CORPUS*.

(11) Defenses Not Raised Below.

Actions on Insurance Policies.—In an action on an accident policy, the company for the first time on appeal sought to show that the beneficiary of the policy had some guilty previous knowledge of her son's alleged intention to murder his father, the insured. Held: That the point was raised too late. *Standard Acci. Ins. Co. v. Walker*, 127 Va. 140, 102 S. E. 585.

No specification having been filed in the trial court of the defense that a policy of insurance was forfeited by the assignment of the right of the assured, that defense can not avail on writ or error. *Billmyer v. Insurance Co.*, 57 W. Va. 42, 49 S. E. 901.

That Bridge Built without Legal Authority.—Where it was agreed by counsel in the lower court that a bridge complained of was constructed "un-

der legal authority" and the jury has been instructed, at the instance of the plaintiff, that the legal power of the defendant "to build the bridge in its present location is not an issue before them," the plaintiff will not be permitted to contend in this court for the first time that the bridge was built without legal authority. *Peek v. Hampton*, 115 Va. 855, 80 S. E. 593.

Broker Not Entitled to Commissions because of Bad Faith.—Where a bill expressly stated that appellant was entitled to a reasonable commission or compensation for his services in a sale of timber, the issue that appellant should be denied all compensation for his services on account of his bad faith while acting as broker, not for his services on account of his bad faith while not acting as broker, not having been made in the pleadings or in the court below, can not be made by assignment of error on appeal. *Harmann v. Moss*, 121 Va. 399, 93 S. E. 609.

(12) Objections to Grand or Trial Jury.

Oath to Jury.—In a civil action, objection to the form of the oath administered to the jury to try the case can not be made, for the first time after verdict. If the record shows that the jury were sworn, and the form of oath administered does not appear, the supreme court will presume that they were properly sworn. *Bank v. Lowther-Kaufman Oil, etc., Co.*, 66 W. Va. 505, 66 S. E. 713.

Omission from the oath administered to the jury in an action of lawful entry and detainer, of the word "unlawfully," which should qualify the word "withholds," not affirmatively shown to have been specifically brought to the attention of the trial court is not available as a ground of error in the appellate court. *Wilson v. Riffe*, 87 W. Va. 160, 104 S. E. 285.

Summoning and Impaneling.—While the statutes with reference to the summoning and impaneling of jurors in criminal cases are mandatory and must

be strictly followed, yet the appellate court will indulge every proper presumption in favor of the regularity of the proceedings, and will not reverse the case where no injury is shown, unless the objection is made before the jury is sworn. *Karnes v. Commonwealth*, 125 Va. 758, 99 S. E. 562.

(13) Objections as to Judge, Time and Form of Trial.

Objections as to Judge.—The objection that a judge of a circuit court of a circuit adjoining that in which the suit was brought, or that a city judge presiding at the hearing of a cause without designation by the governor, as required by statute, can not be made for the first time in the appellate court; nor can the fact that the resident judge failed to enter of record his disqualification to sit be made to appear by the certificate of the clerk of the non-existence of such an entry. Such certificate is no part of the record. The custodian of documents and records can not establish their nonexistence in his office by his certificate to that effect, but must be sworn and examined as any other witness. *Smith v. White*, 107 Va. 616, 59 S. E. 480.

Time of Trial.—Objection on the ground that ample time was not allowed the prisoner to prepare his defense at the trial can not be made upon appeal, if the record does not show the denial of a request for time. *State v. Booker*, 68 W. Va. 8, 69 S. E. 295.

(13½) Remarks of Counsel.

Where no objection is made or exception taken to remarks of counsel, they can not be made a ground for reversal upon appeal. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384. See *State v. Rice*, 83 W. Va. 409, 98 S. E. 432.

In order to warrant the appellate court to revise errors predicated upon the abuse of counsel of the privilege of argument, it should be made to appear that the party asked and was refused an instruction to the jury to dis-

regard the improper statements of counsel. *State v. Clifford*, 58 W. Va. 681, 52 S. E. 864; *State v. Statler*, 86 W. Va. 425, 433, 103 S. E. 345, citing *State v. Barrick*, 60 W. Va. 576, 582, 55 S. E. 652; *Given v. Diamond Shoe, etc., Co.*, 84 S. E. 631, 101 S. E. 153.

(14) Competency of Witnesses.

See post, EXPERT AND OPINION EVIDENCE.

In *Virginia*. — Objection that evidence came from witnesses who did not possess the qualifications necessary to render them competent to testify on the subject, not made in the court below, can not be raised for the first time on appeal. *Reynolds v. Wallace*, 125 Va. 315, 99 S. E. 516.

In *West Virginia*. — Objection to testimony for incompetency of a witness may be made in the appellate court, and it is not essential thereto that objection for such incompetency was made in and acted upon by the court below. *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140.

(15) Evidence.

(a) Admission or Exclusion.

A party can not object to the admissibility of evidence for the first time in the appellate court. *Richmond v. Wood*, 109 Va. 75, 63 S. E. 449; *Reid v. Windsor*, 111 Va. 825, 69 S. E. 1101; *Newberry v. Watts*, 116 Va. 730, 82 S. E. 703; *Hawkins v. Edwards*, 117 Va. 311, 84 S. E. 654; *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62; *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400; *Greer v. Arrington*, 72 W. Va. 693, 79 S. E. 720; *Colebank v. Standard Garage Co.*, 75 W. Va. 389, 84 S. E. 1051.

Parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out. *Conrad v. Ellison-Harvey Co.*, 120 Va. 458, 91

S. E. 763; *American Locomotive Co. v. Hoffman*, 108 Va. 363, 61 S. E. 759; *McCrorey v. Thomas*, 109 Va. 373, 63 S. E. 1011.

If evidence admissible under the general issue, but not under the grounds of defense, is offered and received without objection, and there is no motion to strike it out, objection to its admissibility is thereby waived, and it may be considered by the jury. Objection to its admissibility can not be made for the first time in the Supreme Court of Appeals. *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

If, during the progress of a trial, the court properly reserves decision as to the admissibility of evidence produced before the jury and the objector does not again bring his objection to the court's attention and obtain a ruling thereon, the objection will be treated as waived. *Waldron v. Waldron*, 73 W. Va. 311, 80 S. E. 811.

Lack of Pleading. — Where no objection was made in the court below to the admission of evidence on the ground of the lack of pleading, the question could not be raised for the first time on appeal. *Bradshaw v. Booth*, 129 Va. 19, 106 S. E. 555.

Evidence which is wholly incompetent may be taken advantage of in an appellate court, whether objected to in the lower court or not. *Poteet v. Imboden*, 77 W. Va. 570, 88 S. E. 1024.

Declarations. — Evidence of a declaration having been admitted without objection and no exception taken, the appellate court will not consider the point. *State v. Hunter*, 56 W. Va. 107, 108, 48 S. E. 839.

Hearsay Evidence. — Admission of hearsay evidence without objection and exception, affords no ground for complaint in the appellate court. *State v. Gibson*, 67 W. Va. 548, 68 S. E. 295. See *Newberry v. Watts*, 116 Va. 730, 82 S. E. 703; *Hawkins v. Edwards*, 117

Va. 311, 84 S. E. 654; *Taylor v. Commonwealth*, 122 Va. 886, 94 S. E. 795.

Secondary Evidence.—A party who neither objects to the introduction of secondary evidence, nor moves to exclude it on the ground that it is not the best evidence, will not be heard to complain thereof in this court. *Elswick v. Deskins*, 75 W. Va. 109, 83 S. E. 283. See *Hawkins v. Edwards*, 117 Va. 311, 84 S. E. 654; *Newberry v. Watts*, 116 Va. 730, 82 S. E. 703.

Authentication of Instrument.—Failure to except to the overruling of an objection to the introduction of a document, because not properly authenticated, amounts to a waiver, and is not cured or saved by the subsequent exclusion of the entire evidence as being insufficient to sustain a finding for plaintiff. *Bluefield v. McClaugherty*, 64 W. Va. 536, 63 S. E. 363.

Authenticity of Stenographer's Report.—On objection made to the introduction in evidence in a criminal case to a stenographer's report of evidence in a civil case relating to the same matters, the trial judge stated, in the absence of the jury, that the report was admitted to be correct, or that there was no controversy about its correctness, and this statement was not challenged at the time. Held, the authenticity of the report can not be challenged on a writ of error awarded to the judgment. *Hansel v. Commonwealth*, 118 Va. 803, 88 S. E. 166.

Inventory.—Objections to the admission in evidence of an inventory required by a policy of insurance, made for the first time on appeal, come too late, and must be treated as waived. *Lavenstein Bros. v. Hartford Fire Ins. Co.*, 125 Va. 191, 99 S. E. 579.

Contract Proved by Parol. — It is too late, after verdict, to object that the contract sued on was proved by parol testimony when the statute of frauds required it to be in writing. The failure to object at the proper time is a waiver of the statute, and the case must be heard and determined

in the appellate court upon the same evidence upon which it was heard and determined in the trial court. *Moore Lumber Corp. v. Walker*, 110 Va. 775, 67 S. E. 374.

Objection that a contract was a sealed instrument and that therefore parol evidence was not admissible to charge the defendant thereon as an undisclosed principal, can not be made for the first time in this court. In the case at bar, the defendant did not rely upon that fact in her grounds of defense, nor object to the introduction of the contract in evidence, but on the contrary based an instruction upon the contract, and hence can not now raise the objection in this court. *Dameron v. Quick*, 116 Va. 614, 82 S. E. 709.

Certificate of Probate.—An objection, in the trial court, to the admissibility in evidence of a will, saying nothing as to the certificate of probate, is not a sufficient foundation on which to base an objection in the appellate court to the admissibility of the certificate of probate, and the latter objection can not be made for the first time in the appellate court. *Avant v. Cook*, 118 Va. 1, 86 S. E. 903.

City Ordinance. — In an action for injuries at a crossing, plaintiff introduced a city ordinance relating to gates which were to be erected when deemed necessary and required by the committee on streets. It was objected that there was no evidence in the record to show that the committed on streets ever required the gates to be erected and maintained. It was held a sufficient answer to this objection that this point was not made at the time the ordinance was introduced. The defendant at the trial simply made a general objection to the introduction of the ordinance without specifying any ground therefor. If the question had been raised in the trial court, the court would have doubtless excluded the evidence until the facts with reference thereto had been ascertained, but such a point can not be raised for the first

time on appeal. *Atlantic, etc., R. Co. v. Tyler*, 124 Va. 484, 98 S. E. 641.

Particular Instances.—Where a restrictive provision of a bill of lading was not relied on or considered in the trial court, and no motion was there made to exclude the evidence as to the carrier's liability because of the nonperformance thereof, it will be deemed to have been waived, and can not be insisted on for the first time in the appellate court. *Norfolk, etc., R. Co. v. Wilkinson*, 106 Va. 775, 56 S. E. 808.

Where the declaration, in an action to recover damages for a personal injury, claims only general damages, but the defendant, without objection allows the introduction of evidence touching the loss of wages, and amounts expended for doctor's bills and hospital expenses (even if it be conceded that such damages should have been specially laid in the declaration), he can not make the objection for the first time in the appellate court. A bill of particulars could have been demanded, if desired; or, if the trial court's attention had been called to the objection, an amendment of the declaration would have been permissible. *Bettman v. Skinner*, 113 Va. 24, 73 S. E. 436.

Where, on the trial of the mayor of a city for malfeasance in office, the instructions of the court to the jury were such that the jury could not possibly have been misled into the belief that he could be found guilty, except for some act of commission or omission during his present term of office, their verdict will not be set aside because evidence was received of an occurrence which took place before his present term began, when no objection was made to the admissibility of the evidence on that ground, but exception was based solely upon the ground that the evidence was immaterial, irrelevant, impertinent, collateral, and too remote. *Cutchin v. Roanoke*, 113 Va. 452, 74 S. E. 403.

Where, in an action for divorce for

adultery, a note introduced in evidence alleged to have been written by the defendant, was the subject of considerable investigation and testimony in the lower court without any objection, it is too late to raise the point of admissibility upon appeal. *White v. White*, 121 Va. 244, 92 S. E. 811.

(b) Lack of Evidence.

Objections can not be made in the appellate court for the first time that the evidence upon which a commissioner in chancery allowed a debt against decedent's estate was insufficient or improper. *Reid v. Windsor*, 111 Va. 825, 69 S. E. 1101.

Though in ejectment pedigree is not provable by recitals in a deed less than thirty years old, yet, in an action by vendor against vendee for timber taken from land, such vendee not objecting, an interpleader showing no right or title to land or timber, can not defeat plaintiff's recovery by objecting in the supreme court for the first time to the sufficiency of the proof of pedigree. *Curtis v. Deepwater R. Co.*, 68 W. Va. 762, 70 S. E. 776.

(c) Questions to Witnesses.

Hypothetical Questions.— Suggestions as to the insufficiency of the hypothetical questions which are made in the petition for writ of error and brief of counsel should have been made in the trial court, and it is too late to make such suggestions for the first time on appeal. *Bowen v. Bowen*, 122 Va. 1, 94 S. E. 166.

(16) Depositions.

Objections to depositions should be called to the attention of the lower court and passed upon, and unless this is done, upon appeal they will be treated as waived. *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830; *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400; *Thomas v. Boyd*, 108 Va. 584, 62 S. E. 346. See also, *First Nat. Bank v. Trigg Co.*, 106 Va. 327, 328, 56 S. E. 158.

An exception to the taking of a dep-

osition made while it is in progress, though noted in the deposition, must be brought to the notice of the court before hearing on the merits begins below by motion to suppress, else it will not be regarded in an appellate court. *Whitehouse v. Jones*, 60 W. Va. 680, 55 S. E. 730.

(17) Variance.

In case of variance between the evidence and the allegations, the usual and correct practice is to object to the evidence when offered, or, if it is already in, to move to exclude it. Attention is thus called to the discrepancy and of opportunity afforded the adverse party to meet the emergency in a proper case in one of the modes prescribed by law. The objection can not be raised for the first time in the appellate court. *Holdsworth v. Anderson Drug Co.*, 118 Va. 359, 87 S. E. 565; *Southern R. Co. v. Finley*, 127 Va. 132, 102 S. E. 559. See *Pardee v. Johnston*, 70 W. Va. 347, 74 S. E. 721, 724; *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400.

A variance between the allegation and proof, not called to the attention of the lower court by any means, if so great as to show distinct causes of suit, will be treated by this Court as having been waived. *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400.

An objection that the trial court erred in permitting the plaintiff to recover upon a different case from that made by his declaration, can not be made for the first time on appeal, as it involved the ordinary question of a variance between the declaration and the proof. *Lynchburg Tract., etc., Co. v. Gordon*, 123 Va. 198, 96 S. E. 195.

Section 3384 of the Code of 1904 (Code 1919, § 6250), authorizing amendments, upon terms fair to both parties, whenever a variance between the pleadings and the proof develops during the trial, was expressly designed to meet just such a situation as would have been presented in the trial

court if the question first raised on appeal had been raised there. Having failed to avail itself of the remedy thus provided, or to give the plaintiff or the court the opportunity to invoke it, the defendant can not upon appeal take advantage of the irregularity which the statute would have cured. *Conrad v. Ellison-Harvey Co.*, 120 Va. 458, 91 S. E. 763.

The declaration by a passenger in an action for injuries sustained, alleged that the accident was due to want of proper control of the car and timely application of the brakes. Objection was made to the introduction of evidence under these allegations showing that the controller of the car broke. While perhaps it would have been more regular for the court to have required the plaintiff to amend the declaration, yet as no continuance was asked for on the ground of surprise, and the motorman whom it was claimed had made the statement as to the breaking of the controller was present, the error, if any, was harmless. *Washington-Virginia R. Co. v. Deahl*, 126 Va. 141, 100 S. E. 840.

A variance between the writ and the declaration is a matter of abatement only and the objection can not be raised for the first time in the appellate court. *Chesapeake, etc., R. Co. v. Chapman*, 115 Va. 32, 78 S. E. 631.

(18) Instructions.

The appellate court can not consider an objection to an instruction given by the trial court when the objection was not saved by proper exception. The objection can not be made in the appellate court for the first time. *Wallen v. Wallen*, 107 Va. 131, 132, 57 S. E. 596; *Saunders v. Bank*, 112 Va. 443, 71 S. E. 714; *Arminius Chemical Co. v. Landrum*, 113 Va. 7, 73 S. E. 459; *Greensburg Nat. Bank v. Syer & Co.*, 113 Va. 53, 73 S. E. 438; *Swift & Co. v. Hatton*, 124 Va. 426, 97 S. E. 788; *Queen Ins. Co. v. Perkinson*, 129 Va. 216, 105 S. E. 580; *State v. Briggs*, 58

W. Va. 291, 52 S. E. 218. See *Hawkins v. Edwards*, 117 Va. 311, 317, 84 S. E. 654.

And though it is the duty of the trial court, by §§ 4, and 5, chapter 38, Acts 1907, on modifying an instruction, if objected to, to so inform the jury, and give the instruction as its own, and not as that of the proponent of the original instruction, yet if there be no timely objection or exception to such erroneous action of the court, the error will be deemed to have been waived. *Greer v. Arrington*, 72 W. Va. 693, 79 S. E. 720.

Request for Instructions Supplying Incompleteness.—A party can not, by merely excepting to an instruction which completely and soundly propounds the law as to a particular phase of the case, make it the foundation of an assignment of error because it is incomplete in an incidental reference to another phase, when it does not pretend specifically to propound the law in that regard and is neither misleading nor confusing. He must ask an instruction supplying the incompleteness. *Checks v. Virginia Pocahontas Coal Co.*, 74 W. Va. 553, 82 S. E. 756.

Statement as to Duty of Juror to Disclose Facts within His Knowledge.—A party who wishes the court, under Code of West Virginia, chapter 116, § 31, to state to the jury that a juror knowing anything relative to a fact in issue must disclose the same in open court, but not to the jury out of court, must ask the court to make the statement; otherwise, the omission to do so will not be ground of reversal. *Truex v. South Penn Oil Co.*, 62 W. Va. 540, 59 S. E. 517.

(19) Verdict and Judgment.

Where no objection was made at the time of rendering a verdict, finding for plaintiff generally, it should not be disturbed on appeal. *Powhatan Lime Co. v. Whetzel*, 118 Va. 161, 86 S. E. 898.

Error in the amount of a verdict, found upon a demurrer to evidence,

can not be noticed in this court, if no motion to set it aside was made in the court below. *St. Marys v. Locke*, 73 W. Va. 30, '80 S. E. 841; *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 49 S. E. 378.

Judgment Exceeding Verdict.—If the error complained of be, that the final judgment is in excess of the verdict, it is matter of record and may be reviewed on writ of error, without any formal exception being taken to the action of the trial court. In such case it is not necessary that a motion to set aside the verdict should have been overruled, and an exception taken, in order to entitle the party complaining to a writ of error. *State v. Arbruzino*, 67 W. Va. 534, 68 S. E. 269.

No Allowance of Set-Off.—An objection that the jury did not allow a defendant any credit for a set-off as to which he offered no evidence can not be made in the appellate court for the first time. *Lambert v. Jenkins*, 112 Va. 376, 71 S. E. 716.

Correcting Judgment after Motion Abandoned.—When notice of a motion to correct the judgment of a prior term given by one party to the other, returnable to a day certain, is not proven or docketed, or otherwise noticed on the record on the return day, such motion should be treated as having been abandoned; but where the court below, at a subsequent day, takes up such motion and pronounces judgment thereon, such erroneous and void judgment is not a judgment by default, and it may be reviewed here without a motion in the court below to correct the same, pursuant to §§ 5, 6, chap. 134, Code 1906. *Johnson v. Wheeling Lumber Co.*, 69 W. Va. 539, 72 S. E. 470.

Judgment on Motion.—A judgment pronounced on motion to quash a notice for judgment against a sheriff and the sureties on his official bond may be reviewed here, although there be no exception to such judgment in the lower court. *State v. Keadle*, 63 W. Va. 645, 60 S. E. 798.

(20) Excessive Damages.

See ante, "Verdict and Judgment," XIV, F, 16, b, (19).

A judgment entered on a verdict rendered on a demurrer to the evidence is not reviewable on writ of error, on the ground of excessive damages, where no motion to correct the judgment was made in the trial court. *First Nat. Bank v. Sanders*, 77 W. Va. 716, 88 S. E. 1187. See post, NEW TRIALS.

(22) Reference or Failure to Refer Cause to Commissioner.

Objection, on the ground of prematurity, to a reference of the cause to a commissioner for a settlement of the partnership accounts comes too late when made for the first time in the appellate court, after the parties, without protest, have appeared and introduced their evidence before the commissioner and the lower court has approved his findings, excepted to only on other grounds, by a decree upon the merits. *Jones v. Rose*, 81 W. Va. 177, 94 S. E. 41.

Title Reference.—Though in a suit for specific performance, the general rule is that if there be doubt as to the title, or defendant request it, the court should order a title reference, nevertheless if the parties have taken all their evidence and submitted the cause to the court for final adjudication, without motion or request for such reference until after the court has pronounced its decision, and the facts proven are sufficient to show prima facie a good title in the plaintiff, the decree below will not be reversed here for alleged error in overruling defendant's motion for such title reference, the motion then being too late. *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 69 S. E. 195.

(26) Commissioner's Report.

Objections to the report of a commissioner in chancery, on account of errors not apparent on its face, can not be made for the first time in the ap-

pellate court. *Branner v. Branner*, 108 Va. 660, 62 S. E. 952; *Young v. Young*, 109 Va. 222, 63 S. E. 748; *Virginia, etc., R. Co. v. Heninger*, 110 Va. 301, 67 S. E. 185; *Norfolk, etc., R. Co. v. Consolidated Turnpike Co.*, 111 Va. 131, 68 S. E. 346; *Kincheloe v. Gibson*, 115 Va. 119, 128, 78 S. E. 603; *Ober & Sons Co. v. Smith*, 122 Va. 311, 94 S. E. 787; *Welch Lumber Co. v. Page-ton Lumber Co.*, 69 W. Va. 282, 71 S. E. 282.

"It is a general rule of procedure, observed in this state, that objections to a decree based upon a master's findings, to which no exceptions were taken in the lower court, can not be made in the appellate court for the first time, unless the report is erroneous upon its face. *State v. King*, 47 W. Va. 437, 35 S. E. 30; *Lynch v. Henry*, 25 W. Va. 416, 422; *Poling v. Huffman*, 48 W. Va. 639, 37 S. E. 526." *Williams v. Smith Ins. Agency*, 75 W. Va. 494, 499, 84 S. E. 235.

Exceptions to the report of a commissioner partake of the nature of special demurrers. A party excepting must put his finger on the error, that the court may see what it has to decide, and it is too late to do so for the first time in the appellate court, unless the report be erroneous on its face. *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

Where an attorney has been notified of the completion of a commissioner's report, and makes exceptions to it after its return, it can not be specified as error in the appellate court that the time of notice was too short before filing the report, when no application for further time to the court below was made. *Clark v. Clark*, 70 W. Va. 428, 74 S. E. 234.

Objections to a decree, based upon a master's findings not excepted to before confirmation, and not apparently erroneous, are ineffectual as ground for reversal in an appellate court. *Williams v. Smith Ins. Agency*, 75 W. Va. 494, 84 S. E. 235.

Error Apparent on Face of Report.

—Where it is apparent from the face of the report of a commissioner and from the pleadings and exhibits, independent of other evidence, that the commissioner's report was based upon a fundamental error of law, no exception to the report is necessary. *Carle v. Corhan*, 127 Va. 223, 103 S. E. 699. See *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

"Although no exceptions are filed to a commissioner's report, and the report is confirmed, if the decree of confirmation, upon its face, shows material error as to matter of law, prejudicial to the appellant for such error, the decree should be reversed. * * * *Haymond v. Murphy*, 65 W. Va. 616, 64 S. E. 855." *Houston Lumber Co. v. Wetzel, etc., R. Co.*, 69 W. Va. 682, 691, 72 S. E. 786.

Opinion on Evidence.—The reference in the instant case did not involve the taking of an account, and merely amounted to a direction to a commissioner to take evidence upon the liability of the defendants and give an opinion thereon. In such a case the court can not delegate to a commissioner the duty and obligation of weighing the evidence and deciding the case independent of any opinion expressed in the report. Exceptions to the report, or want of them, are wholly immaterial. The reference in itself is harmless error, but the court, and not the commissioner, must decide the case upon the evidence returned. *Carle v. Corhan*, 127 Va. 223, 103 S. E. 699.

Particular Instances.—The failure to except to the finding of a commissioner because the counsel for the parties had become involved in difficulties and left the city, and the decree was entered confirming the report before the parties knew anything about it, if properly in the court below and made a part of the record, might be availed of upon appeal; but if not so presented it could not be considered on appeal.

Carle v. Corhan, 127 Va. 223, 103 S. E. 699.

In a suit to compel an accounting by a guardian, the guardian assigned as error the failure of the decree to allow him certain commissions as administrator, which were allowed in his ex parte settlement as such administrator. The decree in this particular was based on the master commissioner's report to which no exception was taken by appellant, and, as the disallowance of such commissions does not appear on the face of the report, this assignment of error comes too late under the well-established rule on the subject. Moreover from an examination of the evidence in the record, on which the master commissioner's report and the decree were based, it appeared that there was no error of fact in this assignment of error. *Bliss v. Spencer*, 125 Va. 36, 99 S. E. 593.

(39) Material Alteration in Note.

Whether or not detaching a negotiable note from an agreement annexed to it, and qualifying its terms, and bringing suit on the note alone, is such an alteration as avoids the contract, ought not now to be considered by the appellate court in this case, as it appears that the question was not raised in the trial court until after verdict against the makers, and the case is reversed and remanded for a new trial on other grounds. *Nottingham v. Ackiss*, 107 Va. 63, 57 S. E. 592.

(44) Judicial Sales.

A decree for the sale of land which fails to give the defendant a day in which to redeem, even where he is entitled to such day, will not be reversed for that reason, where it does not appear that the question was raised in the court below and the record does not show that he was in any way prejudiced thereby, and the fair inference from the record is that he was not, and could not have been, thereby prejudiced or injured. *Hall v. White*, 114 Va. 562, 77 S. E. 475.

(54) Ruling of Court on Motion for New Trial.

See post, **EXCEPTIONS, BILL OF; NEW TRIALS.**

If there is a motion for a new trial and an exception to its refusal, no exception to the action of the court for entering judgment need be made to authorize the supreme court to review the case. *Parks v. Morris*, 63 W. Va. 51, 59 S. E. 753.

To secure review of a directed verdict the record must show an exception to the action of the court in overruling a motion for a new trial. *Freeburn v. Baltimore, etc., R. Co.*, 79 W. Va. 789, 91 S. E. 990.

(55) Matters Which Might Have Been Corrected on Motion Below.**Abuse of Privilege of Argument.—**

This court will not consider errors predicated upon the abuse of counsel of the privilege of argument, unless it appears that the complaining party asked for and was refused an instruction to the jury to disregard the improper statements. *State v. Statler*, 86 W. Va. 425, 103 S. E. 345.

Judgment by Confession—Condition Precedent to Review.—An appeal from a decree on a bill taken for confessed will not be entertained by the West Virginia supreme court unless a motion to have such decree reversed be first made and overruled by the court, or the judge thereof, that rendered it. *Cipher v. Bowen*, 56 W. Va. 183, 49 S. E. 128; *Clark v. Harpers Ferry, etc., Co.*, 70 W. Va. 312, 314, 73 S. E. 919.

(56) Questions of Fact.

Whether or not an act of the assembly was passed by the requisite constitutional vote is a question of fact to be determined upon evidence, and can not be raised in the appellate court for the first time. It might have been proved or disproved by the introduction in evidence of copies of the journal of each house printed as required by law. Questions of fact can

only be considered by this court upon the record certified to it by the trial court. *Wayt v. Glasgow*, 106 Va. 110, 55 S. E. 536.

(57) Constitutionality of Statute Creating Offense.

Every indictment is based upon the existence of a valid law annexing a penalty to the offense charged. If that law is unconstitutional, it is void. It is no law at all, and there is no penalty to inflict. So soon, therefore, as this fact is brought to the attention of the court in any way, whether by demurrer, plea, motion or otherwise, the case is at once dismissed, as there is no offense to be punished. It need not be specially pleaded. This rule applies to the appellate court as well as the trial court, although the point is made in the appellate court for the first time. *Pine v. Commonwealth*, 121 Va. 812, 93 S. E. 652.

(58) Objections to Final Hearing of Injunctions.

A final decree in a suit in equity will not be reversed by the appellate court at the instance of the plaintiffs because, at the time of its entry, a rule was pending and undetermined against the defendants for violating a temporary injunction awarded in the suit when it appears that the hearing of the rule had, previous to the final hearing, been continued by an order entered by consent of both parties and that the final hearing was on motion of the plaintiffs to perpetuate the injunction, and that no objection to such final hearing was made by them in the court below. *Pence v. Carney*, 58 W. Va. 296, 52 S. E. 702.

(59) Power of Trustee to Sell.

Objection that a trustee in a deed of trust was not authorized to sell because he had not been requested in writing to sell, as required by the deed of trust, or that the deed of trust was in fact a mortgage, because the trustee was interested in the debt secured, can

not be made in the appellate court for the first time. *Lawler v. French*, 104 Va. 140, 51 S. E. 180.

(60) Order Refusing Probate.

An order, refusing to admit to probate a paper offered as a will, is a final judgment to which a writ of error lies, although no provision is made for the costs of the proceeding in which the will is offered; and an exception to the action of the court, refusing to set aside the verdict of the jury and grant a new trial of the issue as to whether or not the paper offered was the true last will and testament of the testator, is sufficient to enable the propounder of the paper to maintain a writ of error, although no formal exception was taken to the judgment of the court refusing to admit the paper to probate. *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

(61) Commitment to Receiver of Property Not in Controversy.

Courts will not tolerate inconsistency in the conduct of litigants. Hence, a defendant to a bill for a receivership of oil wells who, claiming title thereto, allows a decree to be entered placing his tools and machinery, used in and about the same, in the hands of the receiver for operation thereof, without objection, will not be permitted to reverse the decree on that ground. If he desires to withdraw his tools and machinery from the premises, he must ask it in the court below. *Sult v. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S. E. 307.

(62) Failure to File Set-Off.

A plaintiff will not be allowed to make the objection for the first time in the supreme court that a set-off was not filed by the defendant in the trial court, where it appears that, although the set-off was not marked filed, and the record does not show the filing, the account of set-offs was in the record before the trial began, and the plaintiff had notice of it; that the defendant

called attention to it, witnesses were examined with respect to it, the instructions dealt with the subject and were based upon it, and both parties, throughout the trial, treated it as a part of the record to be considered by the jury and the court. *Norfolk, etc., R. Co. v. Potter*, 110 Va. 427, 66 S. E. 34.

(63) Writ of Error Not Perfected in Time.

Whether a writ of error from a circuit court to a county court was perfected within the time prescribed by law depends, among other things, upon the time which had elapsed between the presentation of the petition for the writ and the delivery of the record and petition to the clerk of the appellate court, which time is to be deducted. If the case was argued in the circuit court, made a vacation case by consent, and submitted to the court for decision, without making the objection that the writ of error was not perfected within the time prescribed by law, and the record is silent as to the time to be deducted as above mentioned, the objection that the writ of error from the circuit court to the county court was not perfected in due time can not be raised for the first time in the supreme court. *Louisa v. Yancey*, 109 Va. 229, 63 S. E. 452.

(64) Assessment of Damages to Property.

A property owner who takes no appeal from the assessment of damages to his property under the act of March 12, 1908, can not make the objection that the assessor returned his report sooner than he should have done, as he is in no way prejudiced thereby. *Lake Bowling Alley v. Richmond*, 116 Va. 429, 82 S. E. 97.

(65) Other Instances.

Decision as to Propriety of Procedure.—On the award of a new trial, founded upon well taken exceptions, an appellate court may, in its discretion.

pass upon the propriety of procedure disclosed by the record, to which no sufficient exception has been taken, for the purpose of such new trial. *State v. Vineyard*, 85 W. Va. 293, 101 S. E. 440.

Sufficiency of Warrant.—In prosecutions for the violation of the act of 1914, p. 352, relating to catching of fish in Rockbridge county, it was alleged that the warrants were totally insufficient in that they charged that the defendants "did violate the fish and game laws of this State," whereas the real subject of prosecution was a violation, not of a State law, but of a local law, and that as the fish and game laws of the State embraced a multitude of subjects, the warrants did not apprise the defendants of the particular offense with which they were intended to be charged. These points do not appear to have been made in the lower court, where they could have been adequately met by new or amended warrants under § 4107 of the Code of 1904. Objections to the warrants upon these grounds could not have been properly sustained after verdict and judgment even in the trial court, and of course come too late when made for the first time on appeal. *Burks v. Commonwealth*, 126 Va. 763, 101 S. E. 230.

Authority of Officer.—The record in the instant case did not disclose how the officer who arrested plaintiff derived his authority as an officer of the law, and plaintiff's counsel contended that there was no proof of his qualification as such, but the trial was proceeded with upon the apparent concession that he was an officer, the plaintiff in his own testimony referred to him as such, his official authority was not in any way challenged, and, under these circumstances, it was too late to raise the question for the first time on appeal. *Clinchfield Coal Corp. v. Redd*, 123 Va. 420, 96 S. E. 836.

Nature of Warrant.—The forfeiture prescribed by § 3799 of the Virginia code for a violation of the Sunday law

can be recovered by civil warrant only, and the objection that the procedure was by a criminal warrant instead of a civil warrant, may be raised in the appellate court for the first time. *Hanger v. Commonwealth*, 107 Va. 872, 60 S. E. 67.

Constitutional Question. — Where a statute evidently contemplates that cases in which the right of drainage may be granted shall depend upon the facts of each case, and the facts are not certified, it is very doubtful whether the constitutional question can be considered at all when raised for the first time on appeal. *Hodges v. Richmond Cedar Works*, 120 Va. 492, 91 S. E. 644.

G. RULES OF DECISION.

See post, "Affirmance," XIV, J; "Reversal," XIV, K.

1. Generally.

See post, NEW TRIALS.

Statutory Provisions. — Va. Code, 1919, §§ 6363, 6365.

2. On Demurrer to Evidence.

See post, "Where Evidence and Not Facts Certified," XIV, G, 4; "Where There Have Been Two Trials Below," XIV, G, 5.

In considering a case as upon a demurrer to the evidence the appellate court is confined to the testimony of the plaintiff and his witnesses together with such other testimony as is not in conflict therewith. *Virginia R., etc., Co. v. Klaff*, 123 Va. 260, 266, 96 S. E. 244.

The supreme court is not concerned with preponderance of evidence, where a demurrer is interposed to plaintiff's evidence and he recovers. *Richmond v. Smith & Co.*, 119 Va. 198, 89 S. E. 123.

On demurrer to the evidence, conflicting evidence will not be considered by the appellate court. *Chesapeake, etc., R. Co. v. National Bank*, 122 Va. 471, 95 S. E. 454.

The judgment of the trial court can not be said to be erroneous when fair

mindful men may well differ as to the conclusion to be drawn from the evidence. *Chesapeake, etc., R. Co. v. Shipp*, 111 Va. 377, 69 S. E. 925; *Bohannon-King & Co. v. Vellines*, 120 Va. 428, 91 S. E. 621.

Inferences in Favor of Plaintiff.—Where a case was presented to the trial judge upon a demurrer to the evidence, it was his duty, and on appeal is the duty of the Supreme Court of Appeals, to draw every inference in favor of the plaintiff from the evidence which the jury might have drawn. *Zirkle v. Allison*, 126 Va. 701, 101 S. E. 869.

Where there is direct evidence for the plaintiff in the record in conflict with inferences of fact from the testimony, they can not be drawn by the Supreme Court of Appeals considering the case upon the demurrer to the evidence which was interposed by the defendant. *Roaring Fork R. Co. v. Ledford*, 126 Va. 97, 116, 101 S. E. 141, 871.

Where on demurrer to the evidence the jury might have found for the demurrer, the appellate court must so find. *Jordan v. Walker*, 115 Va. 109, 116, 78 S. E. 643.

A plaintiff in error occupies the position of a demurrant to the evidence, and the supreme court can not consider his countervailing evidence to sustain his theory of the case. *Adamson v. Norfolk, etc., Tract. Co.*, 111 Va. 556, 69 S. E. 1055. See *Berkley St. R. Co. v. Simpson*, 106 Va. 548, 56 S. E. 331.

An appellant asking to have a decree of a circuit court, based upon facts, reviewed, assumes the position of a demurrant to the evidence, and the decree will not be reversed unless found to be plainly wrong. *Burrows v. Fitch*, 62 W. Va. 116, 57 S. E. 283; *Gardner v. Montague*, 108 Va. 192, 60 S. E. 870; *Atlantic, etc., R. Co. v. Watkins*, 104 Va. 154, 51 S. E. 172.

On error to a judgment for plaintiff in an action for negligence, the evidence of plaintiff's witnesses, so far as at all credible, must be accepted by the

appellate court. *Virginia R., etc., Co. v. Boltz*, 122 Va. 649, 95 S. E. 467.

On appeal from a judgment for a servant in an action against his master for personal injuries, the master stands in the appellate court as on a demurrer to the evidence interposed by it, thereby admitting the truth of all the plaintiff's parol evidence, and all inferences therefrom favorable to the plaintiff, which a jury might fairly draw, and as waiving all of its own evidence in conflict therewith, and all inferences from the latter, except those which necessarily flow therefrom. *DuPont, etc., Co. v. Taylor*, 124 Va. 750, 98 S. E. 866.

The instant case was an action by a buyer against the seller upon a contract to deliver one thousand tons of industrial scrap iron in from ninety to one hundred days. The defense set up was that the plaintiff waived the clause of the contract with reference to the time of delivery, and that following such waiver the defendant was proceeding to make deliveries, and was ready to complete his contract when, without notice, the plaintiff refused to accept any further deliveries under the contract. The parol evidence was sharply conflicting, and the written evidence, consisting of a number of letters which passed between the parties, was of doubtful import, confusing and inconsistent. Held: that considering the evidence as upon a demurrer to defendant's evidence by the plaintiff, it was clear that the Supreme Court of Appeals would not be justified in sustaining the demurrer. *Eichelbaum v. Klaff*, 125 Va. 98, 99 S. E. 721.

In the instant case the trial court permitted each of the witnesses (the purchaser and a witness for the seller) to give to the jury his construction of the meaning of the term "ordering out," and used in the contract of sale, and instructed the jury in accordance with that evidence. The jury found a verdict in favor of the purchaser, and under the demurrer to the evidence

rule the verdict will not be disturbed by the Supreme Court of Appeals, unless there was some error to the prejudice of the sellers committed during the trial. *Manor v. Hindman*, 123 Va. 767, 97 S. E. 332.

Public Service Commission.—In the absence of conflict in the evidence adduced to show a claimant's right to participation in the Workmen's Compensation Fund, the Commission is regarded, in this court, as a demurrant to the evidence, and, if the evidence would sustain a verdict of a jury in favor of the claimant, the claim is regarded as sufficiently proved. *Poccardi v. Public Service Comm.*, 75 W. Va. 542, 84 S. E. 242.

Case Heard by Judge without Jury.—On writ of error to a judgment rendered in a case tried by the court in lieu of a jury, this court will consider the case as if upon a demurrer to the evidence, regarding the plaintiff in error as demurrant. *State v. Decker*, 75 W. Va. 565, 84 S. E. 376; *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083; *Hatfield v. Cabell County Court*, 75 W. Va. 595, 84 S. E. 335.

"Hence, if the evidence is such as would have justified the court in overruling a motion to set aside a verdict of a jury found upon it against plaintiff in error, the finding of the court must be sustained. *Dempsey v. Norfolk, etc., R. Co.*, 69 W. Va. 271, 71 S. E. 284, and *Butcher v. Sommerville*, 67 W. Va. 261, 267, 67 S. E. 726." *State v. Decker*, 75 W. Va. 565, 84 S. E. 376. See *Hatfield v. Cabell County Court*, 75 W. Va. 559, 84 S. E. 335.

Successive Trials.—When there have been three trials of a case, and a verdict for the plaintiff in each of the first two has been set aside because contrary to the law and the evidence, and exceptions duly taken and on the third trial there is a demurrer to the evidence by the defendant which is sustained, on a writ of error by the appellate court on the application of the plaintiff, the records of the first and

second trials are before this court for review, but they are not to be considered as on a demurrer to the evidence. *Citizens' Bank v. Taylor & Co.*, 104 Va. 164, 51 S. E. 159.

Setting Aside Verdict Not Considered Where Demurrer to Evidence Sustained.—The position of a plaintiff is more favorable upon a demurrer to the evidence by the defendant than upon a motion to set aside a verdict in his favor. Accordingly, where the plaintiff assigns as error the action of the court below, first, in setting aside a verdict in his favor, and, second, in sustaining defendant's demurrer to the evidence, the appellate court will consider only the action of the court below upon the demurrer to the evidence. *Wadkins v. Damascus Lumber Co.*, 121 Va. 691, 93 S. E. 591.

Incredible Statements.—Courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially know to be incredible. Though the case be heard as upon a demurrer to the evidence, the court will not stultify itself by allowing a verdict to stand, although there may be evidence tending to support it, when the physical facts demonstrate such evidence to be untrue, and the verdict to be unjust and unsupported in law and in fact. *Virginia, etc., R. Co. v. Skinner*, 119 Va. 843, 89 S. E. 887; *Norfolk, etc., R. Co. v. Strickler*, 118 Va. 153, 86 S. E. 824, citing *Southern R. Co. v. Wiley*, 112 Va. 183, 70 S. E. 510; *Norfolk, etc., R. Co. v. Crowe*, 110 Va. 798, 67 S. E. 518; *Clopton v. Commonwealth*, 109 Va. 813, 63 S. E. 1022. See *Virginia R., etc., Co. v. Bailey*, 123 Va. 250, 96 S. E. 275.

In the case at bar, the statement of the plaintiff, whose automobile was struck at a grade crossing while running only five or six miles an hour, that he both looked and listened so as to make his looking and listening effective and neither saw or heard the rapidly approaching truck at any point

within a clear, unobstructed view of fifteen hundred feet, is incredible. *Norfolk, etc., R. Co. v. Strickler*, 118 Va. 153, 86 S. E. 824.

While it may be very improbable that a plaintiff was injured in the manner and under the circumstances narrated by him, yet if the occurrence as narrated was not impossible, as in the case at bar, the case does not come within the rule that courts are not obliged to "accept as true what in the nature of things could not have occurred in the manner and under the circumstances narrated." *Virginian R. Co. v. Bell*, 118 Va. 492, 87 S. E. 570. See also, *Atlantic, etc., R. Co. v. Newton*, 118 Va. 222, 87 S. E. 618, citing *Chesapeake, etc., R. Co. v. Anderson*, 93 Va. 650, 25 S. E. 947, and *Norfolk, etc., R. Co. v. Crowe*, 110 Va. 798, 67 S. E. 518.

Verdict Determining Ownership of Draft.—A jury having found that a draft was still the property of the drawer, although he had obtained credit for the full amount thereof in bank, and their verdict having been approved by the trial court, this court, hearing the case as on a demurrer to the evidence by the bank, can not set aside the verdict as without evidence to support it, where it appears that the drawer was a customer of the bank of long standing, that it was a custom among banks to credit collections for the accommodation of regular depositors, that the draft was not discounted, that the whole amount thereof was placed to the credit of the drawer, that it was deposited as paper and not as cash, that it was treated by the drawer and his attorney as his property in subsequent correspondence with the drawees, and that protest was waived. *Greensburg Nat. Bank v. Syer & Co.*, 113 Va. 53, 73 S. E. 438.

Criminal Case.—Though a criminal case is to be considered as upon a demurrer to the evidence by the plaintiff in error, he is not required to waive his own evidence as to which there is

no conflict or contradiction, and such evidence is to be accepted as true. *Buck v. Commonwealth*, 116 Va. 1031, 83 S. E. 390.

A verdict of conviction in a criminal case can not be set aside on a writ of error, where there is sufficient evidence to support it. The plaintiff in error stands as on a demurrer to the evidence. *Dix v. Commonwealth*, 110 Va. 907, 67 S. E. 344; *Cook & Son Min. Co. v. Thompson*, 110 Va. 369, 66 S. E. 79; *Bryan v. Nash*, 110 Va. 329, 66 S. E. 69; *Interstate R. Co. v. Tyree*, 110 Va. 38, 65 S. E. 500; *Chesapeake, etc., R. Co. v. Greaver*, 110 Va. 350, 66 S. E. 59; *Metropolitan Life Ins. Co. v. DeVault*, 109 Va. 392, 63 S. E. 982; *Norfolk, etc., R. Co. v. Spears*, 110 Va. 110, 65 S. E. 482; *Washington Luna Park Co. v. Goodrich*, 110 Va. 692, 66 S. E. 977.

Under the statutory demurrer to the evidence rule, in a prosecution for causing or encouraging a child under the age of eighteen years to commit a misdemeanor, the verdict would not be set aside if any evidence had been introduced from which the jury could have inferred that the accused knew the prosecutrix was then under eighteen years of age; but, in the instant case, there was no such evidence, and the case appeared to have been tried upon an erroneous theory as to the essential elements of the crime charged. *Gottlieb v. Commonwealth*, 126 Va. 807, 101 S. E. 872.

3. Where Facts Proved Are Certified.

See post, "Where Evidence and Not Facts Certified," XIV, G, 4.

4. Where Evidence and Not Facts Certified.

Demurrer to Evidence Rule Abolished.—*Va. Code 1919, § 6363*, provides: "When a case at law, civil or criminal, is tried by a jury and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the

ground that it is contrary to the evidence, or when a case at law is decided by a court or judge without the intervention of a jury and a party excepts to the decision on the ground that it is contrary to the evidence and evidence (not the facts) is certified, the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it."

The above section was applied in *Graham v. Commonwealth*, 127 Va. 808, 103 S. E. 565.

Doubt as to Correctness of Decision.—Under Code of 1919, § 6363, the Supreme Court of Appeals, even if it has a doubt as to the correctness of the conclusion of the trial judge, will not set the judgment aside, unless it appears that it is plainly wrong or without supporting evidence. *Standard Acci. Ins. Co. v. Walker*, 127 Va. 140, 102 S. E. 585; *Graham v. Commonwealth*, 127 Va. 808, 103 S. E. 565.

Case Must Be Stated as Jury May Have Viewed It.—Now, in stating a case in the Supreme Court of Appeals which has been tried by a jury, it must be stated as the jury may have viewed it, remembering always that the jury are the sole judges of the weight to be given to the testimony of the witnesses, and also bearing in mind the weight attached to the verdict of a jury which has received the approval of the trial judge. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384; *Queen Ins. Co. v. Perkinson*, 129 Va. 216, 105 S. E. 580.

Demurrer to Evidence under § 3484 of Former Code.—Formerly a plaintiff in error stood in the Supreme Court of Appeals in the position of a demurrant to the evidence, but this has been changed. Va. Code 1919, § 6363. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384; *Queen Ins. Co. v. Perkinson*, 129 Va. 216, 105 S. E. 580; *Webb v. Commonwealth*, 122 Va. 899, 94 S. E. 773; *Bowen v. Bowen*, 122 Va. 1, 94 S. E. 166.

Where the evidence and not the facts are certified, the case stands in the Supreme Court of Appeals as on a demurrer to the evidence by the plaintiff in error. *Abernathy v. Emporia Mfg. Co.*, 122 Va. 406, 95 S. E. 418; *Greensburg Nat. Bank v. Syer & Co.*, 113 Va. 53, 73 S. E. 438. See *Johnson v. Commonwealth*, 104 Va. 881, 52 S. E. 625; *Johnston v. Witt Shoe Co.*, 103 Va. 611, 50 S. E. 153.

Where the evidence is certified, the Supreme Court of Appeals will consider the whole evidence and sustain the verdict unless it be against the law and the evidence, or without evidence. *Carter v. Washington, etc., Railway*, 122 Va. 458, 95 S. E. 464; *Webb v. Commonwealth*, 122 Va. 899, 94 S. E. 773; *Bowen v. Bowen*, 122 Va. 1, 94 S. E. 166. See *Norfolk Hosiery, etc., Mills v. Aetna Hosiery Co.*, 124 Va. 221, 98 S. E. 43.

After verdict for plaintiff, Supreme Court of Appeals must accept as true all of the facts favorable to the plaintiff, which the evidence tended to establish. *Clinchfield Coal Corp. v. Redd*, 123 Va. 420, 96 S. E. 836.

Administratrix's decedent was killed, while riding a bicycle, in a collision with an automobile. There was conflict in the testimony as to the speed of the automobile, the precise location of the accident, the conduct of the decedent, and every other material fact in issue. The jury, as judges of the weight of the testimony, had the right to believe that the proximate cause of the accident was the failure of the driver of the automobile to keep a proper lookout; that the machine was going at an excessive rate of speed; that if the driver had been keeping a proper lookout and controlling the machine, he could have avoided the accident, even after the peril of the decedent was discovered; and that, if he had been keeping a proper lookout and had made a proper turn, there would have been no accident. Under these circumstances, and under the

mandatory provisions of the statute, requiring the court to consider such cases as upon a demurrer to the evidence, there was no reversible error in the refusal of the court below to set aside the verdict on the ground that it was contrary to the law and the evidence. *Bohannon-King & Co. v. Vel-lines*, 120 Va. 428, 91 S. E. 621.

In an action by the tenant of the first floor of a three-story building against the landlord to recover damages resulting from leakage from frozen water pipes, if the written lease contains no stipulation in regard to the duty of cutting off the water, and the evidence is conflicting as to whether it was the duty of the landlord or of the tenant, the appellate court can not set aside a verdict in favor of the plaintiff, as it has to consider the case as on a demurrer to the evidence by the defendant. *Kecoughtan Lodge No. 29 v. Steiner*, 106 Va. 589, 56 S. E. 569.

Case Heard by Judge without Jury.

—Where a case is heard by the judge without a jury, and the evidence is certified, it will be heard in this court as on a demurrer to the evidence by the plaintiff in error. The judgment of the trial court has the same effect as the verdict of a jury, and this court will not disturb its finding unless it is plainly against the evidence, or without evidence. *Delaware, etc., R. Co. v. Cotten*, 113 Va. 563, 75 S. E. 122.

Where a case at law is submitted to a court for its decision, without the intervention of a jury, and a party excepts to the decision on the ground that it is contrary to the evidence, and the evidence, and not the facts, is certified, the rule of decision in the appellate court is to give the judgment of the trial court upon the evidence the same effect as if it were the verdict of a jury. *Hamman v. Miller*, 116 Va. 873, 83 S. E. 382.

Incredible Statements.—The statutory rule, under which the Supreme Court of Appeals must consider the evidence when certified, cannot compel that

court to accept as true what in the nature of things could not have occurred in the manner and under the circumstances narrated. *Virginia R., etc., Co. v. Bailey*, 123 Va. 250, 96 S. E. 275, citing *Norfolk, etc., R. Co. v. Strickler*, 118 Va. 153, 86 S. E. 824; *Virginian R. Co. v. Bell*, 118 Va. 492, 87 S. E. 570. See ante, "On Demurrer to Evidence," XIV, G, 2.

5. Where There Have Been Two Trials Below.

See post, "Conclusiveness on Second Appeal," XV, A, 7.

As § 3484 of the Va. Code stood before the revision (Va. Code 1919, § 6363) the latter part of it provided that when there have been two trials in the lower court, the rule of decision shall be for the appellate court to look first to the evidence and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon. See ante, "Where Evidence and Not Facts Certified," XIV, G, 4.

In the following cases the statute was applied: *Southern Amusement Co. v. Ferrell-Bledsoe Furniture Co.*, 125 Va. 429, 99 S. E. 716; *Carter v. Washington, etc., Railway*, 122 Va. 458, 95 S. E. 464; *Commander v. Provident Relief Ass'n*, 126 Va. 455, 102 S. E. 89; *Reichenstein v. Virginia R., etc., Co.*, 115 Va. 862, 80 S. E. 564; *Norfolk, etc., R. Co. v. Sink*, 118 Va. 439, 87 S. E. 740, 744; *Turner v. Richmond, etc., R. Co.*, 121 Va. 194, 92 S. E. 841; *Davis v. Harrisonburg*, 116 Va. 864, 83 S. E. 401; *Fanshaw v. Norfolk, etc., Tract. Co.*, 108 Va. 300, 61 S. E. 790.

The appellate court will consider the whole evidence and sustain the verdict, unless it be against the law and the evidence, or without evidence. *Shively v. Norfolk, etc., R. Co.*, 125 Va. 384, 99 S. E. 650.

Where there has been three successive verdicts for the plaintiff, each for

a less sum than the one which preceded it, and the first two have been set aside by the trial court as contrary to the evidence, and the third is rendered on a demurrer to the evidence by the defendant, which demurrer the trial court sustained, the appellate court, upon reversal, will enter up judgment on the last verdict, as some latitude must be allowed to the discretion of the trial court, especially when the propriety of its exercise is affirmed by a verdict on the new trial for the party to whom it was granted, or the verdict, though for the same party, is for a substantially less sum. *Citizens' Bank v. Taylor & Co.*, 104 Va. 164, 51 S. E. 159.

First Trial within Meaning of Statute.—The phrase "first trial" used in § 3484 of the Code requiring this court, when there have been two trials in the lower court, "to look first to the evidence and proceedings on the first trial" refers to the first trial in which the ruling of the court was made the ground of exception, which is the first trial within the cognizance of this court. This may, in fact, be the second or a subsequent trial. *Chesapeake, etc., R. Co. v. Parker*, 116 Va. 368, 370, 82 S. E. 183.

Manner of Considering Evidence on First Trial.—Where there have been two trials in the court below and this court is considering the proceedings on the first trial, it is unnecessary to decide whether the evidence given on the first trial shall be considered by this court as on a demurrer to the evidence or otherwise when, in any view of the evidence, it sustains the verdict. In the case at bar it is also unnecessary to consider the question whether or not there is any conflict in the decisions of this court as to the manner in which the evidence on the first trial is to be considered by this court under the provisions of § 3484 of the Va. Code of 1887. *Cardwell v. Norfolk, etc., R. Co.*, 114 Va. 500, 77 S. E. 612.

Affirmance of Judgment. — Where

there have been two trials in the court below, and the record does not disclose on what ground the court set aside the first verdict, but does show that an instruction was asked for by the defendant, which should have been given, but was refused, which would of itself have been good ground for setting aside that verdict, and no evidence at all was offered on the second trial, and judgment was entered for the defendant, this court, on a writ of error, will affirm the judgment. *Reichenstein v. Virginia R., etc., Co.*, 115 Va. 862, 80 S. E. 564.

Identical Evidence—Plaintiff's Case Considered in Trial Court as on Demurrer to Evidence.—The rule is that where there have been two trials the supreme court of appeals must look first to the evidence and proceedings on the first trial, but where the evidence upon each of the last two trials was identical and the latter verdict the larger of the two, it follows that if there was no error to the prejudice of the plaintiff on the last trial, there could have been none on the former, even though there was a view of the premises by the jury on the former trial and not on the latter, where the judge of the trial court had the benefit of such light as the view might have shed upon the evidence, and it was clear that the final trial brought the case to the test under the most favorable possible' circumstances for the plaintiff, since it gave him the benefit of the rules applicable to a demurrer to the evidence in the lower court as well as in the appellate court. *Wadkins v. Damascus Lumber Co.*, 121 Va. 691, 93 S. E. 591. See ante, "On Demurrer to Evidence," XIV, G, 2.

H. REVERSIBLE ERROR.

1. General Rules.

a. Must Be Manifest and Apparent of Record.

Error will not be presumed, but must affirmatively appear by the record in order to be ground for reversal.

Standard Paint Co. v. Vietor & Co., 120 Va. 595, 91 S. E. 752; *Sands & Co. v. Norvell*, 126 Va. 384, 101 S. E. 569; *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384; *State v. Clifford*, 59 W. Va. 1, 14, 52 S. E. 981; *Cox v. National Coal, etc., Invest. Co.*, 61 W. Va. 291, 56 S. E. 494; *Truex v. South Penn. Oil Co.*, 62 W. Va. 540, 545, 59 S. E. 517; *Cave v. Blair Limestone Co.*, 74 W. Va. 752, 82 S. E. 1095; *Myers & Co. v. Lewis*, 121 Va. 50, 92 S. E. 988. See post, "Presumptions on Appeal," XIV, I.

Where the question of contributory negligence was properly submitted to the jury under well-established principles, a mere doubt as to whether the jury decided the question properly is plainly insufficient to justify a reversal of the judgment. *Richmond v. McCormack*, 120 Va. 552, 91 S. E. 767.

The judgment of a trial court will not be abated by the supreme court as excessive, unless the record clearly establishes such excess. *Columbia Amusement Co. v. Pine Beach Inv. Corp.*, 109 Va. 325, 63 S. E. 1002, citing *McIntyre v. Smyth*, 108 Va. 736, 62 S. E. 930.

The supreme court will not reverse a judgment of the circuit court, for sustaining objections to questions propounded to a witness on the trial, unless it affirmatively appears from the record what the answers of the witness thereto would have been, or it is shown what was proposed to be proven by the witness in response to the questions, and that the party complaining has been prejudiced by the rulings of the court. *Lord v. Henderson*, 65 W. Va. 321, 64 S. E. 134.

b. Burden of Proof.

See post, "Presumptions as to Prejudice," XIV, H, 1, c, (3); "Presumptions on Appeal," XIV, I.

The burden is on the appellant to show error in the decree or judgment appealed from, and, if he fails to show it, the decree will be affirmed. *Johnson v. Michaux*, 110 Va. 595, 66 S. E.

823; *Lanford v. Virginia Air Line R. Co.*, 113 Va. 68, 73 S. E. 566; *Crawley v. Glaze*, 117 Va. 274, 84 S. E. 671; *Morrisette v. Cook, etc., Co.*, 122 Va. 588, 95 S. E. 449; *Reynolds v. Adams*, 123 Va. 295, 99 S. E. 695; *Wood v. Lester*, 126 Va. 169, 101 S. E. 52; *Sands & Co. v. Norvell*, 126 Va. 384, 101 S. E. 569; *Shelton v. Sydnor*, 126 Va. 625, 102 S. E. 83.

A new trial will not be granted on account of the refusal of a proper instruction, if other instructions given at the instance of the complaining party, have been omitted from the transcript by his direction, since presumptively the rulings of the court upon the requests for instructions were proper and the burden is upon the complainant to show the contrary. *Ohio Valley Bending Co. v. Pickens*, 74 W. Va. 303, 81 S. E. 1041.

Criminal Case.—To obtain reversal of a judgment of conviction in a criminal prosecution, the accused must show that actual prejudice to him resulted from the proceedings in the trial court. *State v. Rogers*, 80 W. Va. 680, 93 S. E. 757.

Failure to Establish Easement.—A party who claims an easement of a right of way over the land of another has the burden of proof to establish his claim, and where the claim has been decided adversely to him in the trial court the burden is also upon him to overcome the presumption in favor of the correctness of the decision, and to satisfy the appellate court that error has been committed to his prejudice. *Witt v. Creasey*, 117 Va. 872, 86 S. E. 128, citing *Johnson v. Michaux*, 110 Va. 595, 66 S. E. 823; *Smith v. Alderson*, 116 Va. 986, 990, 83 S. E. 373.

c. Must Be Prejudicial.

(1) In General.

Only Prejudicial Error Calls for a Reversal.—*Dixon v. Paddock*, 104 Va. 387, 333, 51 S. E. 841; *Cremans v. Commonwealth*, 104 Va. 860, 52 S. E. 352; *McClung v. Folkes*, 122 Va. 46, 94

S. E. 156; *Nichols v. Camden, etc., R. Co.*, 62 W. Va. 409, 59 S. E. 968; *State v. Davis*, 68 W. Va. 142, 150, 69 S. E. 639; *Snedeker v. Rulong*, 69 W. Va. 223, 71 S. E. 180.

There is No Exclusive Test of Harmless Error.—Anything conclusively showing lack of prejudice in the trial suffices. *Harman v. Appalachian Power Co.*, 77 W. Va. 48, 86 S. E. 917.

Error Not Affecting Result.—A case will not be reversed on appeal where the error complained of could not have affected the result. *Lester v. Simpkins*, 117 Va. 55, 83 S. E. 1062; *Norfolk v. Southern R. Co.*, 117 Va. 101, 83 S. E. 1085.

Where the verdict accords with both law and evidence, all errors committed in the progress of the trial are thereby rendered harmless. *Reunion v. Morrison*, 71 W. Va. 254, 261, 76 S. E. 457; *Jeffrey v. Lemon*, 58 W. Va. 662, 664, 52 S. E. 769; *Belknap v. Baltimore, etc., R. Co.*, 79 W. Va. 691, 91 S. E. 656.

(2) Necessity for Prejudice to Rights of Appellant.

See post, "Applications of Rules in Particular Instances," XIV, H, 2.

Error which works no prejudice to the party complaining, is not cause for reversal. *Mitchell Transparent Ice Co. v. Triumph Elect. Co.*, 116 Va. 725, 82 S. E. 730; *Ney v. Wrenn*, 117 Va. 85, 84 S. E. 1; *Norfolk v. Southern R. Co.*, 117 Va. 101, 83 S. E. 1085; *Norfolk, etc., R. Co. v. Perdue*, 117 Va. 111, 83 S. E. 1058; *Wood v. Jefferies & Co.*, 117 Va. 193, 83 S. E. 1074; *Washington, etc., Railway v. Carter*, 117 Va. 424, 85 S. E. 482; *Wygall v. Wilder*, 117 Va. 896, 86 S. E. 97; *Colley v. Summers Parrott Hdw. Co.*, 119 Va. 439, 89 S. E. 906; *Standard Paint Co. v. Vitor & Co.*, 120 Va. 595, 91 S. E. 752; *Rinehart, etc., Co. v. McArthur*, 123 Va. 556, 96 S. E. 829; *Murphy v. Cuddy*, 124 Va. 207, 97 S. E. 794; *Jeffress v. Virginia R., etc., Co.*, 127 Va. 694, 104 S. E. 393; *Duty v. Chesapeake,*

etc., R. Co., 70 W. Va. 14, 73 S. E. 331; *State v. Gebhart*, 70 W. Va. 232, 73 S. E. 964; *State v. Angelina*, 73 W. Va. 146, 147, 80 S. E. 141; *Stafford v. Jones*, 73 W. Va. 299, 80 S. E. 825; *Ephraim Creek, etc., Co. v. Bragg*, 75 W. Va. 70, 83 S. E. 190; *Hornor v. Life*, 76 W. Va. 231, 85 S. E. 249.

Continuance.—Before reversing a judgment for error in overruling a motion to continue, it should appear that the trial court abused its discretion, and that the mover of the motion has been prejudiced thereby. *State v. Angelina*, 73 W. Va. 146, 80 S. E. 141.

Failure to Appoint Guardian Ad Litem.—An infant can only appear and defend an action by a guardian ad litem duly appointed for that purpose, and the omissions to appoint such guardian ad litem is reversible error in all cases unless it appears that the judgment is for the infant, and not to his prejudice. *Weaver v. Glenn*, 104 Va. 443, 51 S. E. 835, citing and approving *Langston v. Bassette*, 104 Va. 47, 51 S. E. 218.

Failure to Give Sufficient Statutory Notice.—The failure to give sufficient notice under clause 3, § 1294b, of Virginia Code 1904, relating to the right of one railroad company to cross the track of another, is harmless error, where it appears that the complainant company has sustained no injury therefrom, but has asserted all the rights it could have asserted if a proper notice had been given. *Norfolk, etc., R. Co. v. Tidewater R. Co.*, 105 Va. 129, 52 S. E. 852.

Divorce Proceedings.—After a careful consideration of the record, the Supreme Court of Appeals was unable to discover any substantial error to the prejudice of the appellant in the decrees of the trial court and they were therefore affirmed. *McCormick v. McCormick*, 123 Va. 778, 97 S. E. 305.

A decree for the sale of land which fails to give the defendant a day in which to redeem, even where he is entitled to such day, will not be reversed for that reason, where it does not ap-

pear that the question was raised in the court below and the record does not show that he was in any way prejudiced thereby, and the fair inference from the record is that he was not, and could not have been, thereby prejudiced, or injured. *Hall v. White*, 114 Va. 562, 77 S. E. 475.

(3) Presumptions as to Prejudice.

See post, "Applications of Rules in Particular Instances," XIV, H, 2.

All error is presumed to be prejudicial. *Norfolk, R., etc., Co. v. Higgins*, 108 Va. 324, 61 S. E. 766.

If a misdirection, or other error, of the court appear in the record it is presumed to have affected the verdict of the jury, and the judgment thereon must be reversed, unless it plainly appears from the whole record that the error did not and could not have affected the verdict. *Southern R. Co. v. Forgey*, 105 Va. 599, 54 S. E. 477; *American Tobacco Co. v. Polisco*, 104 Va. 777, 52 S. E. 563.

But see *Myers & Co. v. Lewis*, 121 Va. 50, 77, 92 S. E. 988, where the court said: "It does not affirmatively appear that the error in question was injurious, and under the rule established in *Standard Paint Co. v. Vietor & Co.*, 120 Va. 595, 91 S. E. 752, we must regard the error as harmless."

A denial of a constitutional right is, of itself, reversible error. *Pine v. Commonwealth*, 121 Va. 812, 93 S. E. 652.

Dismissal of Petition without Prejudice.—Plaintiff in error applied for appointment as administratrix for herself, or her nominees, which application was refused by the clerk. She thereupon filed her petition in the circuit court, in which she insisted that her marriage settlement had been procured by fraudulent representations and was void, and renewed her motion to be permitted to qualify as administratrix. The petition contained the alternative prayer, that if administration should be denied her, it might be granted to her nominees. The con-

cluding prayer of the petition was that, if the court should be of the opinion that it was without jurisdiction in that proceeding to pass upon the validity of the marriage contract, it would appoint plaintiff in error's nominees, or one of them, curator of the estate ending proceedings by her to determine the validity of the agreement. Held: That the action of the court in dismissing the petition, but without prejudice to the rights of the plaintiff in error to test the validity of the marriage contract in a proper proceeding before a court of competent jurisdiction, if erroneous at all, was harmless error. *Gooch v. Suhor*, 121 Va. 35, 92 S. E. 843.

Issue Erroneously Submitted to Jury.

—Where one of the principal issues submitted to the jury, and one upon which they might have based their verdict, was erroneously submitted, the judgment must be reversed on appeal, although the verdict might have been based upon another issue correctly submitted to the jury. *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225.

(4) Beneficial Error.

See post, "Applications of Rules in Particular Instances," XIV, H, 2.

A party can not complain of an instruction which is distinctly to his advantage. *Southern R. Co. v. Baptist*, 114 Va. 723, 730, 77 S. E. 477; *Norfolk Hosiery, etc., Mills v. Aetna Hosiery Co.*, 124 Va. 221, 98 S. E. 43.

An error favorable to accused is harmless. *Pettus v. Commonwealth*, 123 Va. 806, 96 S. E. 161.

Where the decision on the merits is in favor of the defendant in error, he can not assign irregularities in the proceedings as error. *Rinehart, etc., Co. v. McArthur*, 123 Va. 556, 96 S. E. 829.

"Absence of a material witness for either party to a cause is not a cause of complaint by the other." *Producers Coal Co. v. Mifflin Coal Min. Co.*, 82 W. Va. 311, 319, 95 S. E. 948.

A *remittitur damnum* being favorable to defendant in an action for merchandise and for money advanced, was not prejudicial to him. *Fleming v. Smouse*, 73 W. Va. 188, 189, 80 S. E. 144.

Conflict of Laws.—Where the holding of the court below being in accordance with the law of Pennsylvania was more favorable to the appellant than he was entitled to under the law of Virginia, it is unnecessary for the appellate court to determine whether the law of Virginia or that of Pennsylvania governs, the appellee not complaining of such holding. *Ruckdeschall v. Seibel*, 126 Va. 359, 101 S. E. 425.

d. Must Be Material—Technical Errors.

See post, "Applications of Rules in Particular Instances," XIV, H, 2.

Appellate courts do not sit simply to correct errors. If they did, their work would be unending. To be subject of review the error must be material, and must be prejudicial to the interest of the party complaining of it. *Murphy v. Cuddy*, 124 Va. 207, 97 S. E. 794. See *Polley v. Gilleland*, 7^o W. Va. 301, 78 S. E. 96.

Where questions involved in bills of exceptions were of minor importance and where the occasion was of such little controversy in the lower court as that an apparently experienced court reporter and a careful and capable presiding judge did not discover during the trial that any serious point was being raised in regard to them, they ought not to be made the subject of reversal. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

Where substantial justice has been reached and the rights of all parties in interest have been adequately safeguarded by the decree appealed from, the Supreme Court of Appeals will not be astute to find technical objections by which such decree may be reversed. *Smith v. Woodward*, 122 Va. 356, 94 S. E. 916.

So where a trustee sold more than was necessary to cover the debt secured and applied the money on deeds not in default, of which he was trustee, a decree, requiring the trustee to pay the purchaser the price paid, will not be reversed, although it would have been more regular to have substituted the purchaser to the lien of the deeds not in default, credits to which were canceled, the trustee being amply solvent and having the right to indemnify himself from the proceeds of sales under such deeds of trust. *Smith v. Woodward*, 122 Va. 356, 94 S. E. 916.

That the declaration in a servant's action for injuries is unnecessarily long is immaterial in view of Va. Code 1904, §§ 3246, 3272, relating to the disregard of merely formal errors. *Norfolk, etc., R. Co. v. Whitehurst*, 125 Va. 260, 99 S. E. 568.

For What a Judgment or Decree Will Not Be Reversed. — Va. Code 1919, §§ 6331, 6332; Barnes Code, ch. 134, §§ 3, 4.

A notice for a judgment which describes a negotiable note as "a promissory note," and which is good as far as it goes does not prejudice the defendant by its incompleteness. *Colley v. Summers Parrott Hdw. Co.*, 119 Va. 439, 89 S. E. 906.

Decree Establishing Trust in Favor of More Beneficiaries than Disclosed by Bill.—In a suit to establish a parol trust in personalty, a decree is erroneous which, while it establishes the same trust as that alleged in the bill, in so far as the trustee and the subject of the trust were concerned, established it for the benefit of more persons as objects of the trust than were alleged in the bill. The bill should have been amended under Acts 1914, p. 641, Code 1919, § 6104, so as to make its allegations of fact conform to the proof in the cause in the particular in question, before the decree was entered. The error, however, was harmless, as the failure to amend the pleadings did not affect the substan-

tial rights of the parties. *Russell v. Passmore*, 127 Va. 475, 103 S. E. 652.

2. Applications of Rules in Particular Instances.

½a. In General.

Virginia Statute.—Va. Code 1919, § 6331, provides: "No judgment or decree shall be arrested or reversed for the appearance of either party, being under the age of twenty-one years, by attorney, if the verdict (where there is one), or the judgment or decree, be for him and not to his prejudice; or for want of attorney; or for the want of a similiter, or any misjoining of issue; or for any informality in the entry of the judgment or decree by the clerk; or for the omission of the name of any juror; or because it may not appear that the verdict was rendered by the number of jurors required by law; or for any defect; imperfection, or omission in the pleadings, which could not be regarded on demurrer; or for any other defect, imperfection, or omission in the record, or for any error committed on the trial where it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached. For the purposes of this section, the trial judge shall, upon the request of either party, give a certificate of the facts proved, or, if this be not practicable, of the evidence adduced at the trial, which certificate when signed by the judge shall be a part of the record. Such certificate, however, shall not be given except during the term at which the evidence was adduced, or within sixty days thereafter; if given in vacation shall be certified by the judge to the clerk of his court, and the latter shall file it with the papers in the cause. The certificate shall be prepared and tendered by the party requesting it, or his counsel."

Va. Code 1919, § 6332, provides: "No decree shall be reversed for want

of replication to the answer, where the defendant has taken depositions as if there had been a replication; and when it appears that there was a full and fair hearing on the merits, and that substantial justice has been done, a decree shall not be reversed for want of a replication, although the defendant may not have taken depositions; nor shall it be reversed, for any informality in the proceedings, at the instance of a party who has taken depositions."

West Virginia Statutes. — Barnes Code, ch. 134, § 3, provides: "No judgment or decree shall be stayed or reversed for the appearance of either party, being under the age of twenty-one years, by attorney, if the verdict (where there is one), or the judgment or decree, be for him not to his prejudice; or for want of warrant of attorney; or for want of a similiter, or any misjoining of issue; or for any informality in the entry of the judgment or decree by the clerk; or for the omission of the name of any juror; or because it may not appear that the verdict was rendered by the number of jurors required by law; or for any defect, imperfection, or omission in the pleadings, which could not be regarded on demurrer; or for any other defect, imperfection, or omission, which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of."

Barnes Code, ch. 134, § 4, provides: "No decree shall be reversed for want of replication to the answer, where the defendant has taken depositions as if there had been a replication; nor shall a decree be reversed at the instance of a party who has taken depositions, for an informality in the proceedings, when it appears that there was a full and fair hearing upon the merits, and that substantial justice has been done."

Consolidation of Actions.—*Johnson v. Merritt*, 125 Va. 162, 99 S. E. 785.

Directing Verdict.—See post, "Errors in Verdict or Judgment," XIV, H, 2, f.

a. Errors in Parties.

Misjoinder.—Where an issue of misjoinder of defendants erroneously made has been full and fairly heard by the jury and determined by the verdict, the error is harmless. *Harris v. North*, 78 W. Va. 76, 88 S. E. 603.

Failure to Bring in Parties.—In a suit to enforce judgment liens, the failure to make a subsequent purchaser from the judgment debtor a party will not be noticed by this court, if there is nothing in the record to show his interest in the suit. *Batten v. Lowther*, 74 W. Va. 167, 81 S. E. 821.

A mere statement in an answer that other persons are interested in the property involved, without proof of their interest, their rights not being affected by the decree, will not be ground for reversal. *Starn v. Huffman*, 62 W. Va. 422, 59 S. E. 179.

A decree on a bill, omitting parties, necessary and proper, according to the allegations thereof, but who appear by the proof in the cause to have had no interest in the suit, will not be reversed for the error committed in the overruling of the demurrer, since the irregularity is merely formal and may be ignored in the interest of substantial justice. *White v. White*, 64 W. Va. 30, 60 S. E. 885.

Where in a suit by creditors to set aside a deed for fraud judgment creditors of a prior owner of a part of the real estate conveyed appear before the commissioner and assert and prove their liens on such property, it is error for the court, without requiring the judgment debtor to be brought in and made a party defendant, to decree such judgments in favor of the lienors, and a sale of such land to satisfy the same. Such judgment debtor is a necessary and proper party to such suit. *Westinghouse Lamp Co. v. Ingram*, 70 W. Va. 664, 74 S. E. 941.

Where a trespass has been committed by one only of two or more owners of adjacent lands, under a

claim of title to the land on which a building is in process of erection, and the plaintiff has made the trespassers only parties to his suit, the decree will not be reversed for omission of the other owners, since the title is only collaterally involved and the appellant is not prejudiced by the omission. *Ephraim Creek, etc., Co. v. Bragg*, 75 W. Va. 70, 83 S. E. 190.

However, it may be, in respect to right to appellate relief, when a trustee, suing as plaintiff and failing to make his cestui que trust parties, obtains all the relief to which the latter could possibly be entitled, and defect of parties is relied upon in the appellate court for the first time, such imperfection in the bill affords ground of relief in the appellate court, when the objection has been made by demurrer in the court below, before it could be known what the result would be, since the defendant is entitled to have all interested parties bound by the decree. In such case, there is no waiver of this right, and the court below, at the time of overruling the demurrer, could not know whether injury would result therefrom or not. *Beckwith v. Laing*, 66 W. Va. 246, 66 S. E. 354.

Same—Curing Error.—Though a demurrer to a bill for want of parties be erroneously overruled, yet if they be later made parties by amended bill, the error is cured. *Smith v. Linden Oil Co.*, 69 W. Va. 57, 71 S. E. 167.

Want of Parties against Whom No Relief Could Be Had.—Where a demurrer to a bill based upon the want of necessary parties has been overruled, and it appears upon an appeal to this court that the plaintiff is not entitled to the relief which, according to the contention of his adversary, makes necessary the absent parties, and he is not asking such relief, a decree granting the relief to which the plaintiff is entitled will not be reversed. The allegations of the bill which call for additional parties will be disre-

garded by this court because of the fact that the developments upon the final hearing have eliminated them from consideration in the case. *Ohio Finance Co. v. Mannington Window Glass Co.*, 86 W. Va. 322, 103 S. E. 333.

Improperly Dismissing Administrator—Same Defense Made by Heir.—A bill was filed by a judgment creditor against the administrator and heirs of the deceased debtor, to subject her land to the lien of the judgment. The bill alleged that the debtor owned no personal property at the time of her death, out of which the judgment could be collected. The administrator and one of the heirs filed separate pleas of the statute of limitations. At the hearing the complainant asked leave to dismiss his suit as to his administrator, which motion the administrator resisted. The court, however, permitted the dismissal. Held: That the administrator was a proper party and the suit should not have been dismissed as to him. But the error in permitting complainant to dismiss as to the personal representative of the debtor was harmless, as the heir was permitted to, and did, make the same defense set up by the administrator. *Johnston v. Pearson*, 121 Va. 453, 93 S. E. 640.

Error Not Cured—Wife Supporting Husband's Cause.—In a suit to prohibit the lessee in an oil and gas lease in the execution of which the wife joined the husband and which provides for delivery of the royalty into a pipe line, and payment of the commutation money into a bank, to their joint credit, from drilling on the land, upon the theory of expiration of the lease, to be established by a reformation thereof by way of correction of an alleged fraudulent alteration of its terms, the wife is a necessary party. Her support of her husband's bill for that purpose by her affidavit and testimony does not cure or avoid the error in overruling the demurrer thereto for failure to

make her a party, nor render it harmless. *Coffman v. Hope Natural Gas Co.*, 74 W. Va. 57, 81 S. E. 575.

a½. Errors in Process.

See post, SUMMONS AND PROCESS.

In the instant case it was obvious that the telegraph company was not prejudiced by the form of the process, and the irregularity, if irregularity it was, did not constitute reversible error. *Postal Telegraph-Cable Co. v. Charlottesville*, 126 Va. 800, 101 S. E. 357.

b. Errors in Pleadings.

(1) In General.

Insufficiency of Pleadings. — The clause of § 29 of chapter 125 of the W. Va. Code, denying right of reversal in the appellate court for insufficiency of a pleading, when the order, overruling the demurrer, recites failure to allege anything in support thereof, applies to pleadings in actions at law only, and not to equity pleadings. *James Sons Co. v. Farley*, 71 W. Va. 173, 76 S. E. 169.

Correction of Appeal. — If prejudicial error be committed by the court below on pleadings or motions, such error may be corrected here on appeal. *Scott v. Keenan*, 69 W. Va. 412, 71 S. E. 570.

Refusal to Require Defendant to File Statement of Grounds of Defense.—Where it is manifest that the plaintiff was not embarrassed, hindered or prejudiced in any way by the refusal of the trial court to require the defendant to state his grounds of defense to an action of ejectment, the judgment will not be reversed on that account, as the error, if any, was harmless. *Knight v. Grim*, 110 Va. 400, 63 S. E. 42, citing *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

Filing Notice of Equitable Defense.—Where no substantial prejudice to plaintiff appears, and he does not avail

himself of the leave granted to take a continuance, the action of the court in permitting the filing of a notice of equitable defenses, under § 22, c. 90, of the W. Va. Code, during the progress of a trial in ejectment, will not constitute reversible error. *James Sons Co. v. Hutchinson*, 79 W. Va. 389, 90 S. E. 1047.

(2) Declaration.

Insufficiency of Declaration.—On a writ of error to a judgment by default, after an unsuccessful motion to set it aside, made pursuant to § 5 of chapter 134 of the W. Va. Code, without in any way challenging the sufficiency of the declaration, insufficiency thereof can not be assigned as ground of error, if the matter therein set up be such as, if well pleaded, would constitute a cause of action, cognizable by the court, when sitting as a court of law. *Talbott v. Southern Oil Co.*, 60 W. Va. 423, 55 S. E. 1009.

Unnecessarily Long.—That a declaration in a servant's action for injuries is unnecessarily long is immaterial in view of Va. Code 1887, §§ 3246, 3272, Code 1919, §§ 6085, 6118, relating to the disregarding of merely formal errors. *Norfolk, etc., R. Co. v. Whitehurst*, 125 Va. 260, 99 S. E. 568.

Declaration in Malpractice.—A count in a declaration in an action for malpractice alleged that defendant was negligent in treating plaintiff with X-rays, without first making a preliminary examination to determine plaintiff's susceptibility to the influence of X-rays, as in the exercise of ordinary care it was his duty to make. It was objected that this count was demurrable because it failed to allege, except inferentially, that the plaintiff was in fact more susceptible to the influence of X-rays than other persons, and if such examination had been made it would have resulted in the discovery of such susceptibility. Held: That the point was well taken; that such allegation should have been made and distinctly made,

with definiteness and certainty. An inferential allegation of such material fact was insufficient. But as the case did not turn upon the existence of any peculiar susceptibility of the plaintiff to X-rays, and the verdict was based upon other grounds, the error was harmless. *Hunter v. Burroughs*, 123 Va. 113, 96 S. E. 360.

A declaration by an administrator which fails to allege the appointment and qualification of the administrator is bad on demurrer. And although plaintiff may have testified on the trial that he was such administrator, without objection on the part of defendant, the defect in the declaration can not, consistently with good practice, be treated as harmless error, and as waived by defendant. *Brogan v. Union Tract. Co.*, 76 W. Va. 698, 86 S. E. 753.

Refusal to Strike Out Part of Declaration.—Though under the civil damage act, § 26, chap. 32, W. Va. Code, as construed by the supreme court, no damages can be given a widow against a licensed retailer of spirituous liquors, because of injury to her means of support by the death of her husband, caused by intoxicants sold her husband by him, the refusal of the court on defendant's motion to strike out of her declaration certain references to the death of her husband, will not on writ of error, to the supreme court, be treated as error when it appears as in this case, that defendant was not prejudiced thereby, and that, in ruling on said motion the court announced that the questions presented thereby could and would be acted upon by the court on the trial of the case, and it further appears that on the trial the rights of the defendant were not prejudiced by the judgment of the court on his motion. *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009.

(3) Bill of Particulars.

Refusal of Bill.—Where a full and clear statement of the plaintiff's case

is made in the declaration, the defendant is not prejudiced by the refusal of the court to require a bill of particulars to be filed. *Blue Ridge Light, etc., Co. v. Tutwiler*, 106 Va. 54, 55 S. E. 539.

Where the motion for a bill of particulars is not accompanied by an affidavit showing the information desired and the need of it for the purposes of defense, and the prosecuting attorney, before commencement of the trial, pursuant to court direction, designates upon the record the names of the persons for whom the evidence for the state and the admissions of defendant show the liquors were unlawfully carried, denial of the motion will not be deemed prejudicial error in the appellate court. *State v. Duff*, 81 W. Va. 407, 94 S. E. 498.

Action on Note—Consideration.—In an action upon a note the court refused to require the plaintiff to file a bill of particulars stating the consideration of the note. The motion for a bill of particulars was based upon § 3249 of the W. Va. Code of 1904 (Code 1919 § 6091). Held: That the action of the court in refusing the motion for the bill of particulars, if error, was clearly harmless, because the plaintiff's case was based upon a negotiable note, and the only reason alleged for desiring a bill of particulars was in order to have the plaintiff state the consideration for which the note was given, and upon the trial plaintiff admitted that the note was given for the consideration alleged by defendants. *Keister v. Philips*, 124 Va. 585, 98 S. E. 674.

The refusal of a more definite bill of particulars will not be ground for reversal where the bill of particulars objected to was itemized, and the record of the case as a whole discloses plainly that the defendant was in no-wise prejudiced by being subjected to trial on the same. *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

Sufficiency of Bill.—The ruling of a trial court on the sufficiency of a bill

of particulars filed by the plaintiff will not be reversed where it is evident that the defendant was not embarrassed or hindered in any degree in making his defense. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161.

(4) Plea or Answer.

See post, "Issues, Proof and Variance," XIV, H, 2, b, (9).

When pleas are improperly admitted, but no evidence offered in support thereof, the error will not be ground of reversal, if it appears, as it does in the instant case, that the plaintiff could not have been injured thereby. Here the defense imputed to the plaintiff a straight-out forgery, thus involving him in a charge implying as much moral turpitude as the special pleas complained of. *Ely v. Gray*, 125 Va. 708, 100 S. E. 660.

A plaintiff can not assign as error the reception of a special plea of the defendant upon which the jury found against the defendant. If error, it was not to the plaintiff's prejudice. *Sutherland v. Wampler*, 119 Va. 800, 89 S. E. 875.

Failure to Strike Out Pleadings.—If a plea is insufficient and no answer to the action, it should be rejected when objected to, and the plaintiff should not be put to an issue upon it. A mental reservation of the court to strike it out during the trial, not acted upon, does not cure the error, and the failure to strike it out constitutes good ground for reversal unless, when all the facts are certified, it affirmatively appears that the plaintiff could not have been injured by having been forced to try his case on the improper plea. *Hawling v. Chapin*, 115 Va. 792, 80 S. E. 587.

Rejection of Pleas.—The rejection of a plea is not reversible error, when all that could have been proved under it was admissible under other pleas which were received. *Merriman v. Cover*, 104 Va. 423, 51 S. E. 817.

In a chancery cause where a defend-

ant tenders a plea in writing which is rejected and he is permitted to file an answer setting up the same defense, to which plaintiff enters a general replication, the defendant is not prejudiced by the rejection of the said plea. *Emons v. Hawk*, 62 W. Va. 526, 59 S. E. 519.

Same—Plea of Statute of Limitations.—The rejection by the trial court of defendant's plea of statute of limitations to an amendment of the declaration, on the ground that it was not filed in time, was harmless, as the amendment of the declaration did not make a new case, and the cause of action was not barred at the time the original action was instituted. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Separate pleas of the statute of limitations, to the several demands stated in a bill alleging partnership are proper, but, if an answer tendered with such pleas invokes the statute of limitations generally, and the cause is heard and its merits developed on the bill and answer, erroneous rejection of the pleas is harmless. *Teter v. Moore*, 80 W. Va. 443, 93 S. E. 342.

Immaterial Pleas.—In an action of debt the defendant pleaded nil debet, non est factum, and two special pleas in writing. No evidence was introduced under the special pleas; the only possible reason upon which to base a complaint against them was that they improperly injected into the case damaging and unsupported charges against the plaintiff. Held: That if it be true, as the objection concedes, that the matters set up by the special pleas were provable under the general issue, then the objection to the pleas carried its own refutation. *Ely v. Gray*, 125 Va. 708, 100 S. E. 660.

Plea to Jurisdiction—Jurisdiction Appearing of Record.—If the jurisdiction of the trial court sufficiently appears from any part of the record, this court will not reverse a final judgment ren-

dered upon the merits, on account of error committed in the trial of an issue on a plea to the jurisdiction. *Danser v. Dorr*, 72 W. Va. 430, 78 S. E. 367.

Verification.—Where in an action of debt the defendant pleaded nil debet, non est factum, and two additional pleas in writing, the fact that there was no verification of the special pleas is not in itself a ground of reversal. *Ely v. Gray*, 125 Va. 708, 100 S. E. 660.

Same—Refusal to Allow Filing of Plea.—A party is not injured by the action of the circuit court in refusing to allow a plea to be filed because the same is not verified when such plea is not required by law to be verified, where he afterwards swears to the plea and the same is allowed to be filed. *Payne v. Riggs*, 80 W. Va. 57, 92 S. E. 133.

(5) Replication.

Want of Replication.—A decree will not be reversed for want of replication to an answer, where the defendant has taken depositions as if there had been a replication. *Kirchner v. Smith*, 61 W. Va. 434, 58 S. E. 614; *Towner v. Towner*, 65 W. Va. 476, 64 S. E. 732.

In habeas corpus, the want of replication to the return is not ground for reversal when the court or judge has heard the matter on evidence as though the return was denied. *Hurley v. Hurley*, 71 W. Va. 269, 76 S. E. 438.

"Because the case was heard without a replication to their plea, defendants argue a reversal must ensue. No formal pleas were filed, nor were they necessary. The adult defendant appeared at rules and entered her plea 'not guilty;' and the infant defendant, by guardian ad litem, tendered the same plea in open court. The record shows no other pleading, nor any joinder of issue on the pleas." *Weekley v. Weekley*, 75 W. Va. 280, 284, 83 S. E. 1005.

(6) Indictment or Information.

Defective Indictment.—Although no demurrer was interposed, or motion in arrest of judgment made, if the indictment is so defective that it could not be properly prosecuted a judgment thereon will be reversed. *State v. Dolan*, 58 W. Va. 263, 52 S. E. 181.

(7) Amendments.

Amendment after Verdict.—Where a jury awards as damages in an action on a contract a sum slightly in excess of that demanded by the declaration, the excess being explainable as interest to cover the time between the dates of the accrual of the cause of action and the trial of the case, an amendment of the declaration after verdict increasing the amount demanded to a sum sufficient to cover the verdict is not prejudicial to defendant, because unnecessary, the verdict being proper if no amendment had been permitted. *Hallauer v. Fire Ass'n*, 83 W. Va. 401, 98 S. E. 441.

Amendment Permitted against Defendant Whose Demurrer Was Sustained When Case Was Remanded to Rules as to Other Defendants.—A decree sustained the demurrer of one defendant to a bill and adjudged, ordered and decreed that the bill of complainants be remanded to rules to be matured as to the other defendants. At the next term, an amended bill was filed by leave of court, to which the defendant, whose demurrer had been sustained, objected on the ground that the decree was a final decree, and ended the case as to him, so that he was not affected by the leave given to file the amendment. Held: That the objection was without merit. *Matney v. Yates*, 121 Va. 506, 93 S. E. 694.

Permitting Filing of Amended Bill.—The exercise of the discretion of the trial court, in permitting an amended bill to be filed, will not be disturbed by an appellate court, except in cases of abuse of such discretion. *Floyd v. Duffy*, 68 W. Va. 339, 69 S. E. 993.

Error against the defendant in overruling an objection and allowing the amended bill to be filed is corrected by proceeding with the cause as if it had not been filed, and, as the plaintiff is not prejudiced thereby, he can not complain. *Carper v. Chenoweth*, 69 W. Va. 729, 72 S. E. 1031.

Where in point of fact a case was disposed of on issues raised on the original bill and answer, no notice being taken of the amended bill in the decree, defendants were not prejudiced by the action of the court in permitting the amended bill to be filed, and in not dismissing it on demurrer and answer. *Stewart v. Stewart*, 122 Va. 642, 95 S. E. 388.

Amended Bill Filed Later than Permitted by Order Granting Leave—Subsequent Recognition.—An order was entered at the August term of the lower court, reciting that an amended bill was filed by leave of court, and while the record indicated that it was not in fact filed until September following, this discrepancy, though indirectly adverted to, in the brief of counsel, was immaterial, as the amended bill was recognized and passed upon by the court at a still later term, and no question as to identity of the amendment appeared anywhere in the record. *Matney v. Yates*, 121 Va. 506, 93 S. E. 694.

Failure to Mature Amended Bill Unnecessarily Filed.—If, on appeal, it appears that the original bill is broad enough to admit the evidence and sustain the decree pronounced, the decree will not be reversed for failure to mature an amended bill, unnecessarily filed. *Floyd v. Duffy*, 68 W. Va. 339, 69 S. E. 993.

(8) Rulings on Demurrer.

Refusal to consider a properly interposed demurrer can not be ground for reversal, when the record shows that the demurrer was not well taken. *Gray v. Mankin*, 69 W. Va. 544, 545, 72 S. E. 648.

Where it is apparent that a case was tried on an amended declaration to which there was no demurrer and which stated a good cause of action, questions raised by a demurrer to the original declaration will not be considered in the supreme court. *Washington, etc., R. Co. v. Cheshire*, 109 Va. 741, 65 S. E. 27.

It is not proper to demur to a plea in equity, but if the plea has been properly dismissed the objection by demurrer may be treated as a motion to strike out the plea, and the ruling on the demurrer will be regarded as harmless error. *Sutherland v. Peoples Bank*, 111 Va. 515, 69 S. E. 341.

Overruling Demurrer.—If a demurrer to one count of a declaration containing several counts be improperly overruled, a verdict for the plaintiff must be set aside, unless the court can see that no prejudice did or could have resulted to the defendant from the error. *Newport News, etc., Elect. Co. v. Nicolopoulos*, 109 Va. 165, 63 S. E. 443.

If the good count or counts of a declaration, and the evidence thereunder be sufficient to support the verdict, the judgment thereon will not be vitiated by the error of the trial court, if any, in overruling the demurrer to a bad count, when it clearly appears that the defendant has not been prejudiced thereby. *Duty v. Chesapeake, etc., R. Co.*, 70 W. Va. 14, 73 S. E. 331.

Where a demurrer to faulty counts in a declaration has been overruled, the appellate court will not reverse for the error if all the evidence adduced for the plaintiff was admissible under a good count. *Laraway v. Croft Lumber Co.*, 75 W. Va. 510, 84 S. E. 333; *Hill v. Norton*, 74 W. Va. 428, 82 S. E. 363.

Generally, if a declaration in tort contains more than one count, some of which are good and others bad, and there is a demurrer to the whole declaration and each count thereof, it should be sustained as to the bad

counts, else a general verdict and judgment for the plaintiff will, as a rule, be set aside, as the verdict may have been founded on the faulty count. But where the count is satisfied that the defendant has not been prejudiced by the faulty count, the verdict ought not, for that cause only, to be set aside. So where it is manifest that the trial was had on a particular count and that is good, the appellate court will not concern itself with the insufficiency of other counts. *Virginia Cedar Works v. Dalea*, 109 Va. 333, 64 S. E. 41.

Where upon demurrer to a declaration, and to each count thereof, the demurrer is overruled, and it appears that one or more of the counts are bad, and that the demurrer should have been sustained thereto; yet when it clearly appears that no evidence was admitted, or relief given on the defective count, and that the rights of defendant were not prejudiced by the erroneous ruling of the court, the judgment will not be reversed solely on this ground. *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009.

If the count in an indictment on which a conviction is had, is good, it is immaterial whether a demurrer to other counts should have been sustained. If error is committed in overruling the demurrer, it is clearly not prejudicial to the accused. *State v. Hoke*, 76 W. Va. 36, 84 S. E. 1054.

Error Cured by Striking Out Counts.—Where a demurrer to a declaration as a whole was interposed on the ground of inconsistency between the grounds of action stated in the different counts and all of the counts but one were stricken out, on the motion of the plaintiff, after the evidence was introduced, the defendant could not have been hurt by overruling his demurrer to the declaration. *Washington-Virginia R. Co. v. Bouknight*, 113 Va. 696, 75 S. E. 1032.

(9) Issues, Proof and Variance.

See post, "Variance," XIV, H, 2, c, (h), (3).

Failure to Enter Plea and Join Issue.—The judgment of a circuit court in a case appealed from a justice will not be reversed for failure of the record to disclose entry of a plea and joinder of issue thereon. *Townsend v. Brushy Run Lumber Co.*, 75 W. Va. 47, 83 S. E. 185.

"As the record shows no entry of a plea by the defendant, the technical rule requiring reversal for such defect in the record, applied in common-law actions, as will be seen by reference to *Good v. Chester*, 65 W. Va. 13, 63 S. E. 615, and *Stevens v. Friedman*, 53 W. Va. 79, 44 S. E. 163." *Security Bank Note Co. v. Shrader*, 70 W. Va. 475, 74 S. E. 416, 418.

As a general rule, no judgment can be given upon a verdict rendered as upon the trial of an issue when no issue has been joined. Issue must first be joined on the pleadings. In the case at bar, no plea was filed. An order was made for the defendant to file a statement of his grounds of defense, but it was not complied with, and the trial proceeded as if issue had been joined. The plaintiff objected to the introduction of evidence by the defendant controverting his claim, but his objection was overruled. The plaintiff did all that he could to present the defect to the trial court, and hence is not estopped to rely upon the objection in the supreme court. *Colby v. Reams*, 109 Va. 308, 63 S. E. 1009.

c. Errors in Evidence.

(1½) In General.

Where Verdict Would Not Have Been Changed.—Error in admission or rejection of evidence will not be sufficient ground for reversal when it appears upon the whole case, including the admissions of the defendant, that the verdict would not have been changed, and ought to be affirmed. *State v. Boggs*, 87 W. Va. 738, 106 S. E. 47.

Rulings Unlikely to Effect Verdict Subject of Little Controversy.—Where

questions involved in bills of exceptions relating to the admission or exclusion of evidence which was unlikely to affect the verdict were the occasion of such little controversy in the lower court as that an apparently experienced court reporter and a careful and capable presiding judge did not discover during the trial that any serious point was being raised in regard to them, they ought not to be made the subject of reversal. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

Unsworn Testimony.—The error of the state corporation commission in receiving unsworn statements in a proceeding to determine the necessity for locating a crossing by one railroad over the track of another, is not ground for reversal of the action of the commission, unless the other evidence in the case is not sufficient to support its finding. *Norfolk, etc., R. Co. v. Tidewater R. Co.*, 105 Va. 129, 52 S. E. 852.

Order of Introducing Evidence.—The refusal of the trial court to allow further evidence in chief to be introduced after the evidence on both sides had been closed, will not be reviewed by the appellate court when no reason is shown for not having introduced it at the proper time. *Wilkie v. Richmond Tract Co.*, 105 Va. 290, 54 S. E. 43.

Irregularities in the Introduction of Evidence.—Unless there has been plain abuse of its discretion, prejudicial to the complaining party, the judgment of the trial court will not be reversed for irregularities in the manner in which it has permitted the parties to introduce their evidence in chief and in rebuttal. *American Canning Co. v. Flat Top Grocery Co.*, 68 W. Va. 698, 70 S. E. 756.

A party to an action can not call for reversal of judgment therein merely because evidence on behalf of the opposite party was not submitted in orderly sequence. *Painter v. Long*, 69 W. Va. 765, 72 S. E. 1092.

Condition as to Introduction of Evidence.—Requiring defendant in error to waive his bill of exceptions to the action of the trial court in setting aside a former verdict in his favor, as a condition to the introduction of evidence, was harmless where the defendant in error was successful at the present trial. *McClung v. Folkes*, 122 Va. 48, 94 S. E. 156.

Where evidence is admissible for a particular purpose, it is not reversible error to admit it without restricting it to that purpose, if the objection to its admissibility is general. *Schaubach v. Dillemoth*, 108 Va. 86, 60 S. E. 745.

Requiring Production of Evidence.—In an employee's action for injuries it was harmless error to require the production of a contemporaneous written statement of an employee concerning the accident who was examined as a witness by the defendant, when the statement is not contradictory, but tends to corroborate the testimony of the witness. In such case it would not be prejudicial to the defendant to allow the admission of evidence in the effort to develop the whole truth of the matter under investigation. *Chesapeake, etc., R. Co. v. Swartz*, 115 Va. 723, 732, 80 S. E. 568.

Refusal to Quash Summons Duces Tecum.—A defendant who not only relies upon, but insists that the plaintiffs are bound by the data given in its answer to summons to produce books and papers under § 3371 of the Code but introduces witnesses in its own behalf to prove the same facts, is not prejudiced by the refusal of the trial court to quash said summons. *Norfolk, etc., R. Co. v. Steele & Son*, 117 Va. 788, 86 S. E. 124.

Inspection of Books in Evidence.—The president of plaintiff bank was in court with certain books and papers pursuant to a summons issued against him. Before announcing ready for trial, defendant moved the court to require the plaintiff to allow him to in-

spect these books and papers before putting them in evidence. The plaintiff objected and the court sustained the objection. Held: That the question became moot and immaterial, in view of the fact that counsel did subsequently introduce the witness who had custody of the books and papers which were produced, the witness fully examined with reference to them, the defendant getting the benefit of everything material which they contained. *Duncan v. Broadway Nat. Bank*, 127 Va. 34, 102 S. E. 577.

Requiring Witness to Be Sworn in Order to Identify Books Produced Pursuant to Subpoena Duces Tecum.—In a proceeding by motion for judgment on certain notes a subpoena duces tecum was issued for the plaintiff, the president of the corporation, in payment for whose stock the notes were given, to produce certain books and papers of the company, and in the same subpoena he was summoned to testify on behalf of the defendant. In response to the subpoena, plaintiff appeared with books and papers. The defendant asked liberty to examine the books and papers, but objection was made unless plaintiff was first sworn as witness, and the objection was sustained. Held: In view of the limited extent of the cross-examination to which plaintiff would have been subjected, and as the trial court offered to give counsel for the defendant time and opportunity to examine the books after the swearing of the plaintiff, the defendant could not have been hurt by the ruling requiring plaintiff to be sworn, and the ruling was harmless error. *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

(1) Admission.

(a) In General.

Must Be Prejudicial to Complainant.—The admission of evidence is not ground for reversal where it clearly appears that the objector was not preju-

diced thereby. *Browder v. Southern R. Co.*, 107 Va. 10, 57 S. E. 512; *McCrary v. Thomas*, 109 Va. 373, 63 S. E. 1011; *Barnes v. Crockett*, 111 Va. 240, 68 S. E. 983; *Newman v. McComb*, 112 Va. 408, 71 S. E. 624; *Chesapeake, etc., R. Co. v. Chapman*, 115 Va. 32, 39, 78 S. E. 631; *Adams Exp. Co. v. Allendale Farm*, 116 Va. 1, 81 S. E. 42; *Baltimore, etc., R. Co. v. Hudgins*, 116 Va. 27, 81 S. E. 48; *Norfolk, etc., R. Co. v. Perdue*, 117 Va. 111, 83 S. E. 1058; *State v. Gebhart*, 70 W. Va. 232, 244, 73 S. E. 964; *Wigal v. Parkersburg*, 74 W. Va. 25, 33, 81 S. E. 554.

Substantial Prejudice Necessary for Reversal.—Ruling by the trial court on the admissibility of evidence will not constitute sufficient ground for the reversal of a judgment, unless the appellate court is able to perceive substantial prejudice resulted therefrom. *State v. Farley*, 78 W. Va. 471, 89 S. E. 738.

Error Must Be Plain.—The rule that a court will not interfere with the action of the lower court in admitting evidence, unless it can see that the court below clearly erred, is applicable to the admission of dying declarations. *State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

Incompetent Evidence.—The admission of incompetent evidence over objection will not reverse a judgment when it is clear that such error could have worked no prejudice to the exceptor. *Loverin, etc., Co. v. Bumgarner*, 59 W. Va. 46, 52 S. E. 1000.

Mere formal objections to depositions, as that they were not properly certified, will not be considered on appeal when it cannot be seen that any harm was done by their admission in evidence, and there was no objection to the evidence contained in them. *Burton v. Seifert & Co.*, 108 Va. 338, 61 S. E. 933.

Introduction of Same Evidence by Complainant.—See post, "Relating to Evidence," XIV, H, 3, c, (2).

Particular Instance of Harmless Error.—See *Union Trust, etc., Co. v. Paulhamus*, 74 W. Va. 1, 81 S. E. 547.

In an action under the federal safety appliance act by a brakeman injured in coupling cars, testimony by the plaintiff that he did not knowingly keep his hand on the coupler of the engine as it moved towards the car, was harmless, if erroneous. *Chesapeake, etc., R. Co. v. Arrington*, 126 Va. 194, 101 S. E. 415.

On the trial of an indictment for breaking and entering a railroad car with intent to steal, and stealing certain railroad goods, the admission of evidence of the possession of other goods by defendant in the same room where the goods alleged to have been stolen were stored, and which the evidence tends to show were also stolen by defendant, does not constitute reversible error, in the absence of evidence showing that defendant was prejudiced thereby. *State v. Ringer*, 84 W. Va. 546, 100 S. E. 413.

In an action against an administratrix on a note where the defense was that the note was a forgery, executed as part of a general scheme of fraud, pursuant to which plaintiff had forged not only the note in question, but notes on other parties, the mere fact that plaintiff had shown a witness a note signed by defendant's intestate, unaccompanied by anything to impeach its genuineness, was immaterial, and should have been excluded. It was harmless, however, because if there was any inference to be fairly drawn from it, that inference would have been that the defendant had made a charge against the plaintiff which she was unable to support by proof. *Ely v. Gray*, 125 Va. 708, 100 S. E. 660.

In an action by seller for the purchase of sewing machines, which buyer was induced to purchase by the fraudulent representations of seller's agent in regard to a scheme to aid the buyer in reselling the machines, the personal

guaranty of the agent of the reselling scheme, while not admissible for the purpose of varying or contradicting the contract of sale, was admissible as a part of the *res gestae*—the attending circumstances and conditions under which the contract was entered into. Even if it should not have been admitted, its admission was harmless, because the jury clearly understood that it is constituted no part of the contract. *White Sewing Mach. Co. v. Gilmore Fur. Co.*, 128 Va. 630, 105 S. E. 134.

If on the trial of an action under our civil damage act there be evidence that defendant sold intoxicating liquors to plaintiff's husband, contributing to his habits of inebriety, other evidence that he was intoxicated in defendant's saloon on a particular day, from liquors not proven to have been sold by him, though not very material, is not wholly irrelevant, and it is not reversible error to admit such evidence. *Greer v. Arrington*, 72 W. Va. 693, 79 S. E. 720.

Though evidence of plaintiff, admitted over defendant's objection, tends to contradict the evidence of one of the latter's witnesses, on a collateral matter and may not be good as impeaching evidence, nevertheless, if such evidence be good as evidence in chief, and as tending to support any of the issues, it is not reversible error to admit it. *Greer v. Arrington*, 72 W. Va. 693, 79 S. E. 720.

(b) Presumption as to Prejudicial Effect of Erroneous Admission.

The admission of illegal testimony presumptively prejudices the party against whom it is admitted, and is cause for reversal, unless it is apparent the jury's verdict could not have been influenced by it. *Wheeling Mold., etc., Co. v. Wheeling Steel, etc., Co.*, 62 W. Va. 288, 57 S. E. 826; *Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 219, 69 S. E. 700; *Ewers v. Montgomery*, 68 W. Va. 453, 457, 69 S. E. 907;

State v. White, 81 W. Va. 516, 94 S. E. 972; *Alford v. Kanawha, etc., R. Co.*, 84 W. Va. 570, 100 S. E. 402.

The reception of inadmissible testimony in a trial in which the properly admitted evidence is circumstantial and inconclusive and affords ground for a finding for either plaintiff or defendant, agreeably to the belief of the jury, is presumed to have been prejudicial and necessitates reversal. *State v. Tygart Valley Brew. Co.*, 74 W. Va. 232, 81 S. E. 974.

As a general rule, if the admission of illegal evidence may have been prejudicial, even though it is doubtful whether it was or not, it is reversible error, but the general rule is subject to the exception that if in such case there is a demurrer to evidence, and an alternative verdict, and, after disregarding upon such demurrer such illegal evidence introduced by demurree and treating the residue of the evidence as is proper under the rules applicable to demurrers to evidence, there is plainly enough evidence to sustain a judgment for the demurree, the admission of the illegal evidence will not reverse, otherwise it will. *Lane Bros. & Co. v. Bott*, 104 Va. 615, 52 S. E. 258.

If an accused may have been prejudiced by illegal evidence, even although it is doubtful whether he was or not, a judgment on a verdict of conviction should be reversed. *Haynes v. Commonwealth*, 104 Va. 854, 52 S. E. 358.

On Two Theories Verdict Set Aside, Where Improper Evidence as to One Is Admitted.—Where plaintiff's cause of action is based upon two separate theories of negligence upon the part of the defendant, one of which is supported only by improper evidence admitted over defendant's objection, and the court submits the same to the jury upon both of such theories, a verdict rendered in favor of the plaintiff will be set aside for the reason that it is impossible to tell upon which theory the verdict is based, it being as likely

that the jury based its verdict upon the theory supported only by improper evidence as upon the other. *Alford v. Kanawha, etc., R. Co.*, 84 W. Va. 570, 100 S. E. 402.

Illustrations.—In a condemnation proceeding when a false, speculative and conjectural basis of the value of the real estate, proposed to be taken, is permitted to go in evidence to the jury, over the objections of a party, it will be presumed that the objecting party was prejudiced thereby. *Railway Co. v. Davis*, 58 W. Va. 620, 52 S. E. 724.

The admission of irrelevant testimony, likely to enhance damages, is reversible error unless it plainly appears that the verdict is not in excess of the damages proved. *Rodgers v. Bailey*, 68 W. Va. 186, 69 S. E. 698.

Where it is material to determine whether a car was moving or standing still at the time of an accident, and the evidence is conflicting, if illegal evidence has been received on that point the verdict of the jury will be set aside, as the appellate court can not determine how far the evidence improperly admitted may have affected the minds of the jury in arriving at their verdict. *Blue Ridge Light, etc., Co. v. Price*, 108 Va. 652, 62 S. E. 938.

If a demurrer to a bad count in a declaration has been improperly overruled by the trial court, all evidence received under that count which was not admissible under any other count of the declaration, is improperly admitted, and the verdict of the jury must be set aside as the court can not tell on which count the verdict was rendered. *Clinchfield Coal Co. v. Wheeler*, 108 Va. 448, 62 S. E. 269.

In the instant case it was contended that the verdict was not excessive, and that therefore error in admitting evidence as to the financial condition of plaintiff was harmless. Held: That the admission of evidence of the character complained of must be presumed to have wrongfully affected the ver-

dict, and its admission compelled the defendant to submit to the result of a trial had in violation of a settled rule of evidence which it invoked and had the right to have enforced. *Washington-Virginia R. Co. v. Deahl*, 126 Va. 141, 100 S. E. 840.

If opinion evidence erroneously admitted bears upon the quantum of damages and the evidence pertaining to it is not so clear and conclusive as to enable the court clearly to see that the verdict is not excessive, the error is deemed to have been prejudicial and is cause for reversal of judgment. *Fisher v. Flanagan Coal Co.*, 86 W. Va. 460, 103 S. E. 359.

Opinion of Nonexpert.—It is error, and, for all this court can say, prejudicial error, to permit a purely conjectural nonexpert expression of opinion on a pivotal point in a case to go to the jury. *Virginian R. Co. v. Bell*, 118 Va. 492, 87 S. E. 570.

(c) Evidence Favorable to Complainant.

The admission of evidence whether competent or not which is not prejudicial but rather beneficial to the party complaining will not be grounds for reversal in the appellate court. *Bowls v. Virginia Soapstone Co.*, 115 Va. 690, 697, 80 S. E. 799.

A party to a suit can not complain that evidence was introduced by his adversary which was not competent, when the only inference to be drawn from such evidence is that the party introducing it is under a heavier obligation than that which the law imposes. *Schaffner v. National Supply Co.*, 80 W. Va. 111, 92 S. E. 580.

(d) Where Facts Established by Other Evidence.

The refusal of a motion to strike out improper evidence is harmless when subsequent undisputed evidence established the same facts. *Richmond v. Jackson*, 118 Va. 674, 88 S. E. 49.

A judgment will not be reversed be-

cause of the admission of improper evidence tending to prove a material fact in the case, where such fact is shown by competent evidence and is not controverted by the opposing party. *Starcher v. South Penn Oil Co.*, 81 W. Va. 587, 95 S. E. 28.

A witness testified in chief that, before the happening of the accident complained of, two men looked at the sewer alleged to have caused the accident and talked of being connected with the sewer department. On cross-examination the witness said she did not see these men or hear them talk, but that they were seen and heard by a lady next door. The defendant moved to strike out this evidence, but the trial court overruled the motion and "stated that it could not strike out evidence that had gone before the jury, but that if she did not see them it was not evidence." It was subsequently shown by the undisputed evidence that the sewer department did have notice of the sewer ditch before the accident, and that two men connected with the department did in fact go there as the witness had testified. Held: The motion to exclude should have been sustained in direct terms and not indirectly as was done, but in view of the subsequent undisputed evidence, it was not reversible error. *Richmond v. Jackson*, 118 Va. 674, 88 S. E. 49.

A defendant is not prejudiced by the introduction of evidence of excerpts from a deed where the deed is itself in evidence. *Selvey v. Grafton Coal, etc., Co.*, 72 W. Va. 680, 79 S. E. 656.

Other Evidence to Same Point without Objection.—Objections to evidence will not be considered in the supreme court, when the same facts were proved by another witness, without objection. *New York, etc., R. Co. v. Wilson*, 109 Va. 754, 64 S. E. 1060.

The trial court's action in refusing to exclude the offer of one defendant to compromise plaintiff's claim, elicited

on the cross-examination of the defendant, is not error, where substantially the same offer and others similar in character had already, and without objection, been testified to by a witness for plaintiff, one such offer having been designedly brought out in his cross-examination by defendant's counsel. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

Introduction of Similar Evidence by Complainant.—See post, "Relating to Evidence," XIV, H, 3, c, (2).

(e) Where Proper Result Reached.

Where the jury could not have properly found any other verdict than the one found, this court will not notice rulings of the trial court on the admission of evidence. *Adams Exp. Co. v. Allendale Farm*, 116 Va. 1, 81 S. E. 42; *Norfolk v. Southern R. Co.*, 117 Va. 101, 83 S. E. 1085.

An appellate court will not reverse the action of the trial court because of the admission of evidence where it appears to the court upon the whole case as presented and the admissions of the defendant the verdict ought to be confirmed. *State v. Miller*, 85 W. Va. 326, 329, 102 S. E. 303; *Tucker v. Colonial Fire Ins. Co.*, 58 W. Va. 30, 43, 51 S. E. 86.

(f) Evidence Not Changing Result of Trial.

The verdict of a jury will not be reversed on account of the admission of improper testimony when it clearly appears that, if such evidence had been excluded, the result could not have been changed. Such error is not prejudicial. *Newman v. McComb*, 112 Va. 408, 71 S. E. 624; *Delaware, etc., R. Co. v. Cotten*, 113 Va. 563, 75 S. E. 122; *Lester v. Simpkins*, 117 Va. 55, 83 S. E. 1062; *Glidewell v. Murray*, 81 W. Va. 587, 95 S. E. 28.

Where improper evidence has been State *v. Davis*, 68 W. Va. 142, 69 S. E. 639; *Starcher v. South Penn Oil Co., Lacy & Co.*, 124 Va. 563, 98 S. E. 665;

admitted, yet it is clear that it did not conduce to the verdict, and that the same verdict would have been and, in all fair probability, would have been given, and that there has been a fair trial on the case on its merits, the verdict should stand. *Lay v. Elk Ridge Coal, etc., Co.*, 64 W. Va. 288, 296, 61 S. E. 156.

(g) Where Verdict Authorized by Other Evidence.

See ante, "Where Proper Result Reached," XIV, H, 2, c, (1), (e); "Evidence Not Changing Result of Trial," XIV, H, 2, c, (1), (f).

Sufficient Competent Evidence.—

Where exceptions have been taken to the admission of evidence in the trial court but that unexcepted to is sufficient to sustain the judgment, the judgment will not be disturbed, as the evidence objected to could not have affected the result. *Delaware, etc., R. Co. v. Cotten*, 113 Va. 563, 75 S. E. 122.

Approval by Trial Court.—The error of trial court in improperly receiving evidence is harmless, where the verdict of the jury is supported by other sufficient evidence and was approved by the trial court. *Wilkes v. Wilkes*, 115 Va. 886, 80 S. E. 745.

A judgment by the court in lieu of a jury will not be reversed because of the admission of improper evidence when the judgment is nevertheless legally warranted. *Ewart v. New River Fuel Co.*, 68 W. Va. 10, 69 S. E. 300.

Commissioner in Chancery.—Admission of improper testimony by a commissioner in chancery, returned with his report, is not cause for reversal of a decree, if the appellate court finds sufficient admissible evidence to sustain the finding of the commissioner and the trial court as to the item to which the inadmissible evidence relates. *Cecil v. Clark*, 69 W. Va. 641, 72 S. E. 737.

(h) Irrelevant and Immaterial Evidence.

See ante, "In General," XIV, H, 2, c, (1), (a).

The answer of a witness which shows that he had no knowledge on the subject of inquiry, if error, is harmless. *Chesapeake, etc., R. Co. v. Christian*, 110 Va. 723, 67 S. E. 345.

Evidence of Little Value.—The admission of evidence which is without probative value is immaterial error. *Bowles v. Virginia Soapstone Co.*, 115 Va. 690, 80 S. E. 799.

Immaterial Evidence.—The admission of improper evidence is not cause for reversal, if it is immaterial in the decision of the case. *Scott v. Hughes*, 66 W. Va. 573, 66 S. E. 737.

A verdict of a jury will not be set aside because of the admission of irrelevant and immaterial evidence, where the court can see that such evidence was not prejudicial to the party complaining. *Tucker v. Colonial Fire Ins. Co.*, 58 W. Va. 30, 32, 51 S. E. 86.

Admission of proof as to immaterial, but wholly uncontradicted, fact, causing no controversy or confusion in the trial, nor any prejudice to any of the parties to the action, is harmless error. *Bank v. Lowry & Co.*, 81 W. Va. 578, 94 S. E. 985.

In an action for personal injuries the admission of testimony immaterial to the case cannot be injurious to the defendant, and, if erroneous, is harmless error. *Norfolk, etc., R. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879.

Many years prior to the fire plaintiffs had the complete equitable title to the property destroyed. Defendant excepted to the introduction of a deed to plaintiffs made after the action was brought. Held: That the action of the beneficial owner to recover damages for injury to the property by fire could have been maintained as well without the deed as with it. So that, even if the deed was erroneously admitted, the error was harmless.

Chesapeake, etc., R. Co. v. May, 120 Va. 790, 92 S. E. 801.

Where, in an action by a servant against his master for injuries, it must have been understood by everybody connected with the trial that the accident was due to the fact that a trolley was not properly placed, and that the sole question for determination was whether the defendant was liable to the plaintiff for a failure of duty in warning and instructing him in this particular, admission of testimony that the accident could not have taken place unless the machinery was defective, if erroneous, was harmless. *Du Pont Engineering Co. v. Blair*, 129 Va. 423, 106 S. E. 328.

Admission under Immaterial Issue.—Though evidence be admitted bearing on an issue not presented by the pleadings, yet if it also bear on another issue presented thereby, its admission will not constitute reversible error. Its application may be limited when requested by instructions to the jury. *Yates v. Crozer Coal, etc., Co.*, 76 W. Va. 50, 84 S. E. 626.

Evidence of Collateral Facts.—In a trial before a jury, admission in evidence of collateral facts, or those incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, does not constitute prejudicial error; although such facts if relevant would be inadmissible under § 23, chapter 130, West Virginia Code, as relating to personal conversations of communications with a deceased person. *Hollen v. Crim*, 62 W. Va. 451, 59 S. E. 172.

(i) Cure of Erroneous Admission.

aa. By Withdrawal and Instructions.

The rule is well settled that the error in the admission of improper evidence may be cured by a proper instruction to disregard it, but the withdrawal of the illegal evidence from the jury must be in direct and explicit terms. *Washington-Virginia R. Co.*

v. Deahl, 126 Va. 141, 100 S. E. 840; *Norfolk, etc., R. Co. v. Thomas*, 110 Va. 622, 66 S. E. 817. See *Richmond v. Jackson*, 118 Va. 674, 88 S. E. 49.

The jury are presumed to follow the direction of the court to disregard wrongly admitted evidence, at whatever stage of the case that direction may be given. *Taylor v. Commonwealth*, 122 Va. 886, 894, 94 S. E. 795.

"The authorities are not entirely in harmony upon the subject, but we think it may be said that the rule supported by the better reason and by the great weight of authority is, that where improper evidence has been admitted, in either a civil or a criminal case, the error is rendered harmless by the subsequent action of the trial court in striking out the evidence and specifically instructing the jury to disregard it, unless from the circumstances of the particular case there be reason to apprehend that such improper evidence has prejudiced the minds of the jury, in which latter event the error is reversible. 3 *Ency. Pl. & Pr.*, 520; 2 *R. C. L.*, § 206, 252; *Norfolk, etc., R. Co. v. Steele & Son*, 117 Va. 788, 798, 86 S. E. 124;" *Taylor v. Commonwealth*, 122 Va. 886, 894, 94 S. E. 795.

*A judgment ought not to be reversed for the admission of evidence which the court afterwards directs the jury to disregard unless there is a manifest probability that the evidence or statement has been prejudicial to the adverse party. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

The admission of evidence oral or documentary subject to future rulings of the court in the progress of the trial and subsequently stricken out and not allowed to be read or considered by the jury, does not constitute prejudicial error calling for reversal of the judgment, when it does not clearly appear that the objecting party has been prejudiced by such rulings of the court thereon. *Barna v. Gleason Coal Co.*, 83 W. Va. 216, 98 S. E. 158.

Striking Out Illegal Evidence.—A judgment ought not to be reversed for the admission of evidence which the court afterwards directs the jury to disregard unless there is a manifest probability that the evidence has been prejudicial to the adverse party. A different rule would result in fixing an intolerable handicap upon the nisi prius courts. *Washington, etc., Railway v. Ward*, 119 Va. 334, 89 S. E. 140; *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Refusal to strike out at the time it is offered objectionable evidence is not reversible error, if such evidence is subsequently stricken out upon a motion to exclude the plaintiff's evidence. *Hollen v. Crim*, 62 W. Va. 431, 59 S. E. 172.

Instruction Equivalent to Positive Exclusion of Improper Evidence.—

While improper evidence should be excluded, when offered, or, not having done this, the trial court should have told the jury in terms to disregard it, still no prejudice could have resulted where an instruction given was equivalent to a positive exclusion of such evidence. *Norfolk, etc., R. Co. v. Steele & Son*, 117 Va. 788, 86 S. E. 124.

Peremptory Instruction.—Inadmissible evidence, constituting the sole ground of defense, and erroneously let in over the objection of the defendant, does not preclude a peremptory instruction to find for the plaintiff. Though irregular and technically erroneous, such procedure is unavailing in the appellate court, since it is not prejudicial. *Erie Iron Works v. Miller Supply Co.*, 68 W. Va. 519, 70 S. E. 123.

Instance of Error Cured.—In an action by a servant for personal injuries sustained while working upon a trestle, there was no mention of ice in the declaration but the evidence showed the formation of ice on the trestle. After plaintiff had rested defendant moved to exclude the evidence in regard to the ice. The jury were in-

structed: "The court further instructs the jury if they believe from the evidence the plaintiff slipped on ice and this was the proximate cause of the injury they must find for the defendant." Held: Under these circumstances there was no error in the action of the court in this regard. *Danville v. Lipford*, 120 Va. 280, 91 S. E. 168.

In the instant case, where the dying declarations of a wife were admitted in evidence against her husband, upon his trial for assault on the wife, although her death was caused by her taking poison, a review of the evidence satisfied the Supreme Court of Appeals that the jury obeyed the instructions of the trial judge to disregard the dying declaration. It is not necessary to believe that the jury entirely effaced from their minds the fact that improper evidence had been introduced, and in the instant case there was abundant evidence upon which the verdict might have been found, if the declaration had not been introduced. *Taylor v. Commonwealth*, 122 Va. 886, 94 S. E. 795.

If a court permits an entire contract to be read to the jury, only parts of which are admissible in evidence, but instructs them that they are only to consider certain designated portions thereof, which are the admissible portions, it will be presumed that the jury obeyed the instructions of the court, and, in the absence of any evidence of prejudice to the rights of the parties in consequence of permitting the entire contract to be read to the jury, the verdict will not be set aside on that account. *Washington, etc., R. Co. v. Trimyer*, 110 Va. 856, 67 S. E. 531.

Error Not Cured.—In the instant case where evidence as to plaintiff's financial condition had been erroneously admitted, the error was not cured by an instruction that plaintiff could only recover damages which would actually compensate her for the injuries actually

sustained as the direct result of the accident, especially in view of an instruction for plaintiff that the jury might take into consideration her station in life, and mentioning her mental suffering as a proper element upon which to base a recovery; this element according to plaintiff's theory being necessarily aggravated by her lack of means. *Washington-Virginia R. Co. v. Deahl*, 126 Va. 141, 100 S. E. 840.

Where the trial court has improperly permitted jurors at a former trial to testify what was the condition at that trial of certain machinery which it is alleged caused the injury complained of, on the theory that the general manager of the defendant railroad company had admitted that its condition was the same when the accident occurred (when in fact no such admission had been made), the error is not cured by instructing the jury to disregard the testimony of such jurors if they believe that no such admission had been made. The only remedy for the original error in admitting the testimony based upon the false premise was to have unqualifiedly instructed the jury to disregard it. *Potomac, etc., R. Co. v. Chichester*, 113 Va. 333, 74 S. E. 162.

bb. By Other Evidence.

See ante, "Where Facts Established by Other Evidence," XIV, H, 2, c, (1), (d).

Error Not Cured.—Where the evidence discloses facts and circumstances which would have fully sustained a verdict for the defendant, based upon the plaintiff's contributory negligence, although no witness testified in terms that he was guilty of carelessness, it is error to admit evidence that he was a careful and cautious person. The error is not rendered harmless by the fact that the plaintiff testified positively to his own care and caution at the time. *Southern R. Co. v. Mason*, 119 Va. 256, 89 S. E. 225.

(j) Particular Kinds of Evidence.

Expert and Opinion Evidence.—

The admission of improper opinion evidence is not always ground for reversal. If a statement of inference, conclusion, or judgment is accompanied by the facts on which it is based, error in admitting it is usually harmless, since the jury can judge of its probative value. *Neeley v. Cameron*, 71 W. Va. 144, 75 S. E. 113; *Waldron v. Waldron*, 73 W. Va. 311, 80 S. E. 811.

Where the opinion of a witness, accompanied by the facts on which it is based, relates merely to the amount of damages suffered by personal injury, and it plainly appears that the jury acted on the facts and excluded the opinion in estimating the damages, the admission of the opinion will not call for reversal. *Neeley v. Cameron*, 71 W. Va. 144, 75 S. E. 113.

Expert evidence touching matters of common knowledge is not admissible, but if admitted it is harmless error. *Virginia Iron, etc., Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362.

Same—Where Opinions Coincide with Opposing Experts.—A party is not prejudiced by the opinion evidence of witnesses, not competent as experts, if their opinions coincide with the opinions of the experts testifying for the opposite party. *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S. E. 112.

Secondary Evidence.—Copies of invoices of the goods alleged to be stolen, offered in evidence to identify the property and verified by affidavits thereto attached, furnish no ground for reversal of a judgment of conviction, when it appears that such invoices were proven to be true copies of the originals, by a witness who was present at the trial and testified that he had compared them with the originals and found them to be true copies thereof. *State v. Hoke*, 76 W. Va. 36, 84 S. E. 1054.

The improper admission in evidence of copies of letters of such nature that their admission in evidence could not

have prejudiced the party objecting thereto nor have influenced the verdict of the jury does not constitute reversible error. *Davis v. Cole Bros.*, 115 Va. 501, 79 S. E. 1033.

Declarations of One Indicted with Accused.—In a prosecution for homicide, the court refused to exclude the statements one indicted jointly with defendant made a short while before the killing, ordering two boys to "get away from here." The statements were not objected to when offered, because defendant had expected that the Commonwealth would in some way connect the party indicted jointly with him with the alleged offense. No connection was subsequently shown, and there was no evidence that defendant heard the boys ordered away, or in any way assented to or acquiesced in the alleged statements. Held: That while the statements testified to were wholly irrelevant to the issue, and should have been excluded, the error was harmless, as the defendant could not have been prejudiced in any way by them, as it appeared that he was in no way connected with them. *McCoy v. Commonwealth*, 125 Va. 771, 99 S. E. 644.

Declaration Made Several Years before Trial.—Evidence of verbal admissions ought to be received with great caution because of the liability of witnesses to mistake or misunderstand the admissions when made, and to remember inaccurately or to misrepresent it afterwards. This rule applies with peculiar force where such evidence is to affect the rights of third persons. Where the declarations were made in a casual conversation five or six years before the witness testified, and do not appear to have been distinctly remembered or precisely identified, the ruling of the trial court in admitting them ought not to constitute reversible error. *Metropolitan Life Ins. Co. v. O'Grady*, 115 Va. 830, 80 S. E. 743.

Written Statement.—The admission

on a witness's cross-examination of a prior written statement made by him which, though put in on the theory of self contradiction, is consistent with what the witness stated in chief, can not be prejudicial to the party offering the witness even if improperly admitted. *Cheeks v. Virginia-Poconhontas Coal Co.*, 74 W. Va. 553, 82 S. E. 756.

The improper admission of the declarations or statements of a servant which could not have been prejudicial is not cause for reversal. *Washington etc., Railway v. Carter*, 117 Va. 424, 85 S. E. 482.

Loss and Contents of Written Documents.—While the loss and contents of a warrant offered in evidence and connected with a legal proceeding should ordinarily be proved by the legal custodian of such paper, rather than by other witnesses, yet if the fact and contents of such paper otherwise sufficiently appear from other parts of the record to which the paper belongs, admitted in evidence, the admission of the evidence of such other witnesses will not constitute reversible error. *Howell v. Wysor*, 74 W. Va. 589, 82 S. E. 503.

Ordinance of City.—"The fifth assignment of error challenges the authentication of the ordinance of the town of New Castle, upon which warrants for the arrest of the prisoner were based. It is true that the records of the council were kept in a crude and careless manner in an account book or ledger which had been used for other purposes and contained matter other than the by-laws and ordinances, and, moreover, that a sheet of type-written matter, concerning the business of the town, was injected between the by-laws and ordinances and the certification and signatures of the clerk and mayor. But, considering the record as a whole, we think it contains a sufficient authentication of the passage of the ordinance in question, and

was properly admitted in evidence." *Looney v. Commonwealth*, 115 Va. 921, 930, 78 S. E. 625.

Evidence of Threats.—Evidence of defendant's threat against the property of another in connection with a threat made against the one at whom the fatal shot may have been aimed does not constitute reversible error. *State v. Davis*, 74 W. Va. 657, 658, 82 S. E. 325.

Complainant's Deposition as to Wife's Cruelty—Decree of Divorce Based on Adultery.—In a suit for divorce on the grounds of cruelty and adultery, the reading of the deposition of the complainant was assigned as error. It was conceded that the witness would have been competent if the suit had been based solely on the charge of cruelty, but it was contended that as he was not competent to testify upon the charge of adultery, he was incompetent for all purposes. The deposition, with the exception of a statement by witness that he had not condoned his wife's infidelity, dealt entirely with the charge of cruelty, and the decree complained of was based solely on the charge of adultery. Held: That as the statement, which tended to negative condonation, might be disregarded without affecting the correctness of the decree, the question of the competency of the witness was immaterial. *White v. White*, 121 Va. 244, 92 S. E. 811.

(2) Exclusion.

(a) In General.

Must Be Prejudicial to Complainant.—The ruling of the trial court on the rejection of evidence is not ground for reversal where it clearly appears that the objector was not prejudiced thereby. *Baltimore, etc., R. Co. v. Hudgins*, 116 Va. 27, 81 S. E. 48; *Smith v. Stanley*, 114 Va. 117, 122, 75 S. E. 742; *Sayre v. Woodyard*, 66 W. Va. 288, 66 S. E. 320.

Record Must Show Prejudice.—Error in sustaining objections to questions propounded a witness will not be avail-

able here, unless the record affirmatively shows that the complaining party has been prejudiced thereby. *National Valley Bank v. Houston*, 66 W. Va. 336, 66 S. E. 465.

The party complaining in the appellate court of the rejection of evidence by the court below must state the facts or evidence in the bill of exceptions, from which it must appear affirmatively to the appellate court that he was prejudiced. *Taylor v. Boughner*, 16 W. Va. 327; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575; *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981. Without prejudicial error thus made to appear, the court cannot reverse the judgment on this ground. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 708, 59 S. E. 634. See post, EXCEPTIONS, BILL OF.

Expected Answer Must Be Disclosed to Court.—Refusal of the court to permit a witness to answer a question which by its own terms and subject matter, taken in connection with facts and circumstances already in evidence, shows its relevancy and materiality, is not available as prejudicial error on a motion for a new trial, if the expected answer of the witness was not disclosed to the court at the time of the ruling. An appellate court, in reviewing a judgment on writ of error, cannot assume, in such case, that an answer favorable to the exceptor would have been given. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634, approving *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981, and disapproving *Gunn v. Ohio River R. Co.*, 36 W. Va. 165, 14 S. E. 465.

Where a verdict in accordance with excluded testimony could not be sustained a judgment will not be reversed for such exclusion. *Koch v. Wyllie China Co.*, 80 W. Va. 331, 92 S. E. 656.

Witness Not Qualified to Answer Question.—The judgment of a trial court will not be reversed for refusing to permit a witness to answer a question where it is clear that the witness did not have the requisite knowledge of the

subject about which he was being interrogated, and the interrogator was not prejudiced by the action of the trial court. *Stokes v. Southern R. Co.*, 104 Va. 817, 52 S. E. 855.

Incomplete and Insufficient Evidence.

—It is not erroneous to reject relevant and material, but incomplete and insufficient, evidence of a defense, in the absence of disclosure of purpose and intent to supplement it with additional evidence tending to establish the elements of the defense the proffered evidence does not tend to prove. *Bowyer v. Continental Casualty Co.*, 72 W. Va. 333, 78 S. E. 1000.

A plaintiff having obtained an instruction from the court "that the only question as to the sufficiency of the advertisement was the good faith of the plaintiff in selecting the method in which it was made" is not prejudiced by the refusal of the court to hear evidence that the same land afterwards brought a less price at a public sale largely advertised. *Mundy v. Garland*, 116 Va. 922, 923, 83 S. E. 491.

(b) Presumption as to Prejudicial Effect of Erroneous Exclusion.

When a party offers evidence which he is entitled to introduce to maintain the issue on his part and it is excluded it will be presumed that he was prejudiced thereby and will work a reversal of the judgment, unless it clearly appears from the whole record that such evidence if it had been admitted could not have changed the result. *State v. Cremeans*, 62 W. Va. 134, 135, 57 S. E. 405; *Davidson v. Watts*, 111 Va. 394, 69 S. E. 328, citing *Kimball v. Borden*, 95 Va. 203, 207, 28 S. E. 207. See *Fairview Fruit Co. v. Brydon & Bro.*, 85 W. Va. 609, 102 S. E. 231.

When an issue has been determined by a jury on conflicting evidence, the appellate court can not undertake to say that the result would have been the same if material and competent evidence excluded at the trial had been

admitted. *Painter v. Long*, 69 W. Va. 765, 72 S. E. 1092.

On a trial in which the evidence affords a basis for a finding for either of the parties, according to the belief of the jury as to what the evidence proves, the refusal of the court to admit proper evidence and the giving of an erroneous instruction are presumed to have been prejudicial and necessitate reversal and the award of a new trial. *Ohio Valley Bending Co. v. Pickens*, 74 W. Va. 303, 81 S. E. 1041.

If plaintiff's evidence is sufficient to warrant the jury in finding a verdict upon it, it is error to exclude it. *Findley v. Coal, etc., R. Co.*, 72 W. Va. 268, 78 S. E. 396.

In a prosecution under § 3780a, Code of 1904, as amended by Acts of 1910, p. 18, 3 Pollard's Supp., § 3780-a, it was contended that as the fine was comparatively small, error in rejecting evidence of the truth of the insulting words used by defendant in mitigation of the punishment should not be regarded as prejudicial. But as the amount of the fine imposed was materially larger than the minimum fixed by the statute, the supreme court of appeals could not say that the error was harmless. *Byrd v. Commonwealth*, 124 Va. 833, 98 S. E. 632.

In an action by a real estate company to recover damages against an executor for breach of an alleged parol contract, whereby plaintiff was to have the exclusive right of selling a tract of land of executor's decedent for a stipulated compensation, the refusal of the trial court to permit the recall of decedent's widow in order that she might testify that she heard her husband say to plaintiff's agent as he left the house, "I will consider your proposition and let you hear from me," was reversible error under all the circumstances of the case.

Robertson v. Atlantic, etc., R. Co., 129 Va. 494, 106 S. E. 521.

(c) Where Facts Sought to Be Proved Are Proved by Other Evidence.

It is competent for a party to a suit to show the bias of an adverse witness, and to prove any fact affecting his credibility before the jury, and to ask the witness questions for this purpose; but the refusal to permit such questions to be asked is not reversible error where the other evidence in the case was sufficient to disclose to the jury the state of mind and feeling of the witness. *Norfolk, etc., R. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879.

Where a witness who has made certain official reports testified as to all pertinent or material facts contained in the reports, if there was any error in refusing to admit the reports, which could only be upon the theory that they had some additional sanction because they were alleged to be official reports, the error was clearly harmless. *Stuart v. Smith-Courtney, Co.*, 123 Va. 231, 96 S. E. 241.

Where the plaintiff, in an action against a railroad company for an assault and battery upon him by a brakeman, testifies that he was very drunk when he boarded the train, the exclusion of testimony as to his drunken and disorderly condition before boarding the train is not reversible error. *Norfolk, etc., R. Co. v. Brame*, 109 Va. 422, 63 S. E. 1018.

(d) Subsequent Introduction of Rejected Evidence.

Error in rejection of evidence fully cured by the subsequent testimony of the witness admitted will not justify reversal. *Yates v. Crozer Coal, etc., Co.*, 76 W. Va. 50, 84 S. E. 626; *Hillcary v. Hubbell*, 119 Va. 123, 89 S. E. 111.

Exceptions taken to ruling rejecting evidence will not be considered

where it appears that the questions were afterwards asked the witness and he was permitted to answer them without objection. *Life Ins. Co. v. Hairston*, 108 Va. 832, 62 S. E. 1057.

In an action on a life insurance policy it is not error to exclude from the jury the sworn statement of the attending physician in a proof of death as to the cause of death of the insured where death resulted from a gun-shot wound, and the physician knew no more about what caused it than anyone else who saw the dead body. But, even if such exclusion was error, it was harmless in the case at bar, as the physician was subsequently put upon the stand, and all he knew upon the subject was put completely and effectually before the jury. *South Atlantic Life Ins. Co. v. Hurt*, 115 Va. 398, 79 S. E. 401.

(e) Exclusion of Testimony That Would Not Have Changed Result.

The supreme court will not reserve a case for the exclusion of evidence by the trial court which could not have affected the result. *Lynchburg Milling Co. v. National Exch. Bank*, 109 Va. 639, 64 S. E. 980; *Barnes v. Crockett*, 111 Va. 240, 68 S. E. 983; *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087; *Norfolk v. Southern R. Co.*, 117 Va. 101, 83 S. E. 1085; *Thompson v. Camper*, 106 Va. 315, 55 S. E. 674; *Bugg v. Seay*, 107 Va. 648, 60 S. E. 89.

Exclusion of Deposition—Consideration by Commissioner and Appellate Court.—The exclusion by the court below of a deposition of a witness is harmless, there being nothing to indicate that the commissioner did not consider the deposition in making up his report; and, the appellate court having considered it, being of the opinion that it could not in any event have properly changed the result. *Maddux v. Buchanan*, 121 Va. 102, 92 S. E. 830.

(f) Irrelevant and Immaterial Evidence.

The exclusion of evidence wholly immaterial to the issue before the jury is not ground for reversal. *Bowles v. Virginia Soapstone Co.*, 115 Va. 690, 697, 80 S. E. 799.

Evidence without Probative Value.

—It is proper to reject evidence having no probative value in the determination of any of the material issues. *Walters v. Appalachian Power Co.*, 75 W. Va. 676, 84 S. E. 617.

Evidence Not to Determination of Case.—A plaintiff having obtained an instruction from the court "that the only question as to the sufficiency of the advertisement was the good faith of the plaintiff in selecting the method in which it was made" is not prejudiced by the refusal of the court to hear evidence that the same land afterwards brought a less price at a public sale largely advertised. *Mundy v. Garland*, 116 Va. 922, 83 S. E. 491.

Exclusion under Immaterial Issue.

—In an action for personal injuries where the verdict was for the defendant, the plaintiff could not have been prejudiced by the exclusion of evidence relating solely to the quantum of damages, and hence such exclusion is not assignable error. *Going v. Norfolk, etc., R. Co.*, 119 Va. 543, 89 S. E. 914.

(g) Verdict Curing Error.

An appellate court will not reverse the action of the trial court because of the rejection of evidence where it appears to the court upon the whole case as presented and the admissions of the defendant the verdict ought to be confirmed. *State v. Miller*, 85 W. Va. 326, 329, 102 S. E. 303; *Tucker v. Colonial Fire Ins. Co.*, 58 W. Va. 30, 43, 51 S. E. 86. See *National Union Fire Ins. Co. v. Burkholder*, 116 Va. 942, 945, 83 S. E. 404.

Where it appears that there was no

sufficient reason for a pedestrian's leaving the sidewalk and walking in an adjacent paved gutter, and the jury have rightly so found under instructions from the court, this court will not undertake to review the rulings of the trial court in rejecting evidence offered by the plaintiff, as to the city's having repaired the place in the gutter where the plaintiff was injured, or that others had fallen into the same or similar openings in the gutter. As there could have been no other verdict rightly found than what was found, the proffered evidence was immaterial. *Mitchel v. Richmond*, 107 Va. 193, 57 S. E. 570.

(h) Particular Instances of Harmless Error.

In a case in which the person, inflicting injury upon a passenger, is both a public officer and a servant of the carrier, and his status as such officer has been established by one mode of appointment or election, it is not reversible error to exclude evidence of appointment or election to the same office, or an office carrying the same power and authority, by another mode of conferring title, since no injury or prejudice could result from such error. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

In an action of unlawful entry and detainer, it is not reversible error to refuse to allow the introduction, by the defendant, of a deed or contract showing he does not own, and is not in possession of, a portion of the land sued for. *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 53 S. E. 409.

Exclusion of Evidence of Fraud.—

The refusal of the court on the trial of an action on a negotiable instrument to accept a mere general offer by defendant to show fraud, without at the same time offering to show the facts constituting the fraud, will not constitute reversible error.

Interstate Finance Co. v. Schroder, 74 W. Va. 67, 68, 81 S. E. 552.

Expert Testimony.—When in a suit contesting a will for the alleged incompetency of the testator to make a valid will, the proof of the facts and circumstances founded on the personal observations of the witnesses for the proponents is such as to show beyond doubt the competency of the testator, the mere opinion evidence of medical experts upon hypothetical questions, if properly propounded by contestants, is entitled to but little weight, and its rejection will not be good ground for reversing a judgment in accordance with the verdict of the jury that the instrument in question was in fact the true last will and testament of the testator. *Holmes v. West*, 81 W. Va. 326, 94 S. E. 378.

It is not reversible error to exclude expert testimony presenting a possible, but highly improbable, theory, not based on any particular facts in support thereof, especially if such testimony conflicts with other direct testimony negating such theory. *Wigal v. Parkersburg*, 74 W. Va. 25, 26, 81 S. E. 554.

The exclusion of the record in an action of trespass wherein defendant recovered judgment against plaintiff for a trespass upon the land in controversy in a proceeding to determine boundaries under Acts 1912, p. 133, is harmless, where, although defendant introduced testimony to the effect that he claimed title to the land in controversy by adverse possession, there was no evidence for defendant tending to show such adverse possession for the statutory period. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

(3) Variance.

Immaterial Variance.—Where, in an action for injury to real estate, the lot injured is in part defectively described by location, yet if the declaration, when read in its entirety, substantially locates it as proved, the variance, if any,

is immaterial, and neither party is prejudiced thereby. *Wallace v. Chesapeake, etc., R. Co.*, 73 W. Va. 347, 80 S. E. 499.

The declaration by a passenger in an action for injuries sustained, alleged that the accident was due to want of proper control of the car and timely application of the brakes. Objection was made to the introduction of evidence under these allegations showing that the controller of the car broke. While perhaps it would have been more regular for the court to have required the plaintiff to amend the declaration, yet as no continuance was asked for on the ground of surprise, and the motor-man whom it was claimed had made the statement as to the breaking of the controller was present, the error, if any, was harmless. *Washington-Virginia R. Co. v. Deahl*, 126 Va. 141, 100 S. E. 840.

Cure of Error.—Where a bill of particulars filed with a declaration in an action of assumpsit contains items not covered by the averments of the declaration, it is improper to admit proof as to such claims; but the error so committed is cured or rendered harmless by an amendment to the declaration, subsequently filed, including such items, if it appears that defendant was not prejudiced thereby. *Napier v. Mozena Coal Co.*, 86 W. Va. 220, 103 S. E. 125.

(4) Rulings on Questions to Witnesses.

Leading Question.—Great latitude is allowed trial courts in the matter of the examination of witnesses and their rulings thereon will not be reversed unless clearly prejudicial to the party excepting. Ordinarily, permitting a leading question to be asked is no ground for reversal. *Abernathy v. Emporia Mfg. Co.*, 122 Va. 406, 95 S. E. 418; *Smith v. Stanley*, 114 Va. 117, 125, 75 S. E. 742.

Asking Questions Which Witness Could not Specifically Answer.—Where the declaration in an action for a

personal injury alleged that the injury hindered and prevented, and would in the future hinder and prevent, the plaintiff (who was the proprietor of a grocery store) from transacting his necessary business affairs, but did not otherwise claim any special damages, the fact that the plaintiff was asked a series of questions about the effect on his business which he could not specifically answer, could not have operated to the prejudice of the defendant, and the verdict of the jury will not, on that account, be set aside. *Washington Luna Park Co. v. Goodrich*, 110 Va. 692, 66 S. E. 977.

Asking Accused as to United States License.—Upon the trial of a warrant charging an unlawful sale of liquor, the defendant cannot be asked if he has not a "United States license for the retail of liquor," but if the question be asked over the defendant's objection, and the court informs the defendant that he is not bound to answer, and instructs the jury that no inference or deduction can be drawn by them against the defendant from his refusal to answer, the propounding of the question is not reversible error. *Harding v. Commonwealth*, 105 Va. 858, 52 S. E. 832.

Cross-Examination. — In cross-examining a witness defendant's counsel said: "I know, Mr. Turner, this situation myself, and there are others who know it, and I want to ask you to see if we coincide." Held: That, this could not have prejudiced the plaintiff. *Abernathy v. Emporia Mfg. Co.*, 122 Va. 406, 95 S. E. 418.

In the cross examination of a witness counsel should not indulge in critical or satirical remarks as to the conduct of the witness while testifying, but where no objection is taken by the opposite party to such conduct, and the court immediately requires counsel to desist from making such remarks, and he does so, it is not ground for reversal. *State v. Alic*, 82 W. Va. 601, 96 S. E. 1011.

Refusal to Permit Cross-Examination.—In an action for damages from fire, plaintiff testified in detail as to the amount of his damages. Upon cross-examination he was asked how much did he pay the other heirs for their three-fourths interest in the property subject to his mother's dower. His motive in purchasing from the other heirs was to provide his mother with a home. Held: That even if there was a doubt as to whether the trial judge properly exercised his discretion in sustaining an objection to this question, the error was harmless. *Norfolk Southern R. Co. v. Fentress*, 127 Va. 87, 102 S. E. 588.

This court will not reverse a judgment of conviction merely because the trial court refused to permit a detective, engaged to procure evidence in a criminal prosecution, to state as a witness, on cross-examination, what monthly salary he received from the agency which employed him. *State v. Huff*, 80 W. Va. 468, 92 S. E. 681.

Same—Cure of Error.—Error, if any, in denying proper cross-examination, will not be regarded here, when it appears, as in this case, that such error was fully cured by proper cross-examination of the witness permitted on his subsequent recall. *Kelley v. Aetna Ins. Co.*, 75 W. Va. 637, 84 S. E. 502.

Same—Prejudicial Error.—Where a witness has made previous statements in the form of answers to questions propounded to him in the presence of witnesses, respecting a matter as to which he is examined as a witness in the trial of a case, and such statements are taken down by a stenographer, when made, and thereafter transcribed by him, but not read to, or signed by the witness, and, during the examination of such witness for the purpose of laying a foundation for impeaching him, certain of the questions and answers thereto which apparently contradict his testimony are read over to him, and he is asked if he made them and he fails to recollect, and the whole of such

statement is not offered in evidence, it is prejudicial error to refuse opposing counsel an opportunity to examine the paper for the purpose of enabling him to conduct an intelligent cross-examination of the impeaching witness. *State v. Worley*, 82 W. Va. 350, 96 S. E. 56.

The propounding of questions by the prosecuting attorney, on cross-examination of a prisoner on a trial for homicide, suggestive of other crimes committed by him, objections to which are promptly sustained by the trial court, and to which no answers are required or given, and no comments of counsel allowed thereon, does not constitute reversible error. *State v. Davis*, 74 W. Va. 657, 658, 82 S. E. 525, distinguishing *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676.

d. Errors Occurring at the Trial.

(1) In General.

Refusal to Order Jury from Another County.—The ruling of the trial court, refusing to order a jury from another county to try a criminal case will not be reversed when it appears that an impartial jury was in fact obtained in the county fixed for the trial. *Wright v. Commonwealth*, 114 Va. 872, 77 S. E. 503.

Prior Service as Juror.—Where there is no evidence to show that the accused was not tried by an impartial jury, the mere fact that members of the same panel which tried the defendant for unlawfully selling intoxicating liquors had, at the same term of the court, tried similar cases, proved by the same witnesses who testified against the defendant, does not of itself constitute error. *Fletcher v. Commonwealth*, 106 Va. 840, 56 S. E. 149.

Rejecting Qualified Juror.—The exclusion of a juror for insufficient cause is not reversible error, if the twelve who are finally chosen to try the case are legally qualified. *Pardee v. Johnston*, 70 W. Va. 347, 74 S. E. 721.

Direction to Amend Verdict.—An oral direction by the court to the jury, after returning a verdict of guilty as charged in the indictment, to return to their room and find the degree of the crime, is not violative of the statute, nor does such direction of the court constitute reversible error. *State v. Davis*, 74 W. Va. 657, 658, 82 S. E. 525.

Reading of Will.—The fact that the reading of a will in evidence was unnecessary and entailed a useless expense does not constitute reversible error. *Newton v. White*, 115 Va. 844, 80 S. E. 561.

Refusal to Allow Statement of Attorney. — Where on a trial for homicide objection is made to a question propounded to the prisoner it is not error for the trial court to refuse to allow counsel to state in the presence of the jury what he proposes to prove by the prisoner in answer to a leading question respecting his belief or intent at the time he dealt the deceased the fatal blow. *State v. Alderson*, 74 W. Va. 732, 82 S. E. 1021.

Allowing Credit on Claim.—The action of the trial court in allowing a credit on a plaintiff's claim will not be set aside on the ground that the plaintiff conceded the credit as a compromise, unless the evidence is such as to show that the trial court plainly erred in allowing the credit. *Mitchell Transparent Ice Co. v. Triumph Elect. Co.*, 116 Va. 725, 82 S. E. 730.

Demurrer to the Evidence — Time of Writing Out Demurrer.—In an action against a carrier for delay in delivery of goods shipped, after all the evidence had been introduced, counsel for defendant demurred to the evidence, and it was agreed by counsel that the demurrer might be written out later, and the plaintiff joined therein. After counsel for plaintiff had commenced his argument to the jury upon the measure of damages, counsel for defendant observed that it was

proper for him to give the grounds of the demurrer to the evidence, and stated them in writing, handing the statement of the grounds of the demurrer both to counsel for plaintiff and to the court. Counsel for plaintiff objected to the grounds of demurrer being stated, but the court overruled the objection and counsel for plaintiff excepted. Counsel for plaintiff argued the case as upon a demurrer to the evidence. When the demurrer to the evidence was written out counsel for plaintiff refused to sign the joinder in demurrer, and the court ruled that he must sign it, so counsel signed under protest. It is common practice among lawyers, upon the announcement of a demurrer to the evidence, to agree that it may be subsequently reduced to writing. And it is not perceived that the plaintiff was prejudiced by that irregularity in this instance, especially as defendant's counsel duly delivered the grounds of demurrer in writing to counsel for the plaintiff and to the court. *Cooper v. Norfolk, etc., R. Co.*, 125 Va. 73, 99 S. E. 606.

(2) Remarks of Court.

Derogatory Remark before Trial. —

An inadvertent remark made from the bench by the presiding judge, derogatory to the character of accused, but made a month before the case was tried and not in the presence of any of the jurors who tried the case, is not cause for reversal, if it appears from the record accused has had a fair and impartial trial. *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450.

Remarks on the Evidence.—It was not error in the trial court in its ruling as to the admissibility of evidence of sparks and cinders being thrown out and fires started at other times, to remark that: "I think it admissible but not on the ground of showing that the engines were defective, but showing that at that point the railroad company had thrown out fire on other

occasions and therefore that it is possible for it to have thrown out fire at this time." The objection of the defendant to the ruling was the use of the word "possible" instead of "liable," as the court used in latter rulings on the same question, but it was considered that in this connection the word "possible" was more favorable to the defendant than the word "liable." Moreover, in view of the admittedly correct instruction given by the trial court on this point, it does not affirmatively appear from the record that the jury was misled by this ruling or would or could, in accordance with the evidence, have rendered a different verdict from what they did, and hence the error in such ruling, if there was one, was harmless. *Norfolk, etc., R. Co. v. Spates*, 122 Va. 69, 94 S. E. 195.

Curing Error.—A remark made by the court to the jury, even if improper, will not constitute reversible error, where the appellate court is satisfied that the subsequent action of the court was sufficient to efface any injurious consequences which the original remark may have caused. *Carpenter v. Smithey*, 118 Va. 533, 88 S. E. 321.

(3) Remarks and Conduct of Counsel.

See post, ARGUMENTS OF COUNSEL.

When it clearly appears from the record that the plaintiff in error could not have been prejudiced by a remark made to a juror during the course of the trial, the verdict should not be set aside because of such remark. *State v. Clifford*, 58 W. Va. 681, 52 S. E. 864.

If, when a question is asked a witness, objection is made thereto, and the propounder withdraws it, saying: "We would rather withdraw the question than to give him any show of an appeal," the fact that such statement was made in the presence of the jury is not prejudicial to the objector. *Chesapeake, etc., R. Co. v. Hoffman*, 109 Va. 44, 63 S. E. 432.

Instruction to Disregard.—Remarks or conduct by a prosecuting attorney before the jury during the progress of a criminal trial will not constitute reversible error, especially where the jury are instructed to disregard the statements and conduct, unless it is manifest the rights of defendant were injuriously affected. *State v. Huff*, 80 W. Va. 468, 92 S. E. 681.

c. Errors in Instructions.

(1) Giving.

(a) In General.

Must Be Prejudicial to Complainant.

—The appellate court will not reverse a judgment because of an erroneous instruction if it clearly appears from the whole record that the party objecting was not prejudiced by it. *Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co.*, 105 Va. 574, 54 S. E. 593; *Cranes Nest Coal, etc., Co. v. Mace*, 105 Va. 624, 54 S. E. 479; *Thompson v. Camper*, 106 Va. 315, 55 S. E. 674; *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135; *Neal v. Taylor*, 106 Va. 651, 56 S. E. 590; *Fletcher v. Commonwealth*, 106 Va. 640, 56 S. E. 149; *Browder v. Southern R. Co.*, 107 Va. 10, 57 S. E. 572; *Hanger v. Commonwealth*, 107 Va. 872, 60 S. E. 67; *Homestead Fire Ins. Co. v. Ison*, 110 Va. 18, 65 S. E. 463; *Bryan v. Nash*, 110 Va. 329, 66 S. E. 69; *Barnes v. Crockett*, 111 Va. 240, 68 S. E. 983; *Norfolk Hosiery, etc., Mills v. Aetna Hosiery Co.*, 124 Va. 221, 98 S. E. 43; *Standard Red Cedar Chest Co. v. Monroe*, 125 Va. 442, 99 S. E. 589; *Pinkard v. Commonwealth*, 125 Va. 729, 100 S. E. 821; *Tucker v. Colonial Fire Ins. Co.*, 58 W. Va. 30, 42, 51 S. E. 86; *State v. Lavin*, 64 W. Va. 26, 29, 60 S. E. 888.

Although an instruction is open to criticism if it could not have reasonably misled the jury, it does not warrant a reversal. *Virginia R., etc., Co. v. Smith*, 129 Va. 269, 105 S. E. 532.

When Duty of Court to Direct Ver-

dict.—An erroneous instruction to a jury, given for the plaintiff, is not prejudicial to the defendant if after all the evidence was adduced it would have been the duty of the court upon proper motion to direct a verdict for the plaintiff. *Davis v. Chesapeake, etc., R. Co.*, 61 W. Va. 246, 56 S. E. 400.

Applicability to Issues and Evidence.

—Where upon the trial of an action each party requests and the court grants binding instructions upon the facts relied on by him, based on inconsistent but separable theories of liability, this court will not reverse solely because the instructions failed to present all the facts proved in support of each theory submitted for jury determination. *Leros v. Parker*, 79 W. Va. 700, 91 S. E. 660.

Where a case is tried upon a theory as to which the declaration might have been amended, upon testimony which would have been applicable to the declaration as so amended, and without any objection to such evidence, instructions applicable to this view of the case, which could not have been misunderstood by the jury, though inaccurately phrased, can not be made the ground of reversal. *Du Pont Engineering Co. v. Blair*, 129 Va. 423, 106 S. E. 328.

Instructions which enunciate mere abstract propositions of law should not be given, but the violation of the rule will not constitute reversible error unless the court can perceive that it tended to mislead or confuse the jury. *Newport News, etc., Elect. Co. v. McCormick*, 106 Va. 517, 56 S. E. 281; *Runnion v. Morrison*, 71 W. Va. 254, 260, 76 S. E. 457; *Bond v. Baltimore, etc., R. Co.*, 82 W. Va. 557, 96 S. E. 932.

It is not reversible error to give an instruction, correctly stating law applicable to the evidence adduced, though it is abstract in form and contains no express reference to the evi-

dence. *Teel v. Coal, etc., R. Co.*, 66 W. Va. 315, 66 S. E. 470.

The modification of an instruction which is not prejudicial to a party can not be complained of by the party as error. *Norfolk, etc., Railway v. Harman*, 104 Va. 501, 52 S. E. 368.

Where an instruction proposed is modified so as not to change its meaning or effect, and given as modified, such modification does not constitute reversible error. *Barna v. Gleason Coal Co.*, 83 W. Va. 216, 98 S. E. 15b. See *Morrison v. Fairmont, etc., Tract. Co.*, 60 W. Va. 441, 55 S. E. 669.

Defendant requested the following instruction: "By entering and continuing in the service the employee assumes the risk of dangers normally and necessarily incident to the occupation in which he voluntarily engages." The court substituted the word "ordinarily" for the words "normally and necessarily." Held: That under the evidence in the instant case the plaintiff could not have been injured by the modification made in the instruction. *Norfolk, etc., R. Co. v. Whitehurst*, 125 Va. 260, 99 S. E. 568.

Verbal Inaccuracies.—Error is harmless where the instructions given by the court fairly presented the issues to the jury, although from inadvertence they contained some verbal inaccuracies, there being no misstatement of the law, their meaning being plain, and the jury could not possibly have been misled. *Eichelbaum v. Klaff*, 125 Va. 98, 99 S. E. 721.

In an action to recover for a personal injury inflicted by coming in contact with a switch stand, where a witness testified that the stand was made by a designated manufacturer with their "standard" length rods, and was such as was used by the defendant and other railroad companies, an instruction which spoke of the stand as a "standard" switch stand was not prejudicial to the plaintiff. *Southern*

R. Co. v. Lewis, 110 Va., 847, 67 S. E. 357.

In an action by a servant against his master for injuries, an instruction as to the duty of the master in regard to safe machinery and appliances, although inappropriately worded, is not fatal, where the issue as developed by the evidence was whether the master failed in his duty to instruct and warn the servant. *Du Pont Engineering Co. v. Blair*, 129 Va. 423, 106 S. E. 328.

Instruction Given after Submission to Jury.—It is not reversible error for the trial court to give a written instruction to the jury, at their request, which correctly propounds the law, after the case has been submitted to them and they have deliberated on it for a time. *Freeman v. Freeman*, 71 W. Va. 303, 304, 76 S. E. 657.

(b) Error Favorable to Complainant.

Where an error occurs in an instruction which is favorable to complainant the error is harmless. *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481; *Norfolk Hosiery, etc., Mills v. Aetna Hosiery Co.*, 124 Va. 221, 98 S. E. 43; *Nelson County v. Loving*, 126 Va. 283, 101 S. E. 406.

In a prosecution under the prohibition act, the court instructed the jury that it was unlawful for the defendant to keep or store for sale, gift or use, ardent spirits in any other place than in the bona fide home of himself. This is a mere inadvertence. For it is clearly unlawful to store ardent spirits for sale, even in a bona fide home; but inasmuch as the error is favorable to the plaintiff in error and not against his interest, it is harmless. *Pettus v. Commonwealth*, 123 Va. 806, 93 S. E. 161.

Submitting Construction of Contract to Jury.—Although it is error for an instruction to submit to the jury the construction of a contract when it was the duty of the court to construe it, yet where the error is favorable to the

plaintiffs in error and not injurious to them, it is harmless as to them. *McCorkle & Son v. Kincaid*, 121 Va. 546, 93 S. E. 642.

Servant's Assumption of Risk. —

In an action by a servant against his master for injuries inflicted upon him from being kicked by a mule, the property of the master, the court instructed the jury that the servant did not assume the risk of injury by a vicious mule, about which he had to work, but of the vicious and dangerous character of which he did not know and could not have found out by the exercise of ordinary care, and of which he was not warned by defendant or its employees, who knew or ought to have known thereof. The incorporation of the words "or its employees" in this instruction, if error, was harmless error, so far as defendant was concerned. If the plaintiff had knowledge, no matter how that knowledge was obtained, of the vicious and dangerous nature of the mule, such knowledge would defeat his right to recover; because if he knew the vicious and dangerous propensities of the animal, he would be held to have assumed the risk. Therefore, an instruction, the tendency of which was to increase the plaintiff's sources of knowledge must enure to his prejudice and to the benefit of the defendant, and such was the effect of the superadded words "or its employees." *Turner v. Richmond, etc., R. Co.*, 121 Va. 194, 92 S. E. 841.

(c) Similar Instruction Given at Request of Complainant.

See post, "Invited Error," XIV, H, 3, a.

Though there be error in instructions given on behalf of the prevailing party, yet the judgment will not for this reason be reversed if it appears that the same error was introduced into the record by instructions given at the instance of or was invited by the other party. *State v. Calhoun*, 67

W. Va. 666, 69 S. E. 1098. See *Spencer v. Looney*, 116 Va. 767, 779, 82 S. E. 745.

Validity of Release. — The court instructed the jury that unless they believe from the evidence that the release was executed by the plaintiff without misrepresentation or fraud by the defendant's agent, and was for valuable consideration, the release in nowise bars the plaintiff. It was objected to this instruction that it placed upon defendant the burden of proof of showing that the release was without misrepresentation or fraud on the part of the defendant. Held: That the objection was not well taken. The instruction did not undertake to deal with the question of the burden of proof. The defendant was not prejudiced by it, especially in view of the fact that an instruction almost in the same form was given at his own request. *Ferries Co. v. Brown*, 121 Va. 13, 92 S. E. 813.

(d) Error Rendered Harmless by Other Parts of Charge.

A case will not be reversed for a defect in one instruction if it can be seen that, when read in connection with other instructions given, the jury could not have been misled by it. *Burton v. Seifert & Co.*, 108 Va. 338, 61 S. E. 933; *Cook & Son Min. Co. v. Thompson*, 110 Va. 369, 66 S. E. 79; *Davidson v. Watts*, 111 Va. 394, 69 S. E. 328; *Chesapeake, etc., R. Co. v. McCarthy*, 114 Va. 181, 76 S. E. 319; *Higgins v. Whitmore*, 116 Va. 414, 82 S. E. 180; *Hesson v. Penn Furniture Co.*, 70 W. Va. 141, 73 S. E. 302; *Neil v. West Va. Timber Co.*, 75 W. Va. 502, 84 S. E. 239.

But a defect in one instruction is not cured by a correct statement of the law in another, where the appellate court is unable to say that the jury could not have been misled by the defective instruction. *Abernathy v. Emporia Mfg. Co.*, 122 Va. 406, 95 S. E. 418.

Omissions Cured by Other Instructions.—The omission from one instruction of a correct statement of the law applicable to the facts of the case is harmless, where the same principle was embodied, in plain and unmistakable language, in other instructions given. *Eastern Coal, etc., Corp. v. Beazley*, 121 Va. 4, 92 S. E. 824.

An instruction, based on, but inadequately stating, correct legal principles, will not be deemed prejudicial, if, when read with others, it is apparent the jury was not misled thereby. *Stewart v. Parr*, 74 W. Va. 327, 82 S. E. 259.

Instruction Relating to Indecisive Phase of Main Issue.—An erroneous instruction relating to an indecisive phase of the main issue in a case, not binding as to such issue and accompanied by others fully and clearly advising the jury of the rights of the party against whom such error was committed, is not prejudicial and does not warrant allowance of a new trial. *Bailey v. Gollehon*, 76 W. Va. 322, 85 S. E. 556, 723.

Particular Instances.—In an action for malicious prosecution unqualified instruction that malice was inferrable from want of probable cause was held harmless error in view of other instructions. *Clinchfield Coal Corp. v. Redd*, 123 Va. 420, 96 S. E. 836.

In an action by a servant against his master, an instruction for the plaintiff that if "the jury believe from the evidence that the defendant failed to use ordinary care to furnish the plaintiff a reasonably safe place for the performance of the work of his employment and as a direct consequence and result of said failure the plaintiff was injured without fault on his part and without knowledge of or opportunity of knowledge of any danger, then the jury must find for the plaintiff," was objected to by the defendant on the ground that there is no evidence to justify the court in embodying in the instruction the idea that

the plaintiff had no opportunity of knowledge of any danger; the view of the defendant being that the plaintiff not only had opportunity to know of the danger, but that his knowledge of general conditions were such as to impute to him actual knowledge thereof. Held: That if there was any error in this respect, it was harmless, and the jury could not have been misled thereby, as this feature of the case was fully and completely covered by other instructions given at the instance of the defendant. *DuPont, etc., Co. v. Taylor*, 124 Va. 750, 98 S. E. 866.

(e) Error Immaterial in View of Verdict and Judgment.

Verdict in Favor of Complainant.—Plaintiff can not complain of an instruction, although erroneous, where the verdict is in his favor. *Towson v. Towson*, 126 Va. 640, 102 S. E. 48; *Norfolk Hosiery, etc., Mills v. Aetna Hosiery Co.*, 124 Va. 221, 98 S. E. 43; *Richmond v. Burton*, 115 Va. 206, 78 S. E. 560; *Holt v. Otis Elevator Co.*, 78 W. Va. 785, 90 S. E. 333.

Errors in instructions are not material and need not be discussed on appeal, where the questions of fact about which there could be any dispute were settled by the jury upon instructions exactly as asked for by the appellant. *Virginia R., etc., Co. v. Cherry*, 129 Va. 262, 105 S. E. 657.

Proper Verdict Returned.—Errors in the giving of instructions in a case in which the jury could not properly have found any other verdict than the one they did find, are not prejudicial and may be disregarded as being harmless. *Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co.*, 105 Va. 574, 54 S. E. 593; *Cranes Nest Coal, etc., Co. v. Mace*, 105 Va. 624, 54 S. E. 479; *Thompson v. Camper*, 106 Va. 315, 55 S. E. 674; *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135; *Neal v. Taylor*, 106 Va. 651, 56 S. E. 590; *Fletcher v. Commonwealth*, 106 Va. 840, 56 S. E.

149; *Browder v. Southern R. Co.*, 107 Va. 10, 57 S. E. 572; *Bugg v. Seay*, 107 Va. 648, 60 S. E. 89; *Hanger v. Commonwealth*, 107 Va. 872, 60 S. E. 67; *Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612, 62 S. E. 358; *Taylor v. Baltimore, etc., R. Co.*, 108 Va. 817, 62 S. E. 798; *Portsmouth, etc., Refin. Corp. v. Oliver Refin. Co.*, 111 Va. 745, 69 S. E. 958; *Vaughan v. Pleasonton*, 112 Va. 508, 71 S. E. 529; *Fields v. Virginia R. Co.* 114 Va. 558, 77 S. E. 501; *Jacobs v. Warthen*, 115 Va. 571, 80 S. E. 113; *Adams Exp. Co. v. Allendale Farm*, 116 Va. 1, 81 S. E. 42; *Wood v. Jefferies & Co.*, 117 Va. 193, 83 S. E. 1074; *Straus v. Fahed*, 117 Va. 633, 85 S. E. 969; *Perrow v. Rixey*, 119 Va. 192, 89 S. E. 101; *Glidewell v. Murray-Lacy & Co.*, 124 Va. 563, 98 S. E. 665; *Standard Red Cedar Chest Co. v. Monroe*, 125 Va. 442, 99 S. E. 589; *Pinkard v. Commonwealth*, 126 Va. 729, 100 S. E. 821; *State v. Davis*, 68 W. Va. 142, 69 S. E. 639; *Reilly v. Nicoll*, 72 W. Va. 189, 191, 77 S. E. 897; *Hartmyer v. Everly*, 73 W. Va. 88, 79 S. E. 1093.

A verdict clearly supported by law and the evidence should not be disturbed because an erroneous instruction was before the jury. *Wiggin v. Dillon*, 66 W. Va. 313, 66 S. E. 689; *Runnion v. Morrison*, 71 W. Va. 254, 76 S. E. 457.

Error in the giving of instructions to the jury, will not be good ground for reversal when it appears upon the whole case as presented and the admissions of the defendant the verdict ought to be confirmed. *State v. Miller*, 85 W. Va. 326, 102 S. E. 303.

Where the uncontroverted evidence shows that plaintiff is entitled to a verdict for at least the amount the jury has found in his favor, this court will not review the instructions to ascertain whether the trial court committed error in respect thereto, for such error, if any, could not have pre-

judiced defendant. *Morris v. Risk*, 86 W. Va. 30, 102 S. E. 725.

Erroneous rulings respecting instructions are treated as harmless, if an answer to an interrogatory and an instruction given make it apparent that the jury has specifically found a fact conclusively giving the right awarded by their verdict. *Harman v. Appalachian Power Co.*, 77 W. Va. 48, 86 S. E. 917.

If the evidence in an action for damages for a personal injury is so conclusive of the defendants' negligence as to leave no room for a reasonable conclusion or finding to the contrary, the court may declare it as matter of law, in passing on a motion to set aside the verdict conforming to the evidence, and disregard erroneous rulings in the trial on instructions as harmless errors and render judgment accordingly. *Reilly v. Nicoll*, 72 W. Va. 189, 77 S. E. 897.

An erroneous instruction, improperly given over objection timely interposed, on an issue not involved and hence not pertaining to the merits of the case and without evidence to support it, is not prejudicial, warranting reversal, if upon the facts and circumstances proved and not denied or explained a verdict of guilty as charged in the indictment is the only one which could properly have been rendered thereon. *State v. Hurley*, 78 W. Va. 638, 90 S. E. 109.

Proper Judgment Entered.—Where under the case as presented, as a matter of law the judgment could only be that which has been entered, the appellate court will not reverse for errors in instructions to the jury. *Hartmyer v. Everly*, 73 W. Va. 88, 79 S. E. 1093.

An error in submitting a pure question of law to the jury is rendered harmless by a correct decision thereof by them. *Robert v. United Fuel Gas Co.*, 84 W. Va. 368, 99 S. E. 549.

Damages.—An instruction upon punitive damages, even if erroneous, is harmless where the amount allowed appears upon the face of the verdict to have been compensatory only. *Craddock Lumber Co. v. Jenkins*, 124 Va. 167, 97 S. E. 817.

In the instant case the court instructed the jury as to the measure of damages if they believed that the trees wrongfully cut were not merchantable timber, and as to the measure of damages if they believed the trees cut were merchantable timber. The instruction was objected to on the ground that there was not sufficient evidence to support the first branch of it, which related to the proper measure of damages if the jury should take the view that the trees cut were not merchantable timber. Held: That the verdict showed that the jury were in no way influenced by this branch of the instruction, but that they found their verdict under the latter aspect thereof, evidently believing that the timber was merchantable. *Craddock Lumber Co. v. Jenkins*, 124 Va. 167, 97 S. E. 817.

Intoxicating Liquors—Transportation.—An indictment charged accused with unlawfully transporting more than one quart of ardent spirits and the court instructed the jury that, "You must believe beyond a reasonable doubt that he had this liquor where the law prohibits, and I have told you where he could have it and where he could get it." It was objected to this instruction that defendant was not charged in the indictment with unlawfully keeping or storing the liquor. Held: That upon this point, without conceding that the instruction, when viewed as a whole, was in any respect erroneous, it is sufficient to say that the jury found the defendant guilty, not of having or receiving the whiskey, but of transporting it contrary to law. Upon the facts stated, and in the absence of any conflict of

evidence, the instruction could not have prejudiced the defendant, since he was clearly guilty of the crime of which he was convicted; and the language complained of, while it may have been surplusage, can not be regarded as harmful error. *Carter v. Commonwealth*, 123 Va. 810, 96 S. E. 766.

(f) Particular Instances of Harmless Error.

Instruction Abstractly Erroneous but Correct under Facts of Case.—In an action against a partnership for a libel written by partner, the court instructed the jury that if they believed from the evidence that the letter was written with actual malice, and the defendants were liable, they might award exemplary damages against the partnership. As an abstract proposition, this was error, as the partnership would be liable for compensatory damages only, unless the act of the guilty partner was previously authorized or subsequently ratified by the other partner. But as in the instant case the tortious act was subsequently ratified by the innocent partner, the error was harmless. *Myers & Co. v. Lewis*, 121 Va. 50, 92 S. E. 988.

Omission to make any reference to the right of tacking possessions in an instruction is harmless, where the testimony is to the effect that the only possession claimed was that of the party himself. *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

Instruction Not Limiting Duty to Ordinary Care—Facts Showing Lack of Ordinary Care.—In an action for injuries to an automobile by defendant's train at a public crossing, the court instructed the jury that if they believed from the evidence that the plaintiff was guilty of contributory negligence, yet if they believed that the "defendant company knew of the plaintiff's danger, or by the exercise of ordinary care should have known of

plaintiff's danger in time to have stopped its train and avoided the accident, it was its duty to do so." It was objected to this instruction that it imposed an absolute and unqualified duty upon the defendant to stop its train, and that it should have been qualified by the insertion of the words "by the exercise of ordinary care," or words of similar import, after the words "avoided the accident." Held: That as a legal proposition defendant's position was correct, and the instruction should have been qualified as suggested, but upon the facts of the case it plainly appeared that such error was not prejudicial to the defendant, since with the train about 1000 feet away from the crossing when the motorman saw the plaintiff's automobile stop upon the track, the jury must have found that by the exercise of ordinary care the defendant could have stopped its train in time to have avoided the accident. *Norfolk, etc., R. Co. v. Whitehead*, 121 Va. 139, 92 S. E. 916.

Relating to Property of Married Woman.—Where the proof is clear that a married woman purchased land in 1874, and there is no proof tending to show that it was her equitable separate estate, it is harmless error to tell the jury, in an instruction, that if she purchased the land prior to 1878 it was her common law land, as the first act creating statutory separate estates was not passed until April 4, 1877. *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481.

Homicide.—An instruction to the jury based on the theory of homicide by lying in wait, with a deadly weapon, and telling the jury that in such cases it is not necessary to show that the malice existing in the heart of the prisoner at the time of the killing was directed against the deceased, is not when properly construed, an assumption of the fact of malice, so as to constitute reversible error. *State v.*

Davis, 74 W. Va. 657, 658, 82 S. E. 525.

Homicide Instruction.—Nor will such constitute reversible error, because it concludes by telling the jury if they find defendant guilty of the homicide, by lying in wait, with a deadly weapon they must find the prisoner guilty of murder in the first degree. Such instruction properly construed means simply that homicide so committed constitutes murder in the first degree, and that it is the duty of the jury on their oaths to so find, but it does not invade the province of a jury nor deprive them of their right or duty under the statute to fix by their verdict the degree of the crime. *State v. Davis*, 74 W. Va. 657, 658, 82 S. E. 525.

Intoxicating Liquors—Carrying Liquor on Person or in Baggage.—In the case at bar defendant objected that an obstruction by the court below improperly and unlawfully distinguished between the right of a person to carry whisky in his baggage and his right to carry it in his pocket. Held: That in the instant case the distinction was immaterial, because the defendant had in his possession more than the law allowed, even if it be conceded that having it in his pockets was equivalent to having it in his baggage. *Carter v. Commonwealth*, 123 Va. 810, 96 S. E. 766.

Damages.—In an action for personal injuries, the jury were instructed that they might consider "any loss of time heretofore sustained by the plaintiff from his work as a result of his injuries." There was evidence that plaintiff was in the hospital for three weeks, and thereafter for six weeks he was only able to spend a part of each day at his place of business. It did not appear that the business in which he was engaged was either profitable or unprofitable, or that it was affected by his absence. The instruction was held not preju-

dicial error warranting a reversal where the other elements of damage were all properly set out. *Virginia R., etc., Co. v. Hill*, 120 Va. 397, 91 S. E. 194.

When an erroneous charge upon the measure of damages has been given to the jury, even though the error goes only to one element of damage, the courts will not undertake to say how far the error has affected the total result. But this general rule will not be carried so far as to reverse a judgment obtained upon a fair and otherwise regular trial, when the only error therein, tested by every reasonable probability, could not have affected the result in an amount beyond that which would fall within the influence of the maxim, "*De minimis lex non curat.*" *Virginia R., etc., Co. v. Hill*, 120 Va. 397, 91 S. E. 194.

Adverse Possession.—Plaintiffs' instruction number eight in this case, on the subject of adverse possession, if amenable to the criticism of defendant, that it told the jury plaintiffs were owners of the land unless defendant had acquired title by adverse possession, and that it in effect told the jury that possession which is not hostile in its inception can never become so, as applied to the facts in this case, constituted harmless error not warranting reversal of the judgment. *Bilups v. Woolridge*, 80 W. Va. 13, 91 S. E. 1082.

Sales.—In an action for the price of lumber, an instruction which, while not as clear as it should have been, in substance supported the defendant's theory of the case, and directed a verdict in its favor, if the jury should believe the evidence upon which it relied, was harmless as against the defendant. *Rosenbaum Hdw. Co. v. Paxton Lumber Co.*, 124 Va. 346, 97 S. E. 784.

In an action by a seller against buyer for failure to receive the subject matter of the sale, plaintiff must show that he was not only ready and willing to

perform his part of the contract, but was able to do so. But where an instruction in this connection omitted the word "able" and no objection was raised to the instruction on this account, and, under the evidence, the jury could not have been misled by its omission, the error is harmless. *Norfolk Hosiery, etc., Mills v. Aetna Hosiery Co.*, 124 Va. 221, 98 S. E. 43.

If, in an action for breaches of a contract of sale of a commodity, by the purchaser, the proof shows the market price thereof and the price at which he could have sold it were identical, it is not reversible error for the court to instruct the jury that he may recover the difference between the contract price and what he could have sold it for. *Toney v. Sandy Ridge Coal, etc., Co.*, 84 W. Va. 35, 99 S. E. 178.

In an action to recover the price of goods which the defendant refused to accept on the ground that they were in a damaged condition when received, it is not error to instruct the jury that the burden is on the plaintiff to show that the goods in question were delivered in an undamaged condition; but, in the case at bar, even if the court erred in its instruction as to the burden of proof, it was harmless error, since the defendant proved that the goods were damaged when received, and the evidence leaves no doubt as to that fact; there being no other testimony in the case except that of the defendant and his witnesses. *King & Co. v. Hancock & Sons*, 114 Va. 596, 77 S. E. 510.

In an action of trespass to recover damages done to the plaintiff by the defendant by erecting a bridge across a navigable stream, the plaintiff asked the court to instruct the jury that, in considering whether or not the bridge damaged the property of the plaintiff, they must consider any and all uses, not only to which the property had been put, but to which it might be put. The court added at the end of said in-

struction the words "in the reasonably near future," and as amended gave it, and this is held not to be to the prejudice of the plaintiff. The instruction, as amended and given, is not in conflict with an instruction given at the instance of the defendant, telling the jury that they must consider the value of the property immediately before and immediately after the construction of the bridge, by taking into consideration its uses, surroundings and capabilities, not only for the present, but for the reasonably near future. *Peek v. Hampton*, 115 Va. 855, 80 S. E. 593.

In an action against a hotel company for death of a guest in an elevator accident, the court instructed the jury that defendant's duty in regard to the elevator "applies not only to the manner in which the elevator was being run and controlled by the operator, but also to the machinery, appliances and equipment of said elevator, and the manner in which the same was constructed and maintained." The declaration did not charge negligence in the construction of the elevator. It did not appear from the record, nor was it shown in argument, how the insertion of the word "constructed," in the connection in which it occurs, could have injuriously affected the rights of the plaintiff in error, or produced a different result; therefore, the use of the word must be regarded as harmless error. *Murphy v. Cuddy*, 124 Va. 207, 97 S. E. 794.

In an action of ejectment it was admitted in open court that the parties claimed under a common source, and that the plaintiff had a perfect title to the land as described in the declaration. The entire controversy turned upon the location of the line between the two tracts. The court instructed the jury, at the request of defendants: (1) That in order to find for the plaintiff they must find title in him; and (2) that the plaintiff must rely on his own title, and not on any defects in the defendant's title. While these instructions were

wholly unnecessary and unimportant, and might very properly have been rejected, they could not have prejudiced the plaintiff, as they simply called to the attention of the jury certain essentials of the plaintiff's right to recover which were conceded to exist, and were not in any way in conflict with the instructions given for the plaintiff, and could not be regarded as having had any tendency to mislead the jury. *Reynolds v. Wallace*, 125 Va. 315, 99 S. E. 516.

In an action by a tenant against an insurance company the trial court gave the following instruction: "The court instructs the jury that the plaintiff in this suit had an insurable interest in the property insured under the policy in this suit, regardless of the terms of the lease in evidence." Held: That, this instruction could only have been prejudicial to the insurance company if the assured had no insurable interest under the terms of the lease, and as the assured did have an insurable interest under the terms of the lease, the assignment of error to the instruction could not be maintained. *Phoenix Ins. Co. v. Shulman Co.*, 125 Va. 281, 99 S. E. 602.

In an action against a mine operator for injuries to a miner, the jury were instructed that defendant was liable if plaintiff was injured by a train of empty cars running in the mine without having a conspicuous light on the front of the train. It was objected that the statute (4 Pollard's Code, p. 833) provides that it shall be the duty of the mine foreman to provide for the carrying of a light on the front end of the train, whereas the instruction told the jury the defendant was liable if the light was not there. Held: That abstractly the objection was well taken, but such error was immaterial and harmless in the instant case, since there was no evidence that the company provided for a light on the front end of the train. *Carter Coal Co. v. Bates*, 127 Va. 586, 105 S. E. 76.

(g) Reversible Error—Presumption as to Prejudice.

Prejudice Presumed.—The giving of an improper instruction raised a presumption of injury and prejudice, warranting a new trial, unless the court can see from the record the complaining party was not injured. *Buffington v. Lyons*, 71 W. Va. 114, 76 S. E. 129; *Robinson v. Lowe*, 56 W. Va. 308, 49 S. E. 250; *Norfolk R., etc., Co. v. Higgins*, 108 Va. 324, 61 S. E. 766.

Where the trial court has committed error in giving such peremptory instructions, this court can not assume from the size of the verdict that defendant has not been prejudiced thereby. *Greer v. Arrington*, 72 W. Va. 693, 79 S. E. 720.

Error Not Presumed.—Though it is always good practice directly to predicate an instruction relating to facts on the belief of the jury "from the evidence," harm from failure to do so will not be presumed and reversal based thereon when it does not appear that the jury were misled thereby, their verdict being clearly within the evidence. *Neeley v. Cameron*, 71 W. Va. 144, 75 S. E. 113.

Reversible Error.—An erroneous instruction given in a case in which the issue turns on conflicting evidence justifies the award of a new trial. *Caroway v. Cochran*, 71 W. Va. 698, 77 S. E. 278.

Where the party objecting may have been prejudiced by instruction, the giving of it constitutes reversible error. *Chadister v. Baltimore, etc., R. Co.*, 62 W. Va. 566, 59 S. E. 523.

In an action of debt on a bond given by plaintiff in an action of detinue, the record showed that the defendants had a substantial defense which had not been properly submitted to the jury. This could be done under proper pleadings and appropriate instructions. It was suggested that under the pleadings all evidence as to this defense might have been excluded, and instructions

therefor, empowering the jury consider it, were improper, and therefore, although erroneous, could not be considered prejudicial to the defendants. Held: That the error in the instructions was not harmless, as it could not be said that the judgment, in spite of errors actually committed, was, after all, the finding that, upon the whole, should have been rendered upon the merits. *Skeen v. Belcher*, 128 Va. 122, 104 S. E. 582.

Contradictory Instructions.—Where contradictory instructions on a material point in a case have been given, the verdict of the jury should be set aside, as it can not be known by which the jury were controlled. *Powhatan Lime Co. v. Affleck*, 115 Va. 643, 649, 79 S. E. 1054; *Pulaski, etc., Coal Co. v. Gibboney Sand Bar Co.*, 110 Va. 444, 448, 46 S. E. 73. See *Virginia R., etc., Co. v. Smith*, 129 Va. 269, 105 S. E. 532.

Instruction Not Based on Evidence.—It is reversible error to give an instruction which has no foundation in the evidence adduced, unless the court can clearly see that it did not prejudice the exceptor. *Du Pont Engineering Co. v. Blair*, 129 Va. 423, 106 S. E. 328; *Parker v. National Mut. Bldg., etc., Ass'n*, 55 W. Va. 134, 46 S. E. 811; *Lewis, etc. Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1017; *Kuykendall v. Fisher*, 61 W. Va. 87, 56 S. E. 48; *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073; *Barna v. Gleason Coal Co.*, 83 W. Va. 216, 98 S. E. 158; *Schwartz v. Clark*, 86 W. Va. 244, 248, 103 S. E. 47.

An instruction to the jury, covering a case not presented by the pleadings, though there be evidence on the subject covered thereby, is erroneous, and unless it clearly appears that the rights of the party complaining have not been injuriously affected thereby, the giving of such an instruction will constitute reversible error. *Kunst v. Grafton*, 67 W. Va. 20, 67 S. E. 74.

Withdrawal and Substitution of Instructions.—The withdrawal of correct and proper instructions after submission of a case to a jury whose members entertain conflicting opinions upon controverted facts as to which litigant is entitled to a verdict and the substitution of instructions based upon a different and erroneous theory plainly is prejudicial and reversible error. *Marcuchi v. Norfolk, etc., R. Co.*, 81 W. Va. 548, 94 S. E. 979.

(2) **Refusal.**

(a) **In General.**

Necessity of Prejudice to Complainant.—The refusal of the court to give a proper instruction is not ground for reversing a judgment when it clearly appears that the complaining party was not prejudiced thereby. *Phenix Fire Ins. Co. v. Virginia-Western Power Co.*, 81 W. Va. 298, 94 S. E. 372; *Standard Red Cedar Chest Co. v. Monroe*, 125 Va. 442, 99 S. E. 589.

Presumption of Prejudice.—The refusal of a proper instruction raised a presumption of injury and prejudice, warranting a new trial, unless the court can see from the record the complaining party was not injured. *Buffington v. Lyons*, 71 W. Va. 114, 76 S. E. 129.

Refusal to Amend Instruction.—The judgment of the trial court will not be reversed for its refusal to amend an instruction where it appears that the jury were fully and carefully instructed on the point covered by the proposed amendment and no prejudice could have resulted from its refusal. *Ratcliffe v. Walker*, 117 Va. 569, 85 S. E. 575.

No Departure from Issue.—If the appellate court can clearly see that the refusal of a proper instruction, having for its purpose confinement of the jury to the issue made in the pleadings, did not leave room for a departure from such issue in the verdict, it will treat the error as harmless and refuse to re-

verse for it. *Bank v. Lowry & Co.*, 81 W. Va. 578, 94 S. E. 985.

Direction of Verdict.—Although an instruction to the jury requested by plaintiff states a correct proposition of law, applicable to the evidence, its rejection will not be good ground for reversal, where the court has on motion of defendant, and upon the whole of the evidence rightfully instructed the jury that the evidence does not warrant a verdict for plaintiff and to find for the defendant. In such case the question of law propounded by plaintiff's instruction rejected becomes involved in and fairly presented by the instruction given to find for the defendant. *Butcher v. Sommerville*, 67 W. Va. 261, 67 S. E. 726.

Substitution of Instructions.—Although an instruction requested by defendant was correct as a statement of abstract legal propositions, and the court would not have erred in giving it, there was no reversible error in the substitution of another instruction which was a clear, correct and adequate statement of the law from the defendant's standpoint as applied to the case in hand. *Fitzgerald v. Southern Farm Agency*, 122 Va. 264, 94 S. E. 761.

The refusal to give a proper instruction in the very language asked is not ground for reversal where it affirmatively appears that the party asking it could not have been prejudiced by such refusal, and that the instruction substituted by the court was more favorable to him than the instruction which he had asked. *DuPont, etc., Co. v. Snead*, 124 Va. 177, 97 S. E. 812.

Failure to Instruct as to Burden of Proof.—In an action for personal injuries against a railroad company, the court, through inadvertence, failed to read an instruction to the jury, referring to the burden of proof, which the court at the request of the defendant intended to read. The court certified, however, that the case was argued before the jury by the opposing attor-

ney upon proper assumptions as to the burden of proof as stated in the instruction. Held: That while such an inadvertence might and would probably be reversible error as to many instructions, and in most cases, yet as it is inconceivable that the competent attorneys who argued this case left the jury in any doubt whatever as to the burden of proof, there is no reason to suppose that the railroad company was injured by the inadvertence of the judge. *Atlantic, etc., R. Co. v. Church*, 120 Va. 725, 92 S. E. 905.

The words "highest degree of care" and "utmost degree of care" have substantially the same meaning, and it is not reversible error for a trial court to decline at the instance of one of the parties to tell the jury that "highest degree of care," employed in an instruction given at the instance of the other party, means "utmost degree of care." *Brogan v. Union Tract. Co.*, 76 W. Va. 698, 86 S. E. 753.

(b) Where Jury Fully Instructed.

See post, INSTRUCTIONS.

If the jury were fully and fairly instructed on the whole case so that they could not have been misled by the instructions, it is unnecessary for the supreme court to consider the propriety of the rulings of the trial court on other instructions tendered and refused. *Chesapeake, etc., R. Co. v. Greaver*, 110 Va. 350, 66 S. E. 59.

The rejection of an instruction, although correct, if the subject thereof has been sufficiently covered by another instruction given, will not constitute reversible error. *Bryan v. Nash*, 110 Va. 329, 66 S. E. 69; *Barnes v. Crockett*, 111 Va. 240, 68 S. E. 983; *Clinchfield Coal Corp. v. Osborne*, 114 Va. 13, 16, 75 S. E. 750; *Jacot v. Grossmann Seed, etc., Co.*, 115 Va. 90, 78 S. E. 646; *Sutherland v. Wampler*, 119 Va. 800, 89 S. E. 875; *Nelson County v. Coleman*, 126 Va. 275, 101 S. E. 413; *Squillache v. Tidewater Coal, etc., Co.*,

64 W. Va. 337, 62 S. E. 446; *State v. Gebhart*, 70 W. Va. 232, 247, 73 S. E. 964; *Howell v. Wysor*, 74 W. Va. 589, 593, 82 S. E. 503.

It is harmless error, if any, to refuse an instruction where another instruction given substantially embodies the same proposition of law as that contained in the instruction refused. *Richmond v. McCormack*, 120 Va. 552, 91 S. E. 767.

A party is not prejudiced by the refusal of the court to give a correct instruction where, after reading other instructions to the jury, the court states the law to the jury substantially as requested in the rejected instruction. *Southern R. Co. v. Rice*, 115 Va. 235, 78 S. E. 592.

Ordinarily a defendant properly may demand an instruction couched in his own language, if aptly drawn, intelligible and pertinent, though the state may have asked and the court given a similar one upon the same subject; but if the two instructions in form and effect embody the same legal principle and amount to the same thing, and the one given is aptly drawn, intelligible and pertinent, it is not reversible error to refuse to give the one last proffered. *State v. Rice*, 83 W. Va. 409, 98 S. E. 432.

In an action against a notary public for alleged negligence in taking a void acknowledgment to a deed in which he was named trustee, the refusal of an instruction which, technically and in the abstract, embodied a correct rule of law, should be regarded as harmless error, where the instructions as a whole presented the respective contentions of the parties in a full and fair manner, placing the emphasis where it belonged, and leaving no probable chance for the jury to find against the plaintiff, if they believed from the evidence that negligence of the defendant was the cause of her loss. *Yates v. Ley*, 121 Va. 265, 92 S. E. 837.

(c) Effect of Verdict.

An indictment for violation of the prohibition act contained two counts covering same offense, the only material difference being that one was more specific than the other. The court refused to instruct the jury to disregard one of the counts. It was held that such refusal to instruct was not prejudicial to defendant, where he was convicted of but one offense and received the minimum fine and imprisonment. *Tomlin v. Commonwealth*, 124 Va. 795, 97 S. E. 305.

Proper Verdict Returned.—It is unnecessary to consider the ruling of the trial court in refusing instructions, when, under proper instructions as applied to the facts of the case, a different verdict could not have been rightly found by the jury. *Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co.*, 105 Va. 574, 54 S. E. 593; *Thompson v. Camper*, 106 Va. 315, 55 S. E. 674; *Browder v. Southern R. Co.*, 107 Va. 10, 57 S. E. 572; *Hanger v. Commonwealth*, 107 Va. 872, 60 S. E. 67; *Fields v. Virginia R. Co.*, 114 Va. 558, 77 S. E. 501; *Adams Exp. Co. v. Allendale Farm*, 116 Va. 1, 81 S. E. 42; *Wood v. Jefferies & Co.*, 117 Va. 193, 83 S. E. 1074; *Straus v. Fahed*, 117 Va. 633, 85 S. E. 969; *Standard Red Cedar Chest Co. v. Monroe*, 125 Va. 442, 99 S. E. 589; *Reilly v. Nicoll*, 72 W. Va. 189, 77 S. E. 897.

Error in the refusing of instructions to the jury, will not be good ground for reversal when it appears upon the whole case as presented and the admissions of the defendant the verdict ought to be confirmed. *State v. Miller*, 85 W. Va. 326, 102 S. E. 303.

f. Errors in Verdict or Judgment.

Directing Verdict.—While directing a verdict is not in accordance with the practice in this state, it is harmless error where it appears that no other verdict could have been properly rendered, and a judgment based thereon

will not be reversed on that ground. *Hargrave v. Shaw Land, etc., Co.*, 111 Va. 84, 68 S. E. 278.

Same—On Partial View of the Evidence.—In the instant case an instruction directing a verdict for the plaintiff, if they should find the defendant negligent without referring to the contributory negligence of plaintiff, while faulty, did not constitute reversible error, where ten other instructions in the case recognized and stated with clearness and emphasis that the plaintiff must be free from contributory negligence to be entitled to a verdict, and the court told the jury that all the instructions in the case should be read and construed together. *Virginia R., etc., Co. v. Smith*, 129 Va. 269, 105 S. E. 532.

Where the form of a verdict, finding for plaintiff generally, could not possibly have prejudiced the defendant it should not be disturbed on appeal. *Powhatan Lime Co. v. Whetzel*, 118 Va. 161, 86 S. E. 898.

Verdict against Weight of Evidence.—Injury, without proof of negligence, gives no right of recovery; and, where it is shown by the overwhelming weight of evidence that the injury resulted from plaintiff's negligence, or was an inevitable accident, a verdict for plaintiff can not stand. *Owen v. Appalachian Power Co.*, 78 W. Va. 596, 89 S. E. 262.

Allowance of Credit by Trial Court.—The action of the trial court in allowing a credit on a plaintiff's claim will not be set aside on the ground that the plaintiff conceded the credit as a compromise, unless the evidence is such as to show that the trial court plainly erred in allowing the credit. *Mitchell Transparent Ice Co. v. Triumph Elect. Co.*, 116 Va. 725, 82 S. E. 730.

Decree Erroneously Waiving Homestead Exemption—Solvency of Defendant.—*Alexander v. Critcher*, 121 Va. 723, 94 S. E. 335.

Award of Damages—Excessive Dam-

ages.—See post, **DAMAGES; NEW TRIALS.**

The supreme court will not set aside a verdict for excessive damages, unless it can plainly see that injustice has been done. *Norfolk, etc., R. Co. v. Crull*, 112 Va. 151, 70 S. E. 521.

In an action to recover damages for personal injuries, the court will not interfere with the verdict of a jury, on the ground that the damages found are excessive, unless the finding is so manifestly unjust as to show partiality, prejudice or misapprehension on the part of the jury. *Lane Bros. & Co. v. Bott*, 104 Va. 615, 52 S. E. 258; *McCrorey v. Thomas*, 109 Va. 373, 63 S. E. 1011; *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 49 S. E. 378; *Normile v. Wheeling Tract. Co.*, 57 W. Va. 132, 49 S. E. 1030; *Nichols v. Camden, etc., R. Co.*, 62 W. Va. 409, 59 S. E. 968; *Goshorn v. Wheeling, etc., Foundry Co.*, 65 W. Va. 250, 64 S. E. 22; *Kennedy v. Chesapeake, etc., R. Co.*, 68 W. Va. 569, 70 S. E. 359.

In a case where exemplary damages may properly be awarded, the verdict of a jury will not be set aside on the ground alone that the damages awarded are excessive, unless the amount is so large as to evince passion, prejudice, partiality or corruption in the jury. *Stevens v. Friedman*, 58 W. Va. 78, 51 S. E. 132.

Failure to Give Nominal Damages.

—"The failure to give nominal damages, unless it be upon a matter which involves the settlement of a right other than the right to recover damages, is not a ground for reversal." *Swift & Co. v. Newport News*, 105 Va. 108, 121, 52 S. E. 821, citing *Briggs v. Cook*, 99 Va. 273, 38 S. E. 148.

Allowance of Interest.—The appellate court will not disturb the verdict of a jury allowing interest from November 1, on an admitted loss of freight by a railway company occurring October 18, preceding. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161.

Error Favorable to Party Complain-

ing.—In this case where the aggregate of the special items of damages found by the jury were less by \$100.00 than the amount of the general verdict, and \$200.00 more than the court was of opinion the correct legal findings of the jury amounted to, defendant was not prejudiced by the judgment against him for the amount found by the court. *Duckworth v. Stalnaker*, 74 W. Va. 247, 248, 81 S. E. 989.

In a prosecution for violation of the prohibition act, the jury found defendant guilty of transporting and selling whiskey contrary to law. The penalty imposed by the verdict did not exceed the minimum penalty for transporting. There was no evidence to support that portion of the verdict which found the accused guilty of selling whiskey contrary to law. Held: That although the court below erred in declining to set aside that portion of the verdict which found accused guilty of selling, yet the error was harmless, since the jury imposed no penalty for that offense. *Collins v. Commonwealth*, 123 Va. 815, 96 S. E. 826.

A verdict finding accused guilty on each of sixteen counts of an indictment for unlawfully selling intoxicating liquors, and imposing a fine of \$200 for each offense will not be set aside as excessive. If the penalty for a single offense was proper, the accused cannot complain of a large aggregate resulting from his continued and flagrant criminal misconduct. *Fletcher v. Commonwealth*, 106 Va. 840, 56 S. E. 149.

Suit between Partners — Erroneous Decree Not Cured.—In a suit by one of two partners against the other to recover half the cost of the equipment for the joint enterprise, furnished and installed by plaintiff, under an agreement that defendant should reimburse him to the extent of one-half the cost, it is error to render a personal decree allowing such recovery, before ascertainment of the property and liabilities of the

firm and a final settlement of its accounts. Nor is the error cured by the subsequent appointment in the same decree of a receiver with authority to convert the social assets into money and apply the proceeds to payment of firm obligations, and a reference to a commissioner to ascertain the debts of the partnership and settle its accounts. *Jones v. Rose*, 81 W. Va. 177, 94 S. E. 41.

In a joint action by several, to recover a penalty for unlawful mining the uncontradicted testimony of any one of them that he did not consent in writing to the removal of the coal, will warrant a judgment against defendant for the full penalty, the proof in other respects being complete; and it is not material to defendant whether judgment be rendered in favor of all the plaintiffs or only in favor of the one who so testified. *Selvey v. Grafton Coal, etc., Co.*, 72 W. Va. 680, 79 S. E. 656.

g. Errors in Costs.

See post, COSTS.

h. Errors in Chancery Proceedings.

(½) In General.

Order of Reference.—Where an order of reference has not been excuted the fact that it was improperly made is not assignable error. *Reager v. Chappellear*, 104 Va. 14, 51 S. E. 170.

Erroneous Instruction. — If on the trial of an issue out of chancery an instruction is given which is plainly erroneous and prejudicial, a decree based solely upon the verdict into which the error and prejudice enters, and not upon a consideration of the chancery record independent of the verdict, must be reversed. *Wilson v. Wiggin*, 73 W. Va. 580, 81 S. E. 342.

The omission of a case from the hearing docket of a chancery court will not reverse decrees in it. *Darnell v. Flynn*, 69 W. Va. 146, 71 S. E. 16.

Defect in Notice.—"Total lack of notice being insufficient to impeach a

commissioner's report, when harmless, a mere defect in a notice, waived by appearance and procedure under it, consisting of the taking of full proof, as if the notice had been perfect, constitutes no ground for reversal of a decree founded upon the evidence." *State v. Haymond*, 84 W. Va. 292, 295, 100 S. E. 81.

Where a petition is filed in a chancery suit by the surety of a receiver therein against the receiver and one to whom he has illegally disposed of a part of the funds under his control, praying that they may be required to account for and pay to such person as the court shall direct the funds so illegally disposed of, if the issues between the parties are sharply drawn and they are afforded every opportunity to meet them that could have been afforded on an original bill, and depositions are taken and the parties fully heard, a proper decree based thereon will not be reversed, although the relief granted might have been afforded on an original bill. The parties are not prejudiced by the mode of procedure. *Bowman v. Liskey*, 108 Va. 678, 62 S. E. 942.

Decrees ordering and confirming sales of property and adjudicating priorities and liens, so uncertain as to their effect upon the rights of parties, when read in connection with other decrees and orders in the cause, that the appellate court can not see whether parties have been prejudiced by it, and apparently violative of the rights of some of them, are erroneous and will be reversed. *Birch River Boom, etc., Co. v. Glendon Boom, etc., Co.*, 71 W. Va. 507, 76 S. E. 972.

Directing Issue Out of Chancery.—In determining whether a trial court erred in awarding an issue out of chancery, the appellate court will not be influenced by any matters connected with the testimony taken on the trial of the issue, but will look simply at the state of the proof existing at the time when

the issue was ordered. If it appears that the issue was improperly awarded because of the insufficiency of the affidavits upon which the application was based, this court will reverse the order awarding the issue, although a verdict has been found in favor of the plaintiff, and will remand the cause for further proceedings. *Stevens v. Duckett*, 107 Va. 17, 57 S. E. 601.

Submission of Issue to Jury — Exception to Commissioner's Report. —

Where the report of the commissioner of accounts upon the accounts of the treasurer of a county was excepted to by the treasurer, the court directed a jury to be summoned to try the issue in the cause. That issue was whether the treasurer was entitled to certain credits for sums paid by him upon warrants not authorized by the board of supervisors. The issue presented a question of law which should have been decided by the court and not submitted to a jury. Moreover, there is no authority for summoning a jury on the hearing of the exceptions to the report of a commissioner. It was error, therefore, to have summoned the jury, but the error was harmless, as the court itself properly passed upon the exceptions to the commissioner's report, and it is the correctness of the court's ruling on the exceptions which is the matter in controversy on appeal. *Leachman v. Board*, 124 Va. 616, 98 S. E. 656.

Decree Appointing Receiver.—In a case proper for a receiver, this court will not reverse a decree appointing him after he has performed his duties, for failure to give the notice required by statute. *Wright v. Pittman*, 73 W. Va. 81, 79 S. E. 1091.

Partition Proceedings. — Where substantial justice has been done in making a partition of land, this court will not set aside the decree of the chancellor merely because he has seen fit primarily to invoke the aid of a master in chancery rather than a board

of commissioners to lay the case before him. *Phillips v. Dulany*, 114 Va. 681, 77 S. E. 449.

This court will not reverse a decree determining title and partitioning land for an error in taking the bill for confessed as to a non-resident defendant who was personally served with process out of the state, when no substantial injustice is done to such nonresident. *Wright v. Pittman*, 73 W. Va. 81, 79 S. E. 1091.

Decree Determining Boundary. —

Where the thread of a stream feeding a pond is nearest the side of appellant, he is not injured by a decree declaring the center of the pond to be the true boundary between him and the owner on the other side. *Providence, etc., Club v. Miller Mfg. Co.*, 117 Va. 129, 83 S. E. 1047.

(3) Errors in Interlocutory Decrees.

See ante, "In General," XIV, H, 2, h, (½).

Premature Reference.—The error in an interlocutory decree prematurely referring to a commissioner, a cause in which the depositions were subsequently taken before the commissioner and notaries, at sundry places, the cause fully developed on its merits and a decree entered, settling the principles thereof, is harmless and sufficient ground for reversal of such decree, if it is sustained by the pleadings and proof. *Teter v. Moore*, 80 W. Va. 443, 93 S. E. 342.

(4) Depositions.

Informality in Taking Depositions.

—A decree will not be reversed at the instance of a party who has taken depositions, for an informality in the proceedings, when it appears that there was a full and fair hearing upon the merits, and substantial justice has been done. *Towner v. Towner*, 65 W. Va. 476, 64 S. E. 732.

An irregularity in the taking of depositions fully developing the merits of the cause, at which all of the litigating

parties appeared and examined and cross-examined the witness, constitutes no ground for reversal of the decree founded upon them. *Carroll-Cross Coal Co. v. Abrams Creek Coal, etc., Co.*, 83 W. Va. 205, 98 S. E. 148.

Refusal to Allow Depositions to Be Retaken.—Where depositions in a divorce suit were taken before a justice instead of before a commissioner in chancery as required by § 2260 of the Code, it is not error to refuse to permit them to be retaken before such commissioner where it clearly appears that they could not effect the results of the litigation. *Johnston v. Johnston*, 116 Va. 678, 82 S. E. 694.

3. Errors Not Available on Appeal.

a. Invited Error.

(1) In General.

The judgment below will not be reversed for error induced or invited by the party asking the reversal. *State v. Calhoun*, 67 W. Va. 666, 69 S. E. 1098; *Louisa v. Yancey*, 109 Va. 229, 63 S. E. 452; *Bugg v. Seay*, 107 Va. 648, 60 S. E. 89; *James Sons Co. v. Hutchinson*, 79 W. Va. 389, 90 S. E. 1047; *Wolontier v. United States Casualty Co.*, 126 Va. 156, 167, 101 S. E. 58; *Levy v. Davis*, 115 Va. 814, 80 S. E. 791.

Waiver of Error.—In some instances invited errors are waived. *Mauch Chunk Nat. Bank v. Shrader*, 74 W. Va. 310, 81 S. E. 1121.

Errors in Procedure.—A prisoner on trial in a criminal case can not be heard to complain of mere errors in procedure, not violative of any constitutional guaranty, that he has induced or caused. *State v. Snider*, 81 W. Va. 522, 94 S. E. 981.

"The appellant must be consistent, and if he asks the court below to make a specific ruling, or to proceed in a certain manner, he cannot complain in an appellate court that the ruling or action is erroneous. He has invited the error and must accept its results, and the appellate court will not reverse a

judgment at his instance on account of it." *Comer v. Ritter Lumber Co.*, 59 W. Va. 688, 689, 53 S. E. 906.

Rulings on the pleadings made by the trial court at the instance of the appellant and in his favor, and not objected to by the appellee, will not be noticed on appeal. *Gillespie v. Davis*, 116 Va. 630, 82 S. E. 705.

Rulings on Evidence—Hearing Motions Together.—In an action upon an accident insurance policy, defendant moved to strike out certain oral evidence in regard to the latest address of assured appearing on its records, and afterwards demurred to the evidence. The trial court sustained the motion of the defendant and the demurrer to the evidence. The Supreme Court of Appeals was unable to ascertain from the record what evidence the court excluded under this ruling, but held from clearly admissible evidence that the judgment of the trial court in sustaining the demurrer to the evidence was erroneous. Although the demurrer to the evidence was interposed after the motion to exclude, both were passed on at the same time, and if the defendant suffered in consequence thereof, and would not have demurred if its motion to exclude had been previously overruled, it cannot complain of the error, as it invited it. *Wolontier v. United States Casualty Co.*, 126 Va. 156, 101 S. E. 58.

One who resists a motion made by a party introducing improper evidence to exclude it from the jury cannot complain, on appeal, of its introduction. *Comer v. Ritter Lumber Co.*, 59 W. Va. 688, 53 S. E. 906.

Answer Directly Responsive to Cross-Examination.—If defendants, in an action for libel, are not content to let the case stand upon the general damages presumed by law, but wish to rebut this presumption by questioning plaintiff on cross-examination as to what actual injury plaintiff had in fact sustained by libel, they have the

right to do so, in diminution of damages. But having asked the question, they can not object to an answer in direct response to the question. *Myers & Co. v. Lewis*, 121 Va. 50, 92 S. E. 988.

Failure to Object to Plea in Abatement for Misjoinder of Defendants.—

Although misjoinder of defendants in an action of assumpsit is matter of defense under the general issue and no ground for a plea in abatement, the trial of the issue of misjoinder of defendants, made by a plea in abatement not objected to but replied to by the plaintiff, separately and preliminarily, as other issues on pleas in abatement are tried, over the objection of the plaintiff, is not reversible error, his failure to object to the plea in abatement and his replication thereto having invited and induced the error of the court. *Harris v. North*, 78 W. Va. 76, 88 S. E. 603.

(8) Instructions.

A party cannot complain of error in instructions given at his request. *Wickham v. Leftwich*, 112 Va. 225, 70 S. E. 503; *Norfolk Truckers Exch. v. Norfolk Southern R. Co.*, 116 Va. 466, 82 S. E. 92; *Norfolk, etc., R. Co. v. Crocker*, 117 Va. 327, 341, 84 S. E. 681; *Myers & Co. v. Lewis*, 121 Va. 50, 92 S. E. 988; *Virginia Portland Cement Co. v. Swisher*, 122 Va. 113, 94 S. E. 159; *Norfolk Hosiery, etc., Mills v. Aetna Hosiery Co.*, 124 Va. 221, 98 S. E. 43; *Phoenix Ins. Co. v. Shulman Co.*, 125 Va. 281, 99 S. E. 602; *Towson v. Towson*, 126 Va. 640, 102 S. E. 48. See ante, "Similar Instruction Given at Request of Complainant," XIV, H, 2, e, (1), (c).

Although an instruction requested by a defendant was not given by the trial court, yet if it did instruct upon that point as requested by the defendant, he can not complain, on a writ of error, of the ruling of the trial court on that point. If error was committed, it was

invited by him. *Louisa v. Yancey*, 109 Va. 229, 63 S. E. 452.

In an action for libel defendant requested the court to instruct the jury that if they believe from the evidence that the alleged libelous statements contained in the letter from defendant were substantially true, they must find for the defendant. The court refused to give this instruction as offered, but amended the same by inserting after the words "substantially true" the words "in the ordinary and usually accepted meaning thereof." The court had already given at the request of the defendant an instruction telling the jury that they were to deal with the words in question in "their usual meaning and ordinary signification." Held: That if there was error in the amendment to the instruction, which the court did not think, defendant could not be heard to complain of it. *Vaughan v. Lytton*, 126 Va. 671, 101 S. E. 865.

Where instructions are contradictory and inconsistent, but the erroneous instructions were granted by the court at the instance of the party complaining of the instructions, he can not complain of that as an error which could not possibly have injured his cause. *Standard Paint Co. v. Vietor & Co.*, 120 Va. 595, 91 S. E. 752. See also, *Ferries Co. v. Brown*, 121 Va. 13, 92 S. E. 813.

Where an instruction requested by defendants is amended by the court, and the amended instruction is plainly right, defendants cannot complain that it was in conflict with another instruction given at their request, the error if any being in the latter instruction and arising from the language used at defendants' request. *Craddock Lumber Co. v. Jenkins*, 124 Va. 167, 97 S. E. 817.

Where accused in a requested instruction introduced unnecessary matter not essential to the defense relied on and with reference to which the Commonwealth had introduced no

evidence, he cannot complain that the court inadvertently allowed it to remain therein. *Lucchesi v. Commonwealth*, 122 Va. 872, 94 S. E. 925.

Refusal of Instructions Propounding Different Doctrine.—A party who invites error will not be heard to complain of having misled the court. The principle is not affected by the fact that the party had asked for other instructions propounding a different doctrine which were refused and the ruling excepted to. He should have stood by his exception. *Levy v. Davis*, 115 Va. 814, 80 S. E. 791.

Right to Complain that Jury Did Not Follow Erroneous Instruction. — If a party has secured an erroneous instruction without objection from the adverse party he can not complain if the jury did not follow it. *Norfolk, etc., R. Co. v. Crocker*, 117 Va. 327, 84 S. E. 681.

b. Errors Consented to.

See post, "Waiver or Estoppel," XIV, H, 3, c.

c. Waiver or Estoppel.

(1) In General.

Waiver in Argument in Appellate Court.—Errors suggested in the petition for a writ of error, but not pointed out or pressed in argument, will be considered as waived. *Whealton v. Doughty*, 116 Va. 566, 567, 82 S. E. 94.

"The third assignment of error was waived by counsel in the oral argument, and, therefore, need not be further considered." *Chesapeake, etc., Railway v. McCarthy*, 114 Va. 181, 187, 76 S. E. 319. See also, *Wallace v. Chesapeake, etc., R. Co.*, 73 W. Va. 347, 351, 80 S. E. 499.

When on a trial a party adopts a course directly inconsistent with an exception previously taken by him to some ruling of the trial court, he will be deemed to have waived such exceptions and cannot take advantage of it upon an appeal or writ of error.

Southern R. Co. v. Blanford, 105 Va. 373, 387, 54 S. E. 1.

Acceptance of Benefit of Decrees.—A party who was responsible for cross-errors assigned on rehearing and who had accepted the benefit of the decrees entered in the suit, could not have the errors considered on appeal. *Pardee, etc., Lumber Co. v. Odell*, 78 W. Va. 159, 88 S. E. 419. See ante, "Estoppel to Appeal," IV, F.

Plaintiff Failing to Withdraw Demurrer to Evidence After Sufficient Notice of Plea.—A petition for rehearing alleged that the court erred in affirming a nunc pro tunc order of the lower court, under which a plea of the general issue was entered after the case had been fully tried and judgment entered for the plaintiff—neither the plaintiff nor his counsel having any intimation, during the trial, that the general issue was relied upon by the defendant thus rendering testimony competent which under the actual pleadings was competent. Held: Under the facts established by the record, that the plaintiff had notice in ample time to have withdrawn his demurrer to the evidence if he had desired so to do, and having failed to do so, he could not be heard to say that he was taken by surprise or injured by the effect of his voluntary inaction in the premises. The fact that counsel had no notice till after verdict of the jury was wholly immaterial. *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

Plaintiff obtaining instructions plainly predicated on the existence of certain evidence, is estopped from denying its existence when considering instructions tendered by the defendant predicated upon the same evidence, although the evidence be not certified to this court. *Gatewood v. Garrett*, 106 Va. 552, 56 S. E. 335.

Waiver of Right to Object to Instructions. — Where, in ejectment, plaintiff claims under a junior, and

defendants under a senior inclusive, patent, the former, to recover, must show location of his land within some of the excepted areas; and an instruction imposing on defendants the burden to locate all the exceptions in the senior grant, and to show that they do not embrace the land in controversy, is erroneous, but the defendants, by assuming and attempting to sustain in the trial court such burden of proof, are not held to have waived their right to object to the giving of such instruction or to assign it as error in the appellate court. *Williams v. Smith*, 76 W. Va. 287, 85 S. E. 546.

Acceptance of Service as Releasing Objection Thereto.—Apparent want of service of a notice to take a deposition read on the trial in the court below over a general objection will not be regarded on writ of error here when it is made to appear from a corrected record certified from the lower court that notice thereof was in fact duly accepted by counsel. *McGuire v. Old Sweet Springs Co.*, 73 W. Va. 321, 79 S. E. 350.

To Deny Authority of Trustee in Bankruptcy.—In an action by a trustee in bankruptcy to recover a debt which the referee in bankruptcy has decided belonged to the estate of the bankrupt, an not to the assignee of the debt, objection can not be made in this court for the first time that the referee was without authority to act in the premises, where it appears that his jurisdiction was not questioned at the time he acted, but was in fact admitted by filing a petition in the district court to have his decision reversed on the merits. *Kilgore v. Barr*, 114 Va. 70, 75 S. E. 762.

Jurisdiction of Trial Court.—A party who has answered a petition filed against him in a chancery suit, and made full defense on the merits, can not object in the appellate court for the first time to the jurisdiction of the

trial court to permit the petition to be filed. *Keys Planing Mill Co. v. Kirkbridge*, 114 Va. 58, 75 S. E. 778.

To Maintain Action for Future Injuries.—Where the record shows that a case was conducted throughout in the lower court on the theory that only such damages could be recovered as had been suffered prior to the institution of the suit, and the evidence has been confined to such prior damages at the instance of the defendant, this is an admission of the right and necessity for future actions for subsequent injuries, and the defendant is estopped to deny in this court that the case belongs to that class where the plaintiff is entitled to maintain successive actions for the damage he may from time to time suffer. He can not assume in this court a position inconsistent with that taken by him in the trial court. *Virginia R., etc., Co. v. Ferebee*, 115 Va. 289, 78 S. E. 556.

Filing Amended Bill.—Where a demurrer to an original bill has been sustained, and the complainant, by leave of the court, has filed an amended bill, he is considered to have acquiesced in the action of the court upon the demurrer, and will not be permitted to assign such action as error in the appellate court. *Davis v. Marshall*, 114 Va. 193, 76 S. E. 316.

Sustaining Demurrer to Bill.—"No assignment of error can be considered here as to the action of the trial court in sustaining the demurrer to the original bill. Where a party, after a decree sustaining a demurrer to his bill, by leave of the court files an amended bill, he is considered to have acquiesced in the action of the court upon the demurrer and will not be permitted to assign such action as error in the appellate court. This is the rule in this State, and generally, it seems. *Fudge v. Payne*, 86 Va. 303, 308, 10 S. E. 7. See 2 Cyc. 645; 4 Am. & Eng. Enc. of Law and Practice, 98;

1 Enc. Pl. & Pr. 624, and cases cited in notes." *Davis v. Marshall*, 114 Va. 193, 198, 76 S. E. 316.

Amendment of Plea — Failure to Ask Continuance.—Counsel for plaintiff called the attention of the court to the failure of the defendant to file with his plea the proper affidavit under § 3280, Code of 1904, denying the partnership. Thereupon, on the motion of counsel for the defendant and over the objection and exception of the plaintiff, the court permitted the counsel for the defendant to prepare and file such an affidavit. Plaintiff went on with the trial and did not ask a continuance. Held: Under these circumstances, where neither the evidence nor the facts were certified to the Supreme Court of Appeals so that that court had no facts showing that plaintiff's rights had been injuriously affected, the judgment in favor of the defendant should be affirmed. *Dean v. Dean*, 122 Va. 513, 95 S. E. 431.

Suffering Voluntary Nonsuit and Dismissal.—Where a plaintiff stands by and voluntarily suffers a default and dismissal, by failure to reply to defendant's plea, the court has discretion to refuse to raise the default at a later time in the absence of excuse by the plaintiff, and that discretion can not be reversed on appeal when the record affords nothing to show abuse of the same. *Higgs v. Cunningham*, 71 W. Va. 674, 77 S. E. 273.

Motion to Direct Verdict.—"Defendant twice moved the court to direct a verdict in her favor, once after plaintiff had given her testimony, and again after plaintiff had closed her case. These motions were overruled, and exceptions taken. These motions were properly overruled, because plaintiff's testimony made out a good cause of action. But, even if there had been merit in these motions, defendant waived them by subsequently introducing her own evidence and suffering the case to go to the jury upon the

evidence introduced on both sides." *Averill v. Boyer*, 69 W. Va. 396, 398, 71 S. E. 707, citing *Williams, etc., Co. v. Ferguson Contracting Co.*, 60 W. Va. 428, 55 S. E. 1011.

Complainant Not Estopped — Instructions.—When, in a criminal case, the court gives erroneous instructions at the instance of the state, and refuses a proper one asked for by the defendant, and afterwards gives, at the instance of defendant, instructions embodying the erroneous propositions contained in the instructions given for the state, the action of the court in respect to the defendant's instructions is tantamount to an erroneous modification of the defendant's proper instruction, and he is not estopped from complaining of the action of the court. *State v. Pine*, 56 W. Va. 1, 48 S. E. 206.

Errors Not Waived.—Where in assumpsit on an account, plaintiff has filed with his declaration the affidavit prescribed by § 46, ch. 125, Code, he may, after the overruling of his objection to the filing of any plea unaccompanied by the counter affidavit by that section made an essential prerequisite therefor, and of his motion to strike such plea from file, duly excepted to, join issue and proceed to trial thereon, without waiving the benefit of the exception saved to him upon the record. *Lewis v. Blankenship*, 75 W. Va. 598, 84 S. E. 500.

(2) Relating to Evidence.

Failure to Object to Evidence.—See ante, "Evidence," XIV, F, 16, b, (15).

Parol Evidence.—When a party who is entitled to the benefit of the rule prohibiting the administration of parol evidence to vary or contradict a writing waives the benefit thereof by allowing such evidence to be received without objection and without any effort to have it stricken from the minutes or disregarded by the trial court, he cannot, after the trial has closed and the

case has been decided against him, invoke the rule in order to secure a reversal of the judgment by an appellate court. *Vaughan v. Mayo Milling Co.*, 127 Va. 148, 102 S. E. 597.

Introduction of Same Evidence by Complainant. — A party will not be allowed, in the appellate court, to object to evidence introduced by his adversary in the trial court, where he has himself introduced the same or similar evidence on the same point. *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33; *Southern R. Co. v. Blanford*, 105 Va. 373, 54 S. E. 1; *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101; *Southern R. Co. v. Hansbrough*, 107 Va. 733, 737, 60 S. E. 58; *Seaboard Air-Line Railway v. Chamblin*, 108 Va. 42, 60 S. E. 727; *Burton v. Seifert & Co.*, 108 Va. 338, 61 S. E. 933; *Chesapeake, etc., R. Co. v. Barger*, 112 Va. 688, 72 S. E. 693; *Chesapeake, etc., R. Co. v. McCarthy*, 114 Va. 181, 76 S. E. 319; *Norfolk, etc., R. Co. v. Simmons*, 127 Va. 419, 103 S. E. 609.

An objection to the introduction of evidence is deemed to have been waived where the same fact is testified to by the objector himself. *Davis v. Cole Bros.*, 115 Va. 501, 79 S. E. 1033.

Bringing Out Substantially Same Matter on Re-Examination. — Objection to matter brought out upon cross-examination, if valid, is waived by substantially the same question being put to the witness on his re-examination in chief. *McComb v. Farrow*, 128 Va. 455, 104 S. E. 812.

Defendant waives the benefit of his motion to exclude plaintiff's evidence, by thereafter introducing his own. *Danser v. Dorr*, 72 W. Va. 430, 78 S. E. 367.

Where, after the plaintiff has introduced all his evidence, a motion of the defendant to exclude from the jury all the plaintiff's evidence has been overruled, defendant proceeds to introduce his evidence in defense, the appellate

court will disregard said motion, as having been waived by the defendant, notwithstanding the exception to such ruling is made the subject of a separate bill of exceptions, and will not reverse the judgment, for that cause. *Williams, etc., Co. v. Ferguson Contracting Co.*, 60 W. Va. 428, 55 S. E. 1011.

4. Effect of Statute of Jeofails.

See ante, AMENDMENTS; post, JUDGMENTS AND DECREES; PLEADING.

Statutory Provisions. — Va. Code 1919, §§ 6331, 6332; Barnes Code, Ch. 134, §§ 3, 4.

5. Release of Error.

See ante, "Waiver or Estoppel," XIV, H, 3, c.

Judgment on Confession Releases Errors. — Va. Code 1919, § 6330; Barnes Code, Ch. 134, § 2.

6. Error Waived on Appeal.

An assignment of error to the improper admission of evidence, and of evidence "of a character so intangible as to be not capable of being rebutted," but which does not call attention to any particular evidence as improperly admitted, and which has not been argued, either orally or in briefs, must be regarded as waived. *Warwick County v. Newport News*, 120 Va. 177, 90 S. E. 644.

I. PRESUMPTION ON APPEAL.

1. General Rules.

The presumption of law is in favor of the correctness of the judgment of the lower court, and the supreme court will not reverse unless error affirmatively appears by the record. *Johnson v. Michaux*, 110 Va. 595, 66 S. E. 823; *Smith v. Alderson*, 116 Va. 986, 990, 83 S. E. 373; *Crawley v. Glaze*, 117 Va. 274, 84 S. E. 671; *Witt v. Creasey*, 117 Va. 872, 86 S. E. 128; *Morrisette v. Cook, etc., Co.*, 122 Va. 588, 95 S. E. 449; *Catron v. Bostic*, 123 Va. 355, 96 S. E. 845; *Clinchfield Coal Corp. v. Redd*, 123 Va. 420, 96 S. E. 836; *Du-*

pont, etc., *Co. v. Taylor*, 124 Va. 750, 98 S. E. 866; *Reynolds v. Adams*, 125 Va. 295, 99 S. E. 695; *West v. Commonwealth*, 125 Va. 747, 99 S. E. 654; *Shelton v. Snyder*, 126 Va. 625, 102 S. E. 83; *Osborne v. Gillenwaters*, 128 Va. 21, 104 S. E. 578; *Watts v. Commonwealth*, 129 Va. 781, 106 S. E. 339; *Cox v. National Coal, etc., Invest. Co.*, 61 W. Va. 291, 56 S. E. 494; *Truex v. South Penn Oil Co.*, 62 W. Va. 540, 545, 59 S. E. 517; *Scott v. Newell*, 69 W. Va. 118, 70 S. E. 1092; *Teter v. Franklin Fire Ins. Co.*, 74 W. Va. 344, 346, 82 S. E. 40.

Decree on Conflicting Evidence.—There is a presumption in favor of the decree of a trial court, and this presumption is entitled to special consideration when the decree is based on uncertain and conflicting testimony. *Alexander v. Critcher*, 11 Va. 723, 94 S. E. 335.

2. Applications of Rules in Particular Instances.

(a) In General.

Jurisdiction.—Where there is no bill of exceptions showing all of the evidence introduced, the Supreme Court of Appeals presumes that there was evidence not certified as a part of the record which showed that the offense was committed within the jurisdiction of the court. *Byrd v. Commonwealth*, 124 Va. 833, 98 S. E. 632.

Where a court is a court of general jurisdiction, although an appeal is given to it in a certain class of cases by a separate statute from that conferring most of its jurisdiction, there is the same presumption in favor of its correctness in the one case as the other. There is a legal presumption, in the absence of evidence to the contrary, in favor of the jurisdiction of courts of record of general jurisdiction. *Shelton v. Snyder*, 126 Va. 625, 102 S. E. 83.

Decree Confirming Report of Commissioner.—There is a strong presumption in the appellate court in favor of

a decree by which the trial court has confirmed the report of a commissioner upon a question of fact. *Maddux v. Buchanan*, 121 Va. 102, 92 S. E. 830.

The literal correctness of a record transcript in an appellate court is to be assumed, in the absence of evidence of its inaccuracy. *James Sons Co. v. Hutchinson*, 79 W. Va. 389, 90 S. E. 1047.

Presumption that Jury Understood to Disregard Evidence Stricken Out.—If the court is asked to strike out certain improper evidence that has gotten before the jury, and does so, and states in the presence of the jury that it is stricken out, specifying the part stricken out, it is not indispensable that he should expressly tell the jury not to consider it as evidence. This court will presume that the jury understood that they were not to regard such evidence in arriving at their verdict, and that they did not. *State v. Gebhart*, 70 W. Va. 232, 73 S. E. 964.

Presence of Accused.—If the record of a criminal trial shows retirement of the judge, the attorneys and a witness, from the court room, in which the trial was conducted, and is silent as to whether they were accompanied by the accused, the legal presumption is that they were not and that he remained in the court room. *State v. Snider*, 81 W. Va. 522, 94 S. E. 981.

If the order entered in the trial of a felony shows that the prisoner was set to the bar of the court in custody of the sheriff, it is presumed that his presence continued throughout the entire proceedings of that day. But such presumption is rebuttable, and may be overcome by evidence proving the contrary. *State v. Lemon*, 84 W. Va. 25, 99 S. E. 263.

Same — View of Premises. — The statement in the same order that a view of the premises where the crime was committed was ordered, and "thereupon the jury in charge of the sheriff, the judge and clerk of the court

viewed the premises," does not overcome such presumption; the prisoner was, presumably, present at the view, notwithstanding the failure of the order to mention his name in connection with the jury and the officers of the court. Nor does the failure of the order to state that, at the conclusion of the day's proceedings, he was remanded to jail in the custody of the sheriff overcome such presumption. *State v. Lemon*, 84 W. Va. 25, 99 S. E. 263.

Statement as to Duty of Juror to Disclose Information Relating to Case.

—Where the record is silent as to whether the trial court stated to the jury the duty of the juror to disclose facts within his knowledge it will be presumed that the court made such statement. *Truex v. South Penn Oil Co.*, 62 W. Va. 540, 59 S. E. 517.

That Affidavits Supported Action of Trial Court.—Where determination of a question would require an inspection of affidavits not a part of the record, it must be presumed that such affidavits supported the action of the trial court. *Smith v. Withrow*, 129 Va. 668, 106 S. E. 694.

That Appeal Duly Taken within Time Prescribed.—In the absence of any evidence in the record before the Supreme Court of Appeals to the contrary, that court must hold that the statement in the record that appeal from the decision of a board of supervisors to the circuit court was taken on December 1, 1917, means that the appeal was duly taken in the manner and within the time prescribed by the state. *Shelton v. Snyder*, 126 Va. 625, 102 S. E. 83.

Notice of Taking of Deposition.—An assignment of error, founded upon the overruling of an objection to the reading of a deposition on the ground of insufficiency of the notice in respect to the time and place of the taking of the same, which objection admits notice thereof and is also opposed by re-

cord evidence thereof, is untenable in the absence of proof of uncertainty in respect to the time and place, shown by production of a copy of the notice or otherwise, it being presumed that its terms were reasonably certain. *Stalnaker v. Janes*, 68 W. Va. 176, 69 S. E. 651.

A decree sustained an exception to the deposition of a witness and this was assigned as error. Counsel were not agreed and the record was not clear as to the facts upon which the exception to this deposition should be disposed of, and the presumption, therefore, is that the action of the lower court was right. *Maddux v. Buchanan*, 121 Va. 102, 92 S. E. 830.

Change of Venue.—Where the motion is based on the ground that an impartial jury cannot be obtained in the county, the fact that an impartial jury has subsequently been secured therein is conclusive proof that the motion was without foundation. *Taylor v. Commonwealth*, 122 Va. 886, 889, 94 S. E. 795.

Setting Aside Verdict.—In the absence of affidavits, the action of the lower court in setting aside a verdict must be presumed to be correct. *Smith v. Withrow*, 129 Va. 668, 106 S. E. 694.

In an appeal from a decree of divorce whether proposals to reconcile difference made by either party are genuine and sincere, and in form and substance conciliatory, are matters of fact, as to which a decree, denying relief, is entitled to great weight on appeal. *Maxwell v. Maxwell*, 75 W. Va. 521, 84 S. E. 251.

Amount of Recovery — Professional Charges.—A judgment in an action for personal injuries inflicted by a carrier will not be reversed for failure to prove the value of professional services of a physician treating plaintiff to effect a cure, when the amount of the charge therefor is not shown in the case; nor, when shown, if the court can see the amount thereof is

obviously not unreasonable. *Booth v. Baltimore, etc., R. Co.*, 77 W. Va. 100, 87 S. E. 84.

That Trial Court Looked to Evidence For Facts Disclosed by Pleadings.—It is not error to reverse, on a bill of review, a decree predicated solely upon facts set up in an answer as ground for affirmative relief, because the evidence in the case would disclose the same facts. The appellate court will entertain no presumption that the trial court looked to the evidence for facts which the pleadings disclose, and, on such presumption, reverse the decree. *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733.

Ground for New Trial.—Where the motion of defendant to set aside the verdict and award him a new trial, among others, is based on the ground of some supposed improper statements or remarks of opposing counsel, during the trial or in the course of the argument in the presence of a jury, in the absence of anything in the record showing any such statements or remarks were in fact made, or the character thereof, or the exceptions thereto, or the rulings of the court thereon, or that the action of the court in awarding the new trial was based thereon, this court will not assume that the judgment, otherwise clearly erroneous, was justified on any such ground. *Malone v. Davis*, 77 W. Va. 120, 86 S. E. 1100.

Propriety of New Trial Granted by Special Judge.—An award of a new trial by a special judge who did not preside at the trial of the case is tested, as to its propriety, solely by the record of the trial as preserved and is not aided or strengthened by any presumption arising from supposed personal or judicial knowledge of the character, appearance and demeanor of the parties, witnesses and jurors. *Shipley v. Virginian R. Co.*, 87 W. Va. 139, 104 S. E. 297.

(b) Process.

Where a decree declares that a case is heard upon process served, it will be taken for true that there was such process, and that it was served. *Darnell v. Flynn*, 69 W. Va. 146, 71 S. E. 16.

(c) Pleading.

Amended Declaration. — Where plaintiff has been twice permitted to amend his declaration, and he has so amended it and gone on his second amended declaration, the court will presume that he made the strongest presentation of his case which the facts will permit. *United States Spruce Lumber Co. v. Shumate*, 118 Va. 471, 87 S. E. 723.

Overruling Demurrer.—Where the record shows a demurrer filed but no ruling thereon, the demurrer must be regarded as overruled. *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271, 89 S. E. 305; *Dimmack v. Wheeling Tract Co.*, 58 W. Va. 226, 52 S. E. 101.

Sustaining Demurrer.—A general demurrer to a bill in equity challenges its sufficiency in all respects; and a decree sustaining such a demurrer is presumed in the appellate court to rest upon any sufficient ground disclosed by the bill, even though it was not assigned in writing as a ground of demurrer, while others, are not well taken, were. *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740.

The recital in a decree in chancery that there was a demurrer to a bill which was sustained imports a verity, and, on appeal, the appellate court must assume that there was a demurrer to the bill upon which the trial court was warranted in passing. *Brown v. Cornwell*, 108 Va. 129, 60 S. E. 623.

Plea of Guilty.—If the facts and circumstances attending the reception and recordation of a plea of guilty do not affirmatively appear from the record it will be presumed that the trial court discharged its full duty in the

premises. *State v. Hill*, 81 W. Va. 676, 95 S. E. 21.

Same—Denial of Motion to Withdraw.—Unless the record shows the fact to be otherwise this court will presume that the trial court discharged its full duty and did not abuse its judicial discretion in denying the prisoner's motion to withdraw his plea of guilty and substitute a plea of not guilty, and pronouncing judgment against him. *State v. Hill*, 81 W. Va. 676, 95 S. E. 21.

Refusal to Allow Filing of Supplemental Affidavit.—Where the court has refused a request to file a supplemental affidavit in attachment, and the record does not disclose what was proposed as supplemental, it must be presumed that the proposed supplemental matter was subject to valid objection. *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

Rejection of Counter Affidavit.—When the record does not exhibit a counter affidavit, tendered and refused in a case in which counter affidavit is admissible under Code 1906, ch. 125, § 46, it must be presumed that the same was so defective as to justify the refusal. *Gray v. Mankin*, 69 W. Va. 544, 72 S. E. 648.

(d) Evidence.

An exception taken upon the trial, to the refusal of the court to permit a question propounded to a witness to be answered, will not be considered by the appellate court unless the expected answer was disclosed to the court at the time of the ruling. The appellate court in reviewing the judgment on writ of error, can not assume in such case that an answer favorable to the exceptor would have been given. *State v. Sixo*, 77 W. Va. 243, 87 S. E. 267.

Where the objection to the introduction of documents in evidence is general, the ruling of the trial court in excluding them will not be reversed, if for any reason they were inadmissible.

Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co., 105 Va. 574, 576, 54 S. E. 593.

Confining Proof to Part of Declaration Stating Cause of Action.—Where a declaration is good as to a part of the cause of action therein stated, the presumption is that the trial court confined the proof upon it within proper bounds. *Hot Springs, etc., Mfg. Co. v. Revercomb*, 110 Va. 240, 65 S. E. 557.

Offered Testimony Not Disclosed by Record.—Upon the trial of a cause involving the genuineness of a will, the contestants of the will offered a witness to prove certain declarations of the testatrix made subsequent to the date of the alleged will, accompanying the offer with an avowal by counsel that he expected to show by the witness that from the declarations of the testatrix, that the testatrix "could not have known of this will." The record did not show what the alleged declarations of the testatrix were, therefore the Supreme Court of Appeals must assume from the avowal that they were such as would have tended to show that the testatrix could not have known of the will. *Samuel v. Hunter*, 122 Va. 636, 95 S. E. 399.

Sufficiency of Evidence.—In a proceeding to determine the right of drainage through the lands of another, where none of the evidence is certified on writ of error by defendant, it will be presumed that a proper case was made out. *Hodges v. Richmond Cedar Works*, 120 Va. 492, 91 S. E. 644.

In *Henrico County v. Richmond*, 106 Va. 282, 290, 55 S. E. 683, it is said: "The evidence before the circuit court is not in the record before us, the appellant having appealed solely upon the legal questions involved. Under these circumstances it must be assumed that the evidence was legal, and sufficient to justify the conclusion reached by the circuit court upon all questions of fact."

Where accused was convicted of an

attempt to commit murder in the first degree and the evidence introduced at the trial was not brought before the Supreme Court of Appeals, that the court must presume that it was sufficient to establish that the attempted murder was murder in the first degree. *Fields v. Commonwealth*, 129 Va. 774, 106 S. E. 333.

(e) Instructions.

Correctness of Rulings as to Instructions.—To obtain a review of the action of the trial court, in refusing to give certain instructions at the instance of the complaining party, the record of the cause must show, by bills of exceptions or otherwise, what instructions were given at his instance, so as to enable the appellate court to determine whether any error has been committed in the rulings. In this instance, as in most others, there is a presumption in favor of the correctness of the rulings of the trial court, which prevails unless rebutted by the record. *Bartlett v. Bank*, 77 W. Va. 329, 87 S. E. 444.

Evidence to Support.—There is a presumption that there was sufficient evidence to support an instruction. *Watts v. Commonwealth*, 129 Va. 781, 106 S. E. 339.

That Rejected Instruction Covered by Other Parts of Charge.—Where there is no bill of exceptions showing all the instructions given or all of the evidence introduced, the supreme court of appeals presumes that the rejected instruction was covered by some other one given in the case. *Byrd v. Commonwealth*, 124 Va. 833, 98 S. E. 632.

Instructions Understood by Jury.—Instructions to the jury should not be too general in their terms, but should be limited to the facts alleged and proven, but on writ of error, and in the absence of evidence to the contrary, and of prejudice to the objecting party, this court will presume intelligence sufficient on the part of the jury to understand that such general instruc-

tions were to be limited to the facts in issue before them. *Brogan v. Union Tract. Co.*, 76 W. Va. 698, 86 S. E. 753.

(f) Jury.

Summoning and Impaneling.—While the statutes with reference to the summoning and impaneling of jurors in criminal cases are mandatory and must be strictly followed, yet the appellate court will indulge every proper presumption in favor of the regularity of the proceedings, and will not reverse the case where no injury is shown, unless the objection is made before the jury is sworn. *Karnes v. Commonwealth*, 125 Va. 758, 99 S. E. 562.

Summons of Grand Jurors.—If it appears from the record that some of the grand jurors were not those who were regularly drawn, it will be presumed, in the absence of a contrary showing, that they were legally summoned to take the place of the drawn jurors who failed to appear. *State v. Hoke*, 76 W. Va. 36, 84 S. E. 1054.

Oath of Jury.—If the record recites that the jury "were elected and sworn according to law," it will be presumed that the proper oath was duly administered. *State v. Hoke*, 76 W. Va. 36, 84 S. E. 1054; *Bank v. Lowther-Kaufman Oil, etc., Co.*, 66 W. Va. 505, 66 S. E. 713.

J. AFFIRMANCE.

See ante, "Rules of Decision," XIV, G.

1. In General.

Statutory Provisions.—The appellate court shall affirm the judgment, decree or order if there be no error therein, affirming in those cases where the voices on both sides are equal. Va. Code 1919, §§ 4937, 6365; Barnes Code, ch. 135, § 26, amended by Acts 1921, p. 171; Barnes Code, ch. 160, § 7.

When an appellate court hears a case wherein an appeal, writ of error, or supersedeas has been allowed, if it appears that, either before or since the

same was allowed, the judgment or decree has been so amended, the appellate court shall affirm the judgment or decree, unless there be other error. Va. Code, 1919, § 6334.

Where the record shows no error affirmatively, the judgment will be affirmed. *Burton v. Burton*, 118 Va. 519, 88 S. E. 51.

Unless the judgment is plainly wrong or without evidence to support it the supreme court of appeals must reverse it under Va. Code 1919, § 6336. *Du Pont, etc., Co. v. Brown*, 129 Va. 112, 105 S. E. 660.

No Change in Decree of Lower Court.—Section 6365 of the Code of 1919 does not authorize the Supreme Court of Appeals to change the decree of the lower court, except where such decree is reversed in whole or in part; hence the Supreme Court of Appeals in affirming a decree dismissing a bill for lack of equitable jurisdiction can not remand with direction to transfer the case to the law side of the court. *Ewing v. Dutrow*, 128 Va. 416, 104 S. E. 791.

No Error in Ruling of Court Below.—"The controlling facts in this case are substantially the same as those involved in *Tahaney v. Building Ass'n*, 59 W. Va. 296, 53 S. E. 791, and the principles there enunciated and applied in this case, contrary to the contentions of appellant. The questions of pleading and practice presented and argued seem to be fully covered and decided adversely to appellant, in *Martin v. Smith*, 25 W. Va. 579; *Darby v. Gilligan*, 43 W. Va. 755, 28 S. E. 737; *Dorr v. Dewing*, 36 W. Va. 466, 15 S. E. 93, and *Toledo Tie, etc., Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37. It is unnecessary, therefore, to reiterate the legal rules and principles so well established. We find no error in any of the decrees and proceedings below prejudicial to the rights and interests of appellant, and the decree appealed from will therefore be affirmed." *Washington Na.*

Bldg., etc., Ass'n v. Buckey, 71 W. Va. 363, 76 S. E. 673.

Affirmance of Original Decree.—A motion by the debtor, under §§ 5, ch. 134, W. Va. Code, to reverse a decree on a bill taken for confessed, for error in the allowance of a lien not claimed, which, tacitly admitting the lien, claims a credit on the debt by reason of a payment thereon, opens the decree, as to such lien, only so far as to let in the credit. On reversal of the decree allowing such credit, on appeal, the appellate court will affirm the original decree. *Armstrong, etc., Co. v. Painter*, 75 W. Va. 393, 83 S. E. 1027.

Conflict between Verdict and an Erroneous Instruction.—Where the verdict is right, it will not be set aside because it is in conflict with an erroneous ruling of the court. *Queen Ins. Co. v. Perkinson*, 129 Va. 216, 105 S. E. 680.

Removal with Direction to Transfer to Law Side of Court.—Section 6365 of the Code of 1919 does not authorize the Supreme Court of Appeals to change the decree of the lower court, except where such decree is reversed in whole or in part; hence the Supreme Court of Appeals in affirming a decree dismissing a bill for lack of equitable jurisdiction can not remand with direction to transfer the case to the law side of the court. *Ewing v. Dutrow*, 128 Va. 416, 104 S. E. 791.

Sentence for Capital Offense—Remand.—Where one, who has been convicted of a capital offense and sentenced to be hanged on a certain day, takes an appeal and, pending the appeal, the time fixed for his execution has passed, this court, on affirming the judgment, will remand the case to the lower court for a reentry of the judgment setting another day for his execution. *State v. Lemon*, 84 W. Va. 25, 99 S. E. 263, citing *State v. Haddox*, 50 W. Va. 222, 40 S. E. 387.

Mistake as to Equity Jurisdiction.—In the instant case, in view of the fact that the record suggested the possi-

bility that the defendants were overconfident in their view that a court of equity had no jurisdiction, and, therefore, failed fully to present the evidence upon which they relied in support of their claim of title, the decree of the lower court was affirmed by the Supreme Court of Appeals, without prejudice to the right of the defendants hereafter to assert their title to the property in an action of ejectment, if they should be so advised. *Cumbee v. Ritter*, 123 Va. 448, 96 S. E. 747.

Overruling Demurrer to Evidence.—“In *Mannon v. Camden Interstate R. Co.*, 56 W. Va. 554, 49 S. E. 450, it is held: ‘Judgment of the circuit court overruling a demurrer to evidence, will be affirmed unless it is contrary to the plain preponderance of the evidence or it is without evidence to support it as to some material question at issue.’” *Nichols v. Camden, etc., R. Co.*, 62 W. Va. 409, 416, 59 S. E. 968.

Relinquishment of Interest.—Where the lower court erred in peremptorily directing the jury to allow interest to plaintiff from the time the plaintiff’s demand accrued, where under the Code such allowance of interest was discretionary with the jury, the appellate court may affirm the judgment on condition that plaintiff relinquish the interest upon the principal sum found by the jury. *Washington, etc., Railway v. Westinghouse, etc., Mfg. Co.*, 120 W. Va. 620, 89 S. E. 131, 91 S. E. 646.

Fixing New Date for Extension Order to Become Effective.—Where the date fixed by the trial court for an extension ordinance to go into effect has passed pending an appeal from the order of extension, this court, on affirming the judgment, will fix a new date for the ordinance to go into effect. *Warwick County v. Newport News*, 120 Va. 177, 90 S. E. 644.

Overruling Demurrer—Amendment.—A final judgment for defendant upon issues joined upon a bad declaration, to which a demurrer was interposed and overruled, will not be reversed

for error in overruling the demurrer, when it plainly appears from the averments and proof that the declaration can not be amended without introducing a new cause of action. In such case plaintiff is not prejudiced by an affirmance, because the judgment is no bar to a cause of action in no wise pleaded, or otherwise in issue. *Dotson v. Skaggs*, 77 W. Va. 372, 87 S. E. 460.

Judgment Entered as upon Office Judgment, Where Writ of Inquiry Proper.—A judgment entered as upon an office judgment confirmed, in a case in which a writ of inquiry is proper, while technically irregular as to procedure, is not reversible when the record shows that no jury was demanded and the same judgment must have been entered on inquiry of damages. *Gray v. Mankin*, 69 W. Va. 544, 72 S. E. 648.

Judgment in Favor of One Defendant.—If, in an action on contract against two defendants, the plaintiff recovers judgment against only one, and there is a verdict and judgment in favor of the other defendant, on a writ of error awarded by the appellate court to the losing defendant, and no objection by him or the plaintiff as to the judgment in favor of the other defendant, the latter judgment will be affirmed. *Southern R. Co. v. Forgey*, 105 Va. 599, 600, 54 S. E. 477.

1½. Sufficient Evidence to Support Verdict or Findings.

a. Verdict of Jury.

(1) In General.

Where a case has been fairly submitted to a jury, their verdict will not be disturbed where there is evidence sufficient to support the verdict. *Virginia, R. etc., Co. v. Meyer*, 117 Va. 409, 84 S. E. 742; *Davy Pocahontas Coal Co. v. Kaylor*, 118 Va. 296, 87 S. E. 549; *McClung v. Folkes*, 122 Va. 48, 94 S. E. 156; *Webb v. Commonwealth*, 122 Va. 899, 94 S. E. 773; *Craddock Lumber Co. v. Jenkins*, 124 Va. 167, 171, 97 S. E. 817; *Trauerman v. Oliver*,

125 Va. 458, 467, 99 S. E. 647; *Harris v. Commonwealth*, 129 Va. 751, 756, 105 S. E. 541.

It has been repeatedly held that, where a case has been fairly submitted to a jury and a verdict fairly rendered, it ought not to be interfered with by the court, unless manifest wrong and injustice have been done, or unless the verdict is plainly not warranted by the evidence, or facts proved. *Norfolk, etc., R. Co. v. Duke*, 107 Va. 764, 60 S. E. 96; *Roanoke R., etc., Co. v. Young*, 108 Va. 783, 62 S. E. 961; *Norfolk, etc., R. Co. v. Parrish*, 119 Va. 670, 89 S. E. 923; *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 580, 46 S. E. 613; *Barrett v. Raleigh Coal, etc., Co.*, 55 W. Va. 395, 47 S. E. 154; *State v. Sullivan*, 55 W. Va. 597, 47 S. E. 267; *Buck v. Newberry*, 55 W. Va. 691, 47 S. E. 889; *Robinson v. Lowe*, 56 W. Va. 308, 312, 49 S. E. 250; *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91, 96, 49 S. E. 1012; *Tucker v. Colonial Fire Ins. Co.*, 58 W. Va. 30, 43, 51 S. E. 86; *Kinsey v. Carr*, 60 W. Va. 449, 451, 55 S. E. 1004; *Hollen v. Crim*, 62 W. Va. 451, 59 S. E. 172; *State v. Kidwell*, 62 W. Va. 466, 475, 59 S. E. 414; *Styles v. Chesapeake, etc., Co.*, 62 W. Va. 650, 654, 59 S. E. 609; *State v. Stewart*, 63 W. Va. 597, 60 S. E. 591; *Fisher v. Berwind*, 64 W. Va. 304, 61 S. E. 910; *Bradshaw v. Farnsworth*, 65 W. Va. 28, 63 S. E. 755; *Baker v. Jackson*, 65 W. Va. 282, 283, 64 S. E. 32; *Griffith v. American Coal Co.*, 78 W. Va. 34, 88 S. E. 595; *Perry v. Colborn*, 65 W. Va. 493, 64 S. E. 636.

Power to Review. — The rule, giving great weight, in the appellate court, to the finding of the trial court on a question of fact, lays no restraint upon the power of the former to ascertain, by full and careful investigation and analysis of the evidence, what the facts and circumstances are and whether the general finding is consistent therewith. *Berry v. Colborn*, 65 W. Va. 493, 64 S. E. 636.

The question of the weight of evi-

dence is with the jury and a verdict should not be set aside unless it is clearly shown there is no substantial evidence at all to support their finding. *State v. Clifford*, 58 W. Va. 681, 687, 52 S. E. 864, approved in *Camden v. West Branch Lumber Co.*, 59 W. Va. 148, 164, 53 S. E. 409; *Southern R. Co. v. Blanford*, 105 Va. 373, 54 S. E. 1.

Where the pleadings are sufficient and issue properly joined thereon and the issues depend upon the evidence it is error for an appellate court to usurp the province of a jury by undertaking to determine the issue and to pronounce judgment non obstante veredicto or otherwise. *Thiry v. Banner Window Glass Co.*, 81 W. Va. 39, 93 S. E. 958.

Different Verdict Might Have Been Rendered. — While this court has the right to pass upon the evidence in a case when it has to be considered as upon a demurrer thereto, it will not reverse the judgment of the trial court and grant a new trial because the verdict is contrary to the evidence or without evidence to support it, and not in a doubtful case merely because the court, if on the jury, would have given a different verdict. *Norfolk v. Anthony*, 117 Va. 777, 86 S. E. 68; *McClung v. Folkes*, 122 Va. 48, 94 S. E. 156; *Arminius Chemical Co. v. Landrum*, 113 Va. 7, 73 S. E. 459.

Agency. — When an agent contracts with a third person for a known principal and credit is extended to the agent, the principal can not afterwards be held liable upon the contract, but in the case at bar there was evidence which the jury had the right to believe that the credit was not extended to the agent but to the principal, and their verdict so finding can not be disturbed. *Spangler v. Ashwell*, 116 Va. 992, 83 S. E. 930.

"The defendant denies the agency. But the jury, by its verdict, found against him." *Fleming v. Smouse*, 73 W. Va. 188, 80 S. E. 144.

Cause of Accident. — In an action by a servant against his master for per-

sonal injuries due to a wheel which he was operating "getting away" from him and striking his body, the evidence tended to show that one of the cogs of the wheel was broken out and other cogs nicked and damaged; and this condition caused the wheel to slip and break away from the control of the plaintiff. Held, that the question as to the cause of the accident and the manner of its occurrence having been properly submitted to the jury, the appellate court will not interfere with its finding as contrary to the law and the evidence. *Ferries Co. v. Brown*, 121 Va. 13, 92 S. E. 813.

Contract of Brokerage or Sale.—Whether a contract was a brokerage contract (establishing the relation of principal and agent between the parties) or a contract for the sale of goods, is a question to be determined by all the facts and circumstances bearing on the transaction, and the verdict of a jury determining this question will not be set aside where there is sufficient evidence to sustain it. *Syer & Co. v. Lester*, 116 Va. 541, 82 S. E. 122.

Deed.—When the description in a deed of the land conveyed by it is general, calling for adjacent lands as boundaries, and, read in the light of facts and circumstances disclosed by extraneous evidence, is ambiguous, the price paid for the land, its character and value and all other pertinent facts may be considered by the jury upon the inquiry for the intent of the parties, and its finding will not be disturbed unless it is against the decided weight of the evidence. *Mylius v. Raine-Andrew Lumber Co.*, 73 W. Va. 674, 81 S. E. 823.

Damages.—In a suit for damages for diminution of water power, where an issue to a jury was awarded to determine the amount of damages to be awarded to the plaintiffs for the injuries sustained, the finding of the jury will not be disturbed unless it is palpably and obviously erroneous, and the

supreme court of appeals will not treat the evidence adduced on the trial of the issue as though it had been given in the form of depositions. *Norfolk, etc., R. Co. v. Allen & Sons*, 122 Va. 603, 95 S. E. 406.

Excessive Damages.—A verdict assessing damages in favor of a plaintiff will not be set aside as excessive where there is sufficient evidence in the cause to sustain the verdict, if the jury believed the plaintiff's witnesses as to the damages sustained. *Lynchburg v. Mitchell*, 114 Va. 229, 76 S. E. 286; *Howell v. Wysor*, 74 W. Va. 589, 593, 82 S. E. 503; *Hill v. Norton*, 74 W. Va. 428, 438, 82 S. E. 363; *Chesapeake, etc., R. Co. v. Swartz*, 115 Va. 723, 80 S. E. 568.

In actions for personal injuries the damages are peculiarly within the province of the jury, and unless the amount found is so great or so small as to evince passion, prejudice, partiality or corruption, or some mistaken view of the law, on the part of the jury, its verdict may not rightfully be disturbed. *Given v. Diamond Shoe, etc., Co.*, 84 W. Va. 631, 101 S. E. 153.

Judgment for Reduced Amount.—When the case reaches the supreme court of appeals, it will affirm the judgment for a reduced amount upon the presumption of its correctness, in the absence of evidence to the contrary; but when the evidence is certified, and it appears that the verdict is not so excessive as to warrant the belief that the jury were influenced by partiality, prejudice, or corruption, or have been misled by some mistaken view of the merits of the case, and it also fails to disclose any standard by which the trial court could have measured the reduction, the supreme court of appeals will uphold the verdict of the jury, because it is the tribunal appointed by law to ascertain the damages sustained. *Dupont, etc., Co. v. Taylor*, 124 Va. 750, 98 S. E. 866.

Disputed Boundary.—When in a con-

trovercy over the title to land, dependent upon the location of a disputed boundary line, there are no monuments at the points in dispute, and these points can not be located by measurements from known and undisputed corners of the tracts between which the line is, so that, to render a verdict for either party, the descriptions of the deeds must be departed from in respect to length of lines, a verdict supported by testimony of a witness who swears he saw the monuments called for at the points fixed by the verdict as corners, and evidence of acts of recognition by owners on both sides of the line and other circumstances, can not be disturbed by the appellate court as being contrary to the law and the evidence, in the absence of an admitted or clearly established controlling fact. *Stewart v. Doak Bros.*, 58 W. Va. 172, 52 S. E. 95.

Negligence.—If the question be one of negligence, and reasonable men might fairly differ as to whether or not there was negligence, the verdict of the jury will not be disturbed. *Chesapeake, etc., R. Co. v. Williams*, 108 Va. 689, 62 S. E. 796.

Where the question was the negligence of a municipal corporation a verdict for the plaintiff supported by sufficient evidence, was conclusive of the question. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

Contributory Negligence.—In an action against a master by his servant, a track repairer, for injuries sustained while working in a mine, the verdict of the jury is conclusive on such questions of fact as the contributory negligence of the plaintiff and that the defendant could not have reasonably anticipated a collision resulting in injury to the plaintiff, when the questions were submitted to the jury upon full and fair instructions. *Clinchfield Coal Corp. v. Ray*, 121 Va. 318, 93 S. E. 601.

Where the negligence of defendant railroad is clearly established, and the question of the contributory negligence of the plaintiff is properly submitted to

the jury, the verdict of the jury will not be set aside as contrary to the law and the evidence. *Seaboard Air Line Railway v. Abernathy*, 121 Va. 173, 92 S. E. 913.

Self-Defense.—It is peculiarly within the province of the jury to weigh the evidence upon the question of self-defense, and the verdict of a jury adverse to that defense will not be set aside unless it is manifestly against the weight of the evidence. *State v. Dillard*, 59 W. Va. 197, 53 S. E. 117.

Timber Contract.—Plaintiff sold to defendants the pine and poplar ten inches in diameter across the stump twelve inches from the general level of the ground upon certain lands. Plaintiff claimed defendants cut a large number of trees under the dimensions specified in the contract and brought his action for damages against defendants accordingly. There was a verdict in favor of plaintiff which defendants sought to have set aside on the ground of the insufficiency of the evidence to support it. Held: That the evidence tending to support the verdict, which of course was conclusive in the supreme court of appeals, established in a reasonably certain and definite manner the fact that the defendants cut trees under the size designated in the contract to the number and of the value fixed in the verdict. *Craddock Lumber Co. v. Jenkins*, 124 Va. 167, 97 S. E. 817.

Validity of Servant's Release.—In an action by a servant against his master for personal injuries where a release had been executed by the servant the question as to the validity of the release having been properly submitted to the jury, the appellate court will not interfere with its finding. *Ferries Co. v. Brown*, 121 Va. 13, 92 S. E. 813.

Action for Personal Injuries.—Where a personal injury case has been fairly submitted to the jury under proper instructions from the court, their verdict will not be disturbed where it can not be said, as a matter of law, that the injuries complained of were not

more naturally to be attributed to the negligence of the defendant than to any other cause. *Darby Coal Min. Co. v. Shoop*, 116 Va. 848, 83 S. E. 412.

Trial of Right to Property.—In trial of right to property levied on, conflicting facts and circumstances in relation to fraud vitiating claimant's title as against creditors are properly determinable by the jury and their verdict upon such facts and circumstances will not be disturbed. *Kennedy v. Merchants, etc., Bank*, 67 W. Va. 475, 68 S. E. 32.

Knowledge of Danger.—Where in an action by a servant against his master for personal injuries, the subject of the imputed knowledge of the servant of the danger causing the accident was submitted to the jury under instructions prepared by counsel for the defendant, without objection on the part of the plaintiff, it is concluded by the verdict. *Dupont, etc., Co. v. Taylor*, 124 Va. 750, 98 S. E. 866.

The question as to whether the danger was open and obvious was submitted to the jury under proper instructions, and as there was ample evidence to sustain a finding of the jury that the danger was not open and obvious, that question was concluded in favor of the plaintiff by the verdict of the jury. *Swift & Co. v. Hatton*, 124 Va. 426, 97 S. E. 788.

Criminal Case.—The commission of the offense and the identification of the offender, by his victim, having satisfied the jury, their verdict can not be set aside by this court even though the evidence of the victim was unsupported and uncorroborated. *Thomas v. Commonwealth*, 106 Va. 855, 56 S. E. 705.

Upon a charge of transporting or bringing into the State liquor in violation of the prohibition act, where the defense is that the transportation was interstate commerce, the jury has the right to discredit the testimony of accused, and the issue having been fairly submitted to them, their verdict will not be disturbed upon appeal. *Luc-*

chesi v. Commonwealth, 122 Va. 872, 94 S. E. 925.

(2) Approval by Trial Court.

See post, "Approval by Trial Court," XIV, J, 1½, a, (2).

When a case has been fairly tried upon full evidence and correct instructions, and a verdict has been found which is supported by evidence, and approved by the trial judge, it will not be disturbed by the appellate court. *Burton v. Seifert & Co.*, 108 Va. 338, 61 S. E. 933; *Roanoke R., etc., Co. v. Young*, 108 Va. 783, 62 S. E. 961; *Gardner v. Montague*, 108 Va. 192, 60 S. E. 870; *Gross v. Gross*, 70 W. Va. 317, 323, 73 S. E. 961; *Pippen v. Commonwealth*, 117 Va. 919, 929, 86 S. E. 152; *Virginia R., etc., Co. v. Meyer*, 117 Va. 409, 415, 84 S. E. 742.

A verdict approved by the trial court can not be disturbed by the supreme court of appeals unless it is wholly without evidence to support it, or is so plainly wrong as to leave no doubt upon the subject. *United States Fidelity, etc., Co. v. Country Club*, 129 Va. 306, 105 S. E. 686.

The trial court which has heard the witnesses testify is in a better position to pass on the weight to be attached to their testimony than the appellate court, and the action of the trial court in declining to interfere with the finding of the jury is entitled to weight in the appellate court. *Kritselis v. Petty*, 129 Va. 175, 105 S. E. 536.

Except in case of a plain deviation from right and justice the verdict of a jury approved by the trial court will not be set aside on appeal. *Chesapeake, etc., R. Co. v. Williams*, 108 Va. 689, 62 S. E. 796.

Where the evidence viewed as upon a demurrer to the evidence, fully sustains the verdict of the jury which was approved by the trial court, the verdict can not be disturbed on appeal. *Walton v. Miller*, 109 Va. 210, 63 S. E. 458.

Where Appellate Court Would Not

Have Concurred in Verdict.—The finding of a jury on the weight and influence to be given to the evidence in a case, sanctioned by the trial judge, is not to be disturbed on appeal merely because there may be some room for diversity of opinion among reasonable men. It would be an abuse of appellate power to set aside a verdict and judgment because the judges of the appellate court, from the evidence as written down, would not have concurred in the verdict. *Tuckers' Mfg., etc., Co. v. White*, 108 Va. 147, 60 S. E. 630.

Motions for new trials are governed by the same rules in criminal as in civil cases. In neither case will the appellate court reverse the judgment of a trial court overruling a motion for a new trial on the ground that the verdict is contrary to the evidence unless it finds that the evidence, considered as on a demurrer to the evidence by the plaintiff in error, is plainly insufficient to warrant the finding of the jury. It is not enough that the members of the appellate court think that if they had been on the jury they might have found a different verdict. In the case at bar if the witnesses for the commonwealth were worthy of credit (and of this the jury were the exclusive judges), it can not be said that the verdict of the jury was either contrary to the evidence, or without evidence to support it. *Thomas v. Commonwealth*, 106 Va. 835, 56 S. E. 705.

Will.—"The jury having found that the paper propounded is not the last will and testament of the testator, and that verdict having been sanctioned by the judge of the trial court, the judgment will not be disturbed by this court." *Bowen v. Bowen*, 122 Va. 1, 8, 94 S. E. 166.

(3) Disapproval by Trial Court.

The appellate court will not reverse the action of the trial court in setting aside a verdict and awarding a new trial, unless such action is plainly er-

roneous. *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385.

Though due weight must be given to the action of the judge of the trial court in setting aside a verdict as against the evidence or without evidence to sustain it, the appellate court will sustain a verdict, although it was set aside by the trial judge, unless it can perceive that there has been a plain deviation from right and justice, and that the jury have found a verdict against the law, or against the evidence. *Palmer v. Showalter*, 126 Va. 306, 101 S. E. 136.

The appellate court being called upon to review the action of a trial court in setting aside a verdict and awarding a new trial, it will inquire from the record what errors, if any, sufficient to justify such action, were committed at the trial to the prejudice of the party against whom such verdict was rendered, and whether such verdict is plainly contrary to law and the evidence. *Robinson v. Kistler*, 62 W. Va. 489, 59 S. E. 505.

b. Findings of Court.

See post, "Findings of Court," XIV, J, 2, b.

The decree of the trial court is entitled to great weight upon appeal and ought not to be reversed unless the appellate court is satisfied that it is wrong. *Wood v. Lester*, 126 Va. 169, 101 S. E. 52.

When a case is tried by a court in lieu of a jury, its finding will not be disturbed by the appellate court unless it is against the plain and decided preponderance of the evidence, or wholly without evidence to support it. *Kinsey v. Carr*, 60 W. Va. 449, 55 S. E. 1004; *McCraw v. Bower*, 62 W. Va. 417, 59 S. E. 175.

In equity the finding of any fact by the circuit court will not be disturbed upon an appeal, unless contrary to the plain preponderance of the evidence. *Ruckman v. Cox*, 63 W. Va. 74, 59 S. E. 760.

Evidence Considered as on Demurrer to Evidence.—Where the whole matter of law and fact is submitted to the trial court, without the intervention of a jury, its judgment will not be set aside where the evidence, considered as on a demurrer to the evidence, is sufficient to support the judgment. *Newton v. White*, 115 Va. 844, 80 S. E. 561.

Same—Effect of as Verdict of Jury.—Where a jury was waived and all questions of law and fact submitted to the trial court, and the evidence, and not the facts, is certified, the rule of decision in the appellate court is to give the judgment of the trial court the same effect as the verdict of a jury. *Hilliard v. Union Trust Co.*, 123 Va. 724, 97 S. E. 335; *Appalachia v. Mainous*, 126 Va. 419, 101 S. E. 359; *Postal Telegraph-Cable Co. v. Charlottesville*, 126 Va. 800, 101 S. E. 357; *Pettyjohn & Sons v. Basham*, 126 Va. 72, 100 S. E. 813; *Martin v. Richmond, etc., R. Co.*, 101 Va. 406, 44 S. E. 695; *Hoster-Columbus, etc., Breweries Co. v. Stag Hotel Corp.*, 111 Va. 223, 226, 68 S. E. 50.

But where the jury have been discharged because of their inability to agree upon a verdict, the decision of the trial judge upon the same testimony which was submitted to the jury is not entitled to the same weight as it would otherwise have had. *Pettyjohn & Sons v. Basham*, 126 Va. 72, 100 S. E. 813.

Presumption in Favor of Trial Court's Decision.—When the testimony is heard by the judge ore tenus in a chancery case (as for example in a divorce case), his decision of questions of fact arising thereon is attended with a stronger presumption of their correctness than where the testimony is in the form of depositions. *Norfolk v. Portsmouth*, 124 Va. 639, 98 S. E. 755.

Findings Annulling Charter.—This court will not set aside findings of the circuit court made in lieu of a jury in proceedings according to Code 1918, c. 42, § 2 (Code 1913, § 2383), or reverse the judgment thereon annulling the charter and dissolving a municipal cor-

poration, unless such findings are plainly not supported by the evidence or the judgment is not warranted by law. *Houseman v. Anawalt*, 85 W. Va. 60, 100 S. E. 848.

Authority of Officer of Corporation.—In the absence of a preponderance of evidence against the finding of a trial court on an issue as to whether a corporation conferred upon its general manager express authority to dispose of a part of its leasehold, or ratified his unauthorized attempt to make such disposition thereof, the appellate court can not disturb the finding. *Carroll-Cross Coal Co. v. Abrams Creek Coal, etc., Co.*, 83 W. Va. 205, 98 S. E. 148.

c. Findings of Commissioner in Chancery.

See post, "Findings of Commissioner in Chancery," XIV, J, 2, c.

As to conclusiveness of report of commissioners in partition, see post, PARTITION. As to conclusiveness of findings of commissioner under Workmen's Compensation Act, see post, MASTER AND SERVANT.

Where a commissioner in chancery has passed upon the facts referred to him, his findings will be given great weight though not as conclusive as the verdict of a jury, and should be sustained unless plainly not warranted by the evidence. This rule operates with particular force in an appellate court when the findings of a commissioner have been approved by the court below. *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. 375; *Wolfe v. Second Nat. Bank*, 54 W. Va. 689, 47 S. E. 243; *Allen & Co. v. Maxwell*, 56 W. Va. 227, 236, 49 S. E. 242; *Wolfe v. Morgan*, 61 W. Va. 287, 288, 56 S. E. 504; *State v. King*, 64 W. Va. 546, 63 S. E. 468; *Baker v. Jackson*, 65 W. Va. 282, 64 S. E. 32; *Norfolk, etc., R. Co. v. Stipp*, 70 W. Va. 700, 75 S. E. 60; *Shock v. Gowing*, 71 W. Va. 250, 76 S. E. 441; *Kelly v. Wellsburg, etc., R. Co.*, 80 W. Va. 306, 92 S. E. 433.

The report of a commissioner, ex-

cept as to errors apparent on its face, is prima facie correct. *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

A decree confirming the finding of a commissioner's report and decreeing in accordance therewith, carries with it the presumption of correctness and will not be reversed, unless plainly wrong. *Pickens v. Daniels*, 58 W. Va. 327, 52 S. E. 215.

The appellate court will not disturb the finding of a commissioner on items of accounting between partners on pure questions of fact, where it appears that the commissioner has made a careful and painstaking investigation of every item of dispute, and his findings are well justified by the evidence. *Dixon v. Paddock*, 104 Va. 387, 51 S. E. 841.

Disapproved by Chancellor.—Though entitled to peculiar weight, the chancellor, if dissatisfied with the finding of a commissioner, may set it aside on exception and adopt his conclusion as to what the evidence proves; and, on appeal, the finding of the commissioner will be regarded merely as a circumstance, of more or less weight, to be considered with the evidence, in testing the correctness of the finding of the court. *State v. King*, 64 W. Va. 546, 63 S. E. 468. See *Lewis v. Prichard*, 57 W. Va. 542, 50 S. E. 743.

d. Findings of Public Service Commission.

Findings of fact by the Public Service Commission based upon evidence to support them will not be reviewed by this Court. *Norfolk, etc., R. Co. v. Public Service Comm.*, 82 W. Va. 408, 96 S. E. 62.

2. Where Evidence Conflicting.

a. Verdict of Jury.

(1) In General.

Verdict of Jury Conclusive.—Where the evidence in the trial court was conflicting, a verdict fairly rendered, under proper instructions of the court, will not be disturbed in appellate court unless plainly wrong or manifestly

against the weight of the evidence. *Tuckers' Mfg. Co. v. White*, 108 Va. 147, 60 S. E. 630; *Adamson v. Norfolk, etc., Tract. Co.*, 111 Va. 556, 69 S. E. 1035; *Bettman v. Skinner*, 113 Va. 24, 73 S. E. 436; *United States Leather Co. v. Showalter*, 113 Va. 479, 74 S. E. 400; *Delaware, etc., R. Co. v. Cotten*, 113 Va. 563, 75 S. E. 122; *Lambert v. Phillips & Son*, 113 Va. 616, 75 S. E. 121; *Paschall v. Gilliss*, 113 Va. 643, 75 S. E. 220; *Richmond v. Burton*, 115 Va. 206, 78 S. E. 560; *Honaker v. Shrader*, 115 Va. 318, 79 S. E. 391; *Nesbit v. Webb*, 115 Va. 362, 79 S. E. 330; *Chesapeake, etc., R. Co. v. Swartz*, 115 Va. 723, 80 S. E. 568; *Baltimore, etc., R. Co. v. Hudgins*, 116 Va. 27, 37, 81 S. E. 48; *Higgins v. Whitmore*, 116 Va. 414, 82 S. E. 180; *National Union Fire Ins. Co. v. Burkholder*, 116 Va. 942, 83 S. E. 404; *Norfolk, etc., R. Co. v. Perdue*, 117 Va. 111, 83 S. E. 1058; *Houck Tanning Co. v. Clinedinst*, 118 Va. 131, 86 S. E. 851; *Atlantic, etc., R. Co. v. Newton*, 118 Va. 222, 87 S. E. 618; *Virginian R. Co. v. Bell*, 118 Va. 492, 87 S. E. 570; *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174; *Carpenter v. Smithey*, 118 Va. 533, 88 S. E. 321; *Pocahontas Guano Co. v. Collins-Plass Co.*, 118 Va. 659, 88 S. E. 66; *Peele v. Bright*, 119 Va. 182, 89 S. E. 238; *Portsmouth v. Jobson*, 119 Va. 195, 89 S. E. 127; *Chesapeake, etc., R. Co. v. Tinsley*, 119 Va. 423, 89 S. E. 860; *Bashford v. Rosenbaum Hdw. Co.*, 120 Va. 1, 90 S. F. 625; *Millboro Lumber Co. v. Donald*, 120 Va. 150, 90 S. E. 618; *Chesapeake, etc., R. Co. v. Hunter*, 120 Va. 699, 91 S. E. 181; *Norfolk Hosiery, etc., Co. v. Westheimer*, 121 Va. 130, 92 S. E. 922; *Turner v. Richmond, etc., R. Co.*, 121 Va. 194, 92 S. E. 841; *Lynchburg Tract, etc., Co. v. Gordon*, 123 Va. 198, 96 S. E. 195; *Aetna Ins. Co. v. Aston*, 123 Va. 327, 96 S. E. 772; *Richmond College v. Scott-Nuckols Co.*, 124 Va. 333, 98 S. E. 1; *Washington, etc., Railway v. Warner*, 124 Va. 452, 97 S. E. 799; *Virginia Talc., Co. v. Hurkamp*, 124 Va. 721, 98 S. E. 681; *Eichelbaum v. Klaff*,

125 Va. 98, 99 S. E. 721; *Norfolk, etc., R. Co. v. Whitehurst*, 125 Va. 260, 99 S. E. 568; *Reynolds v. Wallace*, 125 Va. 315, 99 S. E. 516; *Commander v. Provident Relief Ass'n*, 126 Va. 455, 102 S. E. 89; *Virginia R., etc., Co. v. Slack Grocery Co.*, 126 Va. 685, 101 S. E. 878; *Norfolk Southern R. Co. v. Fentress*, 127 Va. 87, 102 S. E. 588; *Farmville v. Wells*, 127 Va. 528, 103 S. E. 596; *Osborne v. Gillenwaters*, 128 Va. 21, 104 S. E. 578; *Smyth Bros., etc., Co. v. Beresford*, 128 Va. 137, 104 S. E. 371; *Tucker Sanatorium v. Cohen*, 129 Va. 576, 106 S. E. 355; *Baker v. Jackson*, 65 W. Va. 282, 64 S. E. 32; *State v. Stowers*, 66 W. Va. 198, 203, 66 S. E. 323; *State v. Piscioneri*, 68 W. Va. 76, 69 S. E. 375; *Sims v. Carpenter, etc., Co.*, 68 W. Va. 223, 69 S. E. 794; *Harmon v. Steele*, 68 W. Va. 386, 69 S. E. 863; *McGuire v. Norfolk, etc., R. Co.*, 70 W. Va. 538, 74 S. E. 859; *Cook v. Chesapeake, etc., R. Co.*, 70 W. Va. 586, 74 S. E. 730; *Galizian v. Henry*, 71 W. Va. 292, 76 S. E. 440; *Polley v. Gilleland*, 72 W. Va. 301, 78 S. E. 96; *Lanham v. Meadows*, 72 W. Va. 610, 78 S. E. 750; *Guerin v. Pittsburg, etc., R. Co.*, 72 W. Va. 725, 79 S. E. 739; *Cumberledge v. Cumberledge*, 72 W. Va. 773, 79 S. E. 1010; *McGuire v. Old Sweet Springs Co.*, 73 W. Va. 321, 79 S. E. 350; *Carnefix v. Kanawha, etc., R. Co.*, 73 W. Va. 534, 82 S. E. 219; *Marshall v. O'Brien*, 73 W. Va. 742, 81 S. E. 551; *Ireland v. Smith*, 73 W. Va. 755, 81 S. E. 542; *State v. Henry*, 74 W. Va. 72, 81 S. E. 569; *Stewart v. Parr*, 74 W. Va. 327, 82 S. E. 259; *Hill v. Norton*, 74 W. Va. 428, 430, 82 S. E. 363; *Cheeks v. Virginia Pocahontas Coal Co.*, 74 W. Va. 553, 82 S. E. 756; *Howes v. Baltimore, etc., R. Co.*, 77 W. Va. 362, 87 S. E. 456; *South Penn Oil Co. v. Blue Creek Develop. Co.*, 77 W. Va. 682, 88 S. E. 1029; *Showalter v. Chambers*, 77 W. Va. 720, 88 S. E. 1072; *Bartlett v. Baltimore, etc., R. Co.*, 84 W. Va. 120, 99 S. E. 322; *Ayers v. Eads*, 84 W. Va. 555, 100 S. E. 404; *Security Realty Invest. Co. v. Lewis,*

etc., Co., 86 W. Va. 10, 102 S. E. 702; *Wilson v. McCoy*, 86 W. Va. 103, 103 S. E. 42; *Strickley v. Thorn*, 87 W. Va. 673, 106 S. E. 240.

To justify setting aside a verdict in a case involving conflicting oral evidence, on the ground alone that the verdict is plainly against the decided weight and preponderance of conflicting evidence, the court must go beyond the question of the credibility of the witnesses who gave conflicting oral evidence in the presence of the jury, and find documentary evidence, facts or circumstances, or some of these, which when considered with such conflicting oral evidence plainly constitute a decided weight and preponderance of evidence against the verdict. *Zuplkoff v. Charleston Nat. Bank*, 77 W. Va. 621, 88 S. E. 116; *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385; *Miller Supply Co. v. Crane*, 61 W. Va. 658, 659, 57 S. E. 268.

To justify setting aside a verdict on the ground that it is plainly against the decided weight and preponderance of conflicting evidence, the weight and preponderance of evidence against the verdict must be decided in the sense of pronounced. The verdict must be palpably unjust. A doubtful case, a slight weight and preponderance of evidence against the verdict, is not a sufficient cause for setting it aside. *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385, approved in *Miller Supply Co. v. Crane*, 61 W. Va. 658, 57 S. E. 268.

A verdict depending solely on conflicting oral evidence given by the witnesses in the presence of the jury will not be set aside on the ground alone that the verdict is plainly against the decided weight and preponderance of such evidence, because to do so would invade the province of the jury in determining the credibility of such witnesses. *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385; *Miller Supply Co. v. Crane*, 61 W. Va. 658, 57 S. E. 268;

Fulton v. Crosby, etc., Co., 57 W. Va. 91, 49 S. E. 1012.

Harmful Error of Law.—Where the evidence is conflicting the verdict of the jury is conclusive on the supreme court of appeals, and will not be disturbed unless some harmful error of law was committed by the trial court. *Atlantic, etc., R. Co. v. Tyler*, 124 Va. 484, 98 S. E. 641; *Bluefield Produce, etc., Co. v. Bluefield*, 71 W. Va. 696, 77 S. E. 277.

Where Court Would Have Rendered Different Verdict.—Although as the evidence appears in cold print, without the advantage possessed by the jury and the trial court, the supreme court of appeals probably would not have found or approved the verdict which was found by the jury and approved by the trial judge, that will not justify that court in setting aside the verdict, unless, after considering the case as on a demurrer to the evidence by the plaintiffs in error, it is of opinion that the verdict is without evidence to support it, or is plainly contrary to the evidence. *Norfolk, Hosiery, etc., Mills v. Aetna Hosiery Co.*, 124 Va. 221, 98 S. E. 43. See *Richmond College v. Scott-Nuckols Co.*, 124 Va. 333, 98 S. E. 1.

The credibility of witnesses and the weight to be given to their testimony are peculiarly questions for the jury; and, where the evidence is conflicting, the mere fact that the court doubts the correctness of the verdict, or if on the jury would have rendered a different verdict, is not sufficient to justify the court in setting aside the verdict found by the jury. To warrant a new trial where the evidence is conflicting the evidence must be insufficient to support the finding of the jury. *Virginia Fire, etc., Ins. Co. v. Hogue*, 105 Va. 355, 54 S. E. 8.

The verdict of a jury in a criminal case based upon conflicting oral evidence will not be reversed on writ of error to this court, unless the evidence so strongly preponderates in favor of

the defendant as to clearly indicate that the jury was influenced by passion, prejudice, or other improper motive in arriving at such verdict. *State v. Cook*, 81 W. Va. 686, 95 S. E. 792.

The rule, defining the character and prescribing the quantum of circumstantial evidence, necessary to a conviction, saying that the facts and circumstances shown must be consistent with the hypothesis of guilt, inconsistent with every other hypothesis and conclusive in their nature and tendency, operates upon the facts found by the jury, not on mere items of evidence adduced, and a verdict will not be set aside as based on insufficient evidence, or as being contrary to the evidence, when the evidence relating to the facts found by the jury was conflicting and involved the credibility of witnesses, and the court can see that the jury may have found from the evidence facts sufficient to bring the case within the rule just stated. *State v. Kidwell*, 62 W. Va. 466, 59 S. E. 414.

Based on Improbable Testimony.—In the instant case, a prosecution for rape, it was earnestly insisted that the testimony of the prosecutrix, corroborated by that of her companion, a girl eight years old, was incredible and unbelievable, and therefore that the verdict of guilty should be set aside as contrary to the law and the evidence. While conceding that the story as told by the girl and her companion appeared improbable, the supreme court of appeals, upon a careful examination of all the evidence, was of opinion that the case was one in which it could not interfere with the verdict of the jury. *Luffy v. Commonwealth*, 126 Va. 707, 100 S. E. 829.

Substantial Support in Evidence.—The verdict of a jury in a criminal case which finds substantial support in the evidence, even though the same may be highly conflicting, will not be set aside by this Court. *State v. Statler*, 86 W. Va. 425, 103 S. E. 345.

Appellant as Demurrant to the Evi-

dence.—Where the evidence is conflicting the plaintiff in error occupies the position of a demurrant to the evidence. *Chesapeake, etc., R. Co. v. Swartz*, 115 Va. 723, 80 S. E. 568; *Tuckers' Mfg., etc., Co. v. White*, 108 Va. 147, 60 S. E. 630. See *Mitchell v. United States Coal, etc., Co.*, 67 W. Va. 480, 68 S. E. 366; *Wilson v. Johnson*, 72 W. Va. 742, 746, 79 S. E. 734.

Cause of Injury.—The finding of the jury, upon conflicting evidence, that plaintiff's injury was caused by X-rays, is conclusive on appeal. *Hunter v. Burroughs*, 123 Va. 113, 96 S. E. 360.

Genuineness of Signature. — Where the evidence as to the genuineness of the signature on a note sued upon was conflicting, the controversy was peculiarly one for decision by the jury and their verdict can not be disturbed on appeal. *Ely v. Gray*, 125 Va. 708, 100 S. E. 660.

Fraud.—"The evidence on the subject of fraud in the procurement of the contract being conflicting, the finding of the jury on that subject is final and conclusive." *Upton v. Holloway & Co.*, 126 Va. 657, 662, 102 S. E. 54.

Damages.—A verdict dependent as to the quantum of damages, upon permanency of the plaintiff's injury, supported by evidence other than the testimony of the plaintiff, will not be set aside as being excessive, even though his testimony as to the extent of his injury is contradicted by extra-judicial admissions and conduct, so explained by him as to set forth a reasonable motive for them. *Wilson v. Elkins*, 86 W. Va. 379, 103 S. E. 118.

Where the evidence in a case is conflicting, and the case has been fairly submitted to the jury under proper instructions from the court, and the case is heard in this court, as on a demurrer to the evidence by the plaintiff in error, the verdict of the jury will not be set aside as contrary to the evidence or for excessive damages where there is sufficient evidence to support the verdict. In such case the preponder-

ance of the evidence can not influence the action of the court in considering a motion for a new trial. *Chesapeake, etc., R. Co. v. Chapman*, 115 Va. 32, 78 S. E. 631.

In an action for malicious prosecution the quantum of damages is a matter peculiarly within the province of the jury, and when the evidence of such damage is conflicting, their verdict is entitled to great weight, and ordinarily should not be set aside unless the amount found is so great or small as to evince passion, prejudice, partiality, corruption or some mistaken view of the law. *Burdette v. Goldenburg*, 87 W. Va. 32, 104 S. E. 270.

Negligence.—Where the evidence is conflicting as to the negligence of the defendant, or the contributory negligence of the plaintiff, the verdict of the jury will not be disturbed unless palpably erroneous. Nor will the appellate court undertake to pass on the weight of evidence, or the credibility of witnesses. This is the province of the jury which the court will not usurp. *Norfolk, etc., R. Co. v. Spencer*, 104 Va. 657, 52 S. E. 310. See *Bashford v. Rosenbaum Hdw. Co.*, 120 Va. 1, 90 S. E. 625.

Where the negligence, if any, of the master in furnishing the servant with defective machinery, and the contributory negligence of the servant in not discovering and reporting the fact, have been submitted to a jury under instructions which clearly and correctly state the law, and there is evidence tending to support either view of the case, the verdict of the jury is conclusive. The appellate court can not set aside a verdict unless it is without evidence to support it, or is plainly and palpably contrary to the evidence. *Virginia Iron, etc., Co. v. Cash*, 105 Va. 570, 54 S. E. 472.

Negligence and concurring negligence are questions for the jury. *Virginia R., etc., Co. v. Smith*, 129 Va. 269, 105 S. E. 532.

Where plaintiff brought his action for

injuries sustained by stepping from a bridge at night owing to the absence of a handrail, the determination of the question of whether plaintiff was guilty of contributory negligence in not observing his nearness to the edge of the bridge and the absence of the handrail and in walking off the bridge as he did, depended upon the determination of the controverted question of fact as to what was the condition of light or darkness upon the bridge at the time of the accident. There being a conflict in the testimony on this subject, ordinarily the verdict of the jury would admittedly conclude the question. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

Explosives.—Where the testimony of witnesses in respect to the manner in which frozen nitro-glycerine was being thawed, preparatory to shooting an oil well, which exploded causing the death of plaintiff's intestate, one of such witnesses testifying that it exploded while suspended in a barrel of water into which a steam pipe was inserted and the steam turned on, which was admittedly negligent, and another, the expert who had charge of the nitro-glycerine and was employed by defendant to shoot the well, testifying that he laid it carefully on the ground, and did not put it in the barrel, the question of negligence is for the jury to determine from the conflicting evidence and the physical results produced by the explosion, and, unless such physical results are of such conclusive character as to demonstrate the falsity of the testimony of one or the other of said witnesses, the verdict should not be disturbed. *McClain v. Marietta Torpedo Co.*, 84 W. Va. 139, 100 S. E. 87.

Compliance with Guaranty.—Whether a guaranty has been complied with is a question of fact to be determined by the jury, and when the testimony in respect thereto is so conflicting as to render the matter uncertain, the finding of the jury is conclusive. *Mineral Ridge Mfg. Co. v. Smith*, 79 W. Va. 736, 91 S. E. 817.

Existence of Trade Custom or Usage.

—In a seller's proceeding by motion to recover from the buyer damages for rejecting several carloads of "winter wheat bran" as ordered, defendant contended that he had no actual knowledge of a custom or usage of the trade to the effect that the term "winter wheat bran" was used to designate a commodity which carried a certain percentage of screenings, and that it was not sufficiently certain and notorious to give rise to a presumption of knowledge on his part. There was evidence tending to support the contrary view, and the verdict of the jury is conclusive upon appeal. *Walker v. Gateway Milling Co.*, 121 Va. 217, 92 S. E. 826.

In an action upon an insurance policy containing the condition that no obligation is assumed by the insurer unless at the date thereof the insured is, "in sound health," which is treated by the defendant as a representation falsely and fraudulently made, and the evidence is conflicting as to the condition of the insured's health at the time he was insured, and also as to the time he was examined and advised by a physician that he had chronic nephritis, some witnesses fixing the time before and others after the date of the policy, a verdict based on such conflicting evidence will not be disturbed. *Huff v. Equitable Life Ins. Co.*, 83 W. Va. 263, 98 S. E. 203.

In a prosecution for larceny of an automobile, a witness for the Commonwealth testified positively that the automobile was his property. His wife testified for the defendant that it was her property, and that she delivered it to the defendant and asked him to sell it for her. Held: That a verdict of guilty settled the conflict in favor of the Commonwealth, and that verdict could not be disturbed on appeal. *Ambrose v. Commonwealth*, 129 Va. 763, 106 S. E. 348.

(2) Approval by Trial Court.

The verdict of the jury rendered upon conflicting evidence, which has

been approved by the trial court, will not be disturbed by the appellate court as contrary to the evidence where the case was fairly submitted to the jury. *Norfolk, etc., R. Co. v. Spencer*, 104 Va. 657, 52 S. E. 310; *Thomas v. Commonwealth*, 106 Va. 855, 56 S. E. 705; *Wright v. Rabey*, 117 Va. 884, 86 S. E. 71; *Pippen v. Commonwealth*, 117 Va. 919, 86 S. E. 152; *Kanter v. Hofheimer & Co.*, 118 Va. 625, 88 S. E. 60; *Stuart v. Smith-Courtney Co.*, 123 Va. 231, 96 S. E. 241.

The judgment of a circuit court refusing to set aside the verdict of a jury found upon conflicting evidence will not be reversed by this court, unless it clearly appears that such verdict is repugnant to the right and justice of the case. *Phenix Fire Ins. Co. v. Virginia-Western Power Co.*, 81 W. Va. 298, 94 S. E. 373; *Dunn v. Prindle*, 81 W. Va. 123, 94 S. E. 28.

The supreme court will not set aside a verdict approved by the trial court, where the evidence was conflicting, and there was sufficient evidence, when viewed from the standpoint of a demurrer to the evidence, to support the verdict. *Shea Realty Corp. v. Page*, 111 Va. 490, 69 S. E. 327; *Protzman v. Joseph*, 65 W. Va. 788, 65 S. E. 461; *Bank v. Thompson*, 63 W. Va. 196, 59 S. E. 974; *Stanley v. Commonwealth*, 109 Va. 796, 63 S. E. 10; *Norfolk, etc., Tract. Co. v. O'Neill*, 109 Va. 670, 64 S. E. 948; *Danville v. Thornton*, 110 Va. 541, 66 S. E. 839; *Atlantic Trust, etc., Co. v. Union Trust, etc., Corp.*, 111 Va. 574, 69 S. E. 975; *Chesapeake, etc., R. Co. v. Paris*, 111 Va. 41, 68 S. E. 398; *Thompson v. Norfolk, etc., Tract. Co.*, 109 Va. 733, 64 S. E. 953; *South Penn Coal Co. v. Male*, 65 W. Va. 694, 64 S. E. 925; *Virginia Iron, etc., Co. v. Prophet*, 121 Va. 685, 93 S. E. 590.

Damages.—In a case where there was no certain standard for the admeasurement of the damages to be assessed, and there was serious conflict in the testimony as to the amount of the dam-

ages inflicted, an issue of fact was awarded. The sole question submitted to the jury was the amount of damages to be awarded the plaintiffs for the injury sustained and to be sustained, by reason of the acts done and proposed to be done by the defendant. No other question was submitted to them. Their assessment of the damages was approved by the trial court, and where this is the case, and no error is pointed out in the action of the court or the conduct of the case, the finding of the jury will not be disturbed unless it is palpably and obviously erroneous, or is without evidence to support it. *Norfolk, etc., R. Co. v. Allen & Sons*, 122 Va. 603, 95 S. E. 406.

Negligence.—Where the evidence is in conflict as to the charges of negligence against defendant, and the verdict and judgment of the court below is for the plaintiff, the supreme court of appeals will assume that the negligence of the defendant was established. *Virginia R., etc., Co. v. Boltz*, 122 Va. 649, 95 S. E. 467.

Limitation of Action.—Where an issue of fact raised by a plea of the statute of limitations has been submitted to the jury upon correct instructions, their verdict, upon conflicting evidence, which has been approved by the trial court, can not be disturbed by this court. *Portsmouth Cotton Oil Refin. Corp. v. Richardson*, 118 Va. 667, 88 S. E. 317.

In an action of ejectment, the questions at issue were whether the plaintiff had shown the location of the land in question in a certain block of a survey, and whether defendants had shown adverse possession under color of title of the land claimed by them, or any part thereof, within an interlock, for ten years since the senior title of plaintiff accrued. As both these propositions involved jury questions, and both, upon highly conflicting evidence, were fairly submitted to and passed upon by the jury in favor of the plaintiff, their findings upon the

facts, approved by the trial court, were beyond the cognizance of the supreme court of appeals. *Sutherland v. Gent*, 121 Va. 643, 93 S. E. 646.

Whether Place of Injury Was Public Street.—A survey and map of an unincorporated town was duly recorded and expressly referred to in the act of incorporation of the town thus answering the statutory requirements of Virginia Code 1904, § 1014. An action was brought by plaintiff for personal injuries caused by a defective board walk. The contention on behalf of the town was that the point at which the accident happened was originally an approach built by a railroad to a pleasure pavilion, and not a public street. The contention of the plaintiff was that the board walk was an extension of one of the original streets of the town, and that it had long been constantly used by the public and accepted and maintained by the town as a street. It appeared that the town did some repairing to the sidewalk in question. The case was fairly submitted upon this simple issue of fact, which the jury, upon conflicting evidence, resolved in favor of the plaintiff, and their verdict was approved by the trial court. Held, that the verdict should not be disturbed. *Virginia Beach v. Ogle*, 120 Va. 611, 91 S. E. 747.

b. Findings of Court.

See ante, "Findings of Court," XIV, J. 1½, b.

If the parties waive a jury and submit all questions of law and fact to the court, its judgment can not be set aside by this court where the evidence is conflicting. *Stewart v. Rogers*, 117 Va. 836, 86 S. E. 161; *Wallace v. Douglas*, 58 W. Va. 102, 51 S. E. 869; *Ramsey v. England*, 85 W. Va. 101, 101 S. E. 73; *Hilliard v. Union Trust Co.*, 123 Va. 724, 97 S. E. 335.

A finding of fact by the judge of a circuit court, depending on conflicting testimony of witnesses, will not be disturbed by this court, unless it is clearly against the preponderance of the evi-

dence. *McDannald v. Wilmoth*, 82 W. Va. 719, 97 S. E. 132; *Pettyjohn & Sons v. Basham*, 126 Va. 72, 100 S. E. 813.

Where the testimony for the defendant upon an issue of fact was unreliable and inconclusive, and the trial court, upon conflicting evidence, gave judgment for the plaintiff, this court will not disturb it. *Roller v. Catlett*, 118 Va. 185, 86 S. E. 909; *Smith v. Rush*, 79 W. Va. 228, 92 S. E. 247; *Gainer v. Griffith*, 76 W. Va. 426, 85 S. E. 713; *Miller v. Johnson*, 79 W. Va. 198, 90 S. E. 677.

Same Weight as Verdict of Jury—Weight Attached to Findings of Court.

—Upon the trial of a case by the court without the intervention of a jury, where the evidence is conflicting, the judgment of the trial court is given the same weight as the verdict of a jury. *Stock & Sons v. Owen*, 129 Va. 256, 103 S. E. 587.

When Reversed.—A decree, determining a question of fact, will be reversed where it clearly appears to be against the weight and preponderance of the evidence. *Wallace v. Douglas*, 58 W. Va. 102, 107, 51 S. E. 869.

Though upon a question of fact, as to which there is conflicting evidence, the finding of the trial court is entitled to peculiar weight and will not ordinarily be disturbed, the appellate court will reverse such finding, when there is a decided preponderance of the evidence against it and the finding itself is inconsistent with what the evidence, on the whole, clearly shows was intended to be the relation of the parties toward one another. *Pearson v. West Va. Lime, etc., Co.*, 56 W. Va. 650, 49 S. E. 418.

Question of Law. — Where no controverted fact was passed on by the trial court, but solely a question of law, the judgment of the trial court is not entitled to the same weight as where given upon conflicting evidence upon a question of fact. *Rinehart, etc., Co. v. McArthur*, 123 Va. 556, 96 S. E. 829.

A finding in equity from conflicting evidence, not contrary to a plain preponderance, will not be disturbed on appeal. *Stevens v. Johnson*, 72 W. Va. 434, 78 S. E. 377; *Bank v. Thompson*, 63 W. Va. 196, 59 S. E. 974; *Wethered v. Conrad*, 73 W. Va. 551, 80 S. E. 953.

A decree in equity, founded upon weighty inferences arising from well established facts and circumstances, will not be reversed for a mere preponderance against the finding in the number of witnesses, testifying as to a fact in issue. *Crouch v. Crouch*, 70 W. Va. 587, 74 S. E. 726.

If a decree is based upon depositions which are so conflicting and of such doubtful and unsatisfactory character that different minds and different judges might reasonably reach different conclusions as to what the real facts deducible from them are, an appellate court will not reverse it, though such court might have rendered a different decree had it acted in the cause in the first instance. *Ross v. McConnaughy*, 85 W. Va. 199, 101 S. E. 443.

The decree of the trial court is entitled to great respect, and is generally presumed to be right, but where the evidence was not taken before the trial court, but by depositions, and is conflicting, and involves not only the question of the credibility of the witnesses but the charge of fraud on the part of some of the parties who have testified in the cause, it is peculiarly a case for an issue to be tried by a jury, and if the chancellor has failed to order it, though not requested by the parties, his decree will be reversed. *Catron v. Norton Hdw. Co.*, 123 Va. 380, 96 S. E. 853.

Fraud. — A trial court's finding of fraud in a conveyance of real estate from a son to his mother, made with knowledge, on the part of the latter, of an assertion of a claim of indebtedness against the former and his intention bitterly and stubbornly to resist

it, and attended by disposition of all of his personal property, participated in and aided by her, leaving him without property out of which compulsory satisfaction of the debt can be obtained, in the event of the establishment thereof, can not be disturbed by the appellate court, even though there is oral evidence tending to prove payment of the purchase money of the real estate, some months before the deed was executed. *Root v. Close*, 83 W. Va. 600, 98 S. E. 733.

Damages.—Where the evidence as to the amount of damages is conflicting, the finding of the judge will not be set aside as excessive. *Appalachia v. Mainous*, 126 Va. 419, 101 S. E. 359.

Finding as to Newly Discovered Evidence Not Disturbed.—The finding of a trial court on an issue of fact, as to whether matter relied upon in support of a motion for a new trial, is new and after-discovered, will not be disturbed by the appellate court, when the evidence of lack of prior knowledge thereof is clear and positive and the opposing evidence uncertain, indefinite and inconclusive. *Lindamood v. Light, etc., Co.*, 85 W. Va. 85, 100 S. E. 868.

c. Findings of Commissioner in Chancery.

See ante, "Findings of Commissioner in Chancery," XIV, J, 1½, c.

The findings of a commissioner based upon conflicting evidence and confirmed by the circuit court is entitled to great weight on appeal, and will not be reversed unless plainly wrong. *Kane, etc., Hdw. Co. v. Cobb*, 79 W. Va. 587, 91 S. E. 454; *Smith v. White*, 77 W. Va. 377, 87 S. E. 865, 88 S. E. 662; *Patterson v. Clem*, 79 W. Va. 666, 91 S. E. 654; *Cottrell v. Mathews*, 120 Va. 847, 92 S. E. 808; *Virginia, etc., R. Co. v. Heninger*, 110 Va. 301, 67 S. E. 185; *Baker v. Jackson*, 65 W. Va. 282, 283, 64 S. E. 32; *Shock v. Gowing*, 71 W. Va. 250, 251, 76 S. E. 441; *Virginia Lumber, etc., Co. v. McHenry Lumber Co.*, 122 Va. 111, 94 S. E. 173;

Alexander v. Critcher, 121 Va. 723, 94 S. E. 335; *Reynolds v. Adams*, 125 Va. 295, 99 S. E. 695; *McDermitt v. Moore*, 87 W. Va. 300, 104 S. E. 744.

This court will not disturb the decree of the lower court confirming a commissioner's report as to a question of fact, found upon conflicting testimony, unless it appears that such decree is clearly wrong. *Shock v. Gowing*, 71 W. Va. 250, 76 S. E. 441; *Patterson v. Clem*, 79 W. Va. 666, 91 S. E. 654; *Marshall v. Porter*, 83 W. Va. 246, 98 S. E. 207; *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

Where a commissioner returns with his report, involving controverted questions of fact, the evidence upon which it is based, the court will, upon exceptions, review and weigh the evidence, and, if not satisfied with the commissioner's conclusion will overrule his findings; but the report, except as to errors apparent on its face, is taken as prima facie correct, and, where the evidence is conflicting, the appellate court will not disturb the action of the trial court in overruling exceptions thereto unless the findings of the commissioner are clearly erroneous. *Hall v. Hall*, 104 Va. 773, 52 S. E. 557.

Where Appellate Court Might Have Pronounced Different Decree.—"Where a decree or finding of a commissioner is based on depositions conflicting, on which different persons might reasonably disagree as to the facts proved, or the proper conclusion therefrom, the appellate court will decline to reverse the chancellor, although the testimony might be such that the appellate court might have pronounced a different decree, if deciding the case in the first instance." *Wolfe v. Morgan*, 61 W. Va. 287, 289, 56 S. E. 504, citing *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273.

Damages.—This court will not reverse a decree of the lower court based upon the finding of a commissioner, to whom the cause has been referred to ascertain and report the amount of

damages sustained by a vendee of land on account of the breach of a covenant against encumbrances, by the existence on the land, at the time of the conveyance, of a subsisting, but unused easement, when the amount of such damages depends upon conflicting oral testimony, and it does not appear that such finding is clearly erroneous. *Smith v. White*, 77 W. Va. 377, 87 S. E. 865, 88 S. E. 662.

Value of Property.—The report of a commissioner in chancery on the value of property, on conflicting evidence, sustained by the circuit court, can not be properly overruled on appeal. *Virginia Lumber, etc., Co. v. McHenry Lumber Co.*, 122 Va. 111, 94 S. E. 173.

3. Decision Substantially Right.

When the judgment appeared to be substantially right it will be affirmed notwithstanding an error may have been committed in the progress of the cause. *Lay v. Elk Ridge Coal, etc., Co.*, 64 W. Va. 288, 61 S. E. 156.

When the court, on a thorough examination of the whole case, finds that substantial justice has been done, the judgment will not be reversed for any error committed by the circuit court, unless such error, if it had not been committed, would have tended in some measure to have produced a different result. *Barnes v. Grafton*, 61 W. Va. 408, 56 S. E. 608.

"Substantial justice," as used in § 6331 of the Code of 1919, providing that there shall be no reversal where it appears that "the parties have had a fair trial on the merits and substantial justice has been done," has been attained when litigants have had one fair trial on the merits. *Virginia, R., etc., Co. v. Smith*, 129 Va. 269, 105 S. E. 532.

Erroneous Reason for Decision.—A sound decree, sustaining a demurrer, should not be reversed merely because the trial court assigned an erroneous or incorrect reason therefor. *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, citing *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. 170.

If evidence is held admissible for two reasons the judgment will be affirmed if either of the reasons are sufficient. *Kincanon v. Commonwealth*, 6 Leigh 611.

4. Where Reversal Would Be Unavailing to Complainant.

See post, "Entry of Such Judgment as Should Have Been Entered Below, or Should Seem Right and Proper." XIV, K, 1.

6. Amendment.

Amendment of Verdict by Supreme Court of Appeals.—Va. Code 1919, § 6334. See *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680; *Surry Lumber Co. v. Wellons*, 129 Va. 536, 106 S. E. 382.

Amount of Judgment.—A manifest or admitted error in the amount of a judgment at law will be corrected by the supreme court, without remanding the cause for such correction. *Richmond v. Barry*, 109 Va. 274, 63 S. E. 1074.

Clerical Errors.—If, an error in a judgment is such a clerical error as might be corrected on motion in the circuit court, if done there before affirmance here, under chapter 134, W. Va. Code, or here under § 6 of that chapter, we may now correct the judgment and affirm it. We have several times held that errors in failing to give judgment for the aggregate of principal and interest as provided by § 114, chap. 50, W. Va. Code, in justice's courts, and as provided in §§ 14, 16, chap. 131, in circuit courts, are such clerical errors as may be thus corrected. *Watkins v. Angotti*, 65 W. Va. 193, 199, 63 S. E. 969.

Mere errors in calculation in the trial court which are readily corrected from the record, will be corrected on a writ of error, and a judgment which is otherwise right will be corrected and affirmed. *Aultman, etc., Machinery Co. v. Gay*, 108 Va. 647, 62 S. E. 946.

When it clearly appears that there is an error in the amount of the judg-

ment appealed from to the prejudice of the defendant in error, and the record contains data by which the same can be corrected, this court will make the correction although no motion to correct it has been made in the court below, and will then affirm the judgment, unless there be other errors. *Farmers' Nat. Bank v. Howard*, 71 W. Va. 57, 76 S. E. 122.

An error of less than \$100 in a pecuniary judgment brought to this court, on assignments of error pertaining to jurisdictional amounts, will be corrected, notwithstanding the failure of such assignments. *Toler v. Sanders*, 77 W. Va. 398, 87 S. E. 462.

Where in an action for personal injuries the jury were told to disregard a release executed by the plaintiff when a minor, the supreme court of appeals will not remand the case when they do not believe that the interests of justice require it, but will render final judgment upon the merits, crediting the judgment of the lower court with the amount received by the plaintiff by way of compromise, and affirming the judgment thus amended. *Clinchfield Coal Corp. v. Couch*, 127 Va. 634, 104 S. E. 802.

On writ of error by defendant to the judgment against him below, for the specific sum found, "with interest from the date on said note," according to the verdict of the jury, and neither the date of the note, or the note itself, appears in any part of the record, except in the bill of exceptions and certificate of evidence of defendant, made up and certified within thirty days after adjournment of the term at which the judgment was entered, the error therein being less than the amount necessary to give the supreme court jurisdiction, the aggregate of principal and interest to the date of the judgment below will be ascertained, by reference to the date of said note shown in such bill of exceptions and certificate of evidence, and the judgment corrected, and as corrected, there

being no other error found therein, it will be affirmed. *Watkins v. Angotti*, 65 W. Va. 193, 63 S. E. 969.

Abatement of Verdict.—A circuit court can not nor can this court in any case of its own motion abate any part of a verdict and pronounce judgment for the residue. Its only course when a remittitur is refused, is to set aside the verdict and award a new trial. *Cox & Co. v. Carter Coal Co.*, 81 W. Va. 555, 94 S. E. 956.

Addition of Interest.—If a verdict is found which does not allow interest, judgment should be entered for the sum found with interest from the date of the verdict, under the express terms of § 3390 of the Code, and if the trial court has failed to enter judgment for the interest, its judgment will be amended in this respect on cross error assigned by the plaintiff in this court. *Atlantic, etc., R. Co. v. Grubbs*, 113 Va. 214, 74 S. E. 144.

Correcting Rate of Interest.—"There is an error in the judgment which is not made the subject of any assignment of error and which, we think, can be properly corrected under the provisions of § 3452 of the Code. The verdict of the jury was as follows: 'We, the jury, find for the plaintiff the sum of \$305.55, with damages thereon at the rate of ten per cent. per month from the first day of January, 1912.' In entering up judgment upon this verdict the court ordered 'that the plaintiff recover of the defendants \$305.55, the amount by the jury in this verdict ascertained, with interest thereon at the rate of 10 per cent. per month from the first day of January, 1912, until paid.'"

* * * The judgment in the present case should include damages at the rate of 10 per cent up to the date of the verdict, and the amount thus resulting as principal should bear interest at the rate of six per cent. until paid. *Powers v. Hamilton*, 117 Va. 810, 86 S. E. 98.

Reduction of Amount of Judgment.—The trial court having given judg-

ment for the face value of an insurance policy, upon which the premium had not been paid, and there being no other error in its judgment, this court will amend the judgment by deducting therefrom the amount of the premium agreed to be paid, and, as amended, affirm it. *Interstate Fire Ins. Co. v. McFall*, 114 Va. 207, 76 S. E. 293.

In an action for personal injuries the supreme court of appeals having determined that no error was committed in fixing liability upon defendant for plaintiff's injury, but that the verdict was excessive, if the case were remanded to the trial court it would be solely for the purpose of assessing the damages. But when the supreme court of appeals is in as good condition to do that as a jury would be, the remand is unnecessary. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Where a verdict has been improperly reduced by the trial court, and judgment entered for only a part of the amount found by the jury, when it should have been entered for the whole, this court, on writ of error, will render judgment for the plaintiff for the amount of the reduction, with interest from the date fixed by the verdict, and for costs. *Hoffman v. Shartle*, 113 Va. 262, 74 S. E. 171.

Parties.—An action for fire damage was brought in the names of one F. and K., trustee. The trustee, K., having died, his executrix was made a party to the proceeding on appeal. It not appearing that K.'s executrix had any interest whatever in the litigation, the judgment of the trial court was amended and entered on appeal in favor of F. alone. *Norfolk Southern R. Co. v. Fentress*, 127 Va. 87, 102 S. E. 588.

Failure to Dismiss Bill without Prejudice.—Where a court of equity has not jurisdiction to decree relief, and dismisses a bill without inserting in its decree a clause showing that the bill is not dismissed without prejudice, and

plaintiff is at fault in not asking the court at the time of the decree to dismiss such bill without prejudice, the decree will be modified and affirmed here, but costs will be adjudged against him. *Newton v. Kemper*, 66 W. Va. 130, 66 S. E. 102.

Bill Improperly Taken for Confessed.

—A bill in equity against a nonresident, as to whom no process other than an order of publication, duly published and posted, has been taken, can not be taken for confessed as to such party; but, if a decree, erroneous in that respect, gives no relief against such party, it will be corrected without reversal, when in the appellate court for review on other grounds and not otherwise erroneous. *Billmyer Lumber Co. v. Merchants Coal Co.*, 66 W. Va. 696, 66 S. E. 1073.

Judgment against Administrator.

The judgment, being by proper construction personal against the administrator, is correctible, and may be amended, here, so as to read, "against K, administrator of Adolphus Armstrong, to be levied of the goods and chattels in his hands to be administered." *Selvey v. Armstrong*, 73 W. Va. 13, 79 S. E. 1019.

Decree Allowing Alimony.—It is error in decreeing a divorce a mensa et thoro, to decree payment of alimony "for and during the wife's life;" it should be during their joint lives, or until reconciliation. But, if such is the only error appearing, this court will correct the decree, and will affirm it as thus modified. *Henrie v. Henrie*, 71 W. Va. 131, 76 S. E. 837.

Bill for Injunction.—A motion in the appellate court, on appeal, for leave to amend a bill for an injunction, unsustained by anything in the record, showing facts which, if incorporated in the bill, would sustain the injunction, will be refused. *Sutherland v. County Court*, 62 W. Va. 1, 2, 57 S. E. 274.

Where a decree of specific performance does not protect the public interests and the interest of a railway

company in the future performance of its duties and obligations to the public, it may on appeal be modified in that particular, and as so modified, affirmed. *Harper v. Virginian R. Co.*, 76 W. Va. 788, 86 S. E. 919.

In a suit for specific performance, a decree declared the effect of a deed which it directed the vendor to make to the vendee to divest the vendor of the legal title and all interest in the land and to invest the same in the vendee. It was conceded that there was a lease upon part of the property, which at the time of the sale had six years to run. Held: That while no recital in the decree could affect the rights of the lessee, who was not a party to the litigation, the supreme court of appeals would amend the decree of the trial court, so as to provide that all the rights of the lessee should be excepted and reserved. *Watson v. Mitchell*, 128 Va. 312, 104 S. E. 825.

A decree setting aside a fraudulent conveyance in so far only as it affects the rights of plaintiffs and directing a sale of the property, and application of the proceeds to payment of costs and plaintiffs' debt, but which is erroneous only in that it directs the residue of proceeds, if any, to be paid to the grantor, instead of the grantee, will be corrected on appeal, in that respect, and then affirmed, with costs to appellees. *Ridenour v. Roach*, 77 W. Va. 551, 87 S. E. 881.

Costs.—It is unusual for the court of appeals to modify a decree in respect to costs, and allowances in the nature of costs, while affirming it in all other particulars, unless in case of palpable error. *William v. Bond*, 120 Va. 678, 91 S. E. 627.

Enjoining Obstruction of Easement.

—A decree enjoining the owner of a servient estate from obstruction of an easement and entered upon pleadings and evidence raising no issue as to his right to maintain gates or bars across it, is too broad in its scope and will be modified by the appellate court so as

to limit it to the total obstruction complained of, a fence without gates or bars. *Sharp v. Kline*, 82 W. Va. 13, 95 S. E. 441.

Timber Rights.—A decree of court relating to timber and the right to remove it from the land of another imposed no limitation as to the time within which the timber should be removed. Inasmuch as the lower court should have fixed a reasonable time within which to remove the timber, the supreme court of appeals amended the decree, so as to require its removal within eighteen months from date, with leave to the owner to apply to the lower court within six months from date, for a reasonable extension of such time. *Johnson v. Powhatan Min. Co.*, 127 Va. 352, 103 S. E. 703.

Collection Fees Included in Judgment on Note—Reduction.—Since stipulations in a negotiable note for payment of a certain percentage of the principal as collection fees are invalid and unenforceable (in West Virginia), the inclusion of such charges in a recovery is erroneous but correctible in the appellate court by reduction of the judgment. *First Nat. Bank v. Sanders*, 77 W. Va. 716, 88 S. E. 187.

Reimbursement of Tax-Purchaser.—Notwithstanding a tax-purchaser has fraudulently prevented the owner from redeeming, he is, nevertheless, entitled to be reimbursed, on the setting aside of the tax-deed, if the taxes for which the land was sold were a proper charge on the land. If the decree avoiding the tax-deed, in such case, fails to provide for his reimbursement, it is reversible error if the amount is more than one hundred dollars, and error which this court may correct before affirming the decree, if the amount is less than one hundred dollars. *James v. Piggott*, 70 W. Va. 435, 74 S. E. 667.

Action against Broker to Recover Secret Profits—Amendment of Verdict by Supreme Court of Appeals.—*Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

7. Damages.

When Damages Awarded Appellee.—Va. Code 1919, § 6366; Barnes Code, ch. 135, § 27.

Where Judgment for Specific Personal Property Affirmed Damages May Be Given for Detention of Property.—Code of Va., § 6377.

8. Effect.

Relief on Affirmance.—Upon affirmance of an order of the state corporation commission, establishing a connection between two railroads, the appellate court will leave it to the commission, which has ample authority in the premises, to carry out its suggestions as to the manner in which the parties shall afford to each other proper facilities in their traffic relations. *Louisville, etc., R. Co. v. Interstate R. Co.*, 107 Va. 225, 57 S. E. 654.

8½. Partial Affirmance.

Va. Code 1919, § 6365; W. Va. Acts, 1921, p. 171, amending Barnes Code, ch. 131, § 26.

The statute in terms authorizes a partial reversal, and the entry by the appellate court of a judgment, the effect of which must be to affirm in part and reverse in part the original judgment. It must follow that to the extent to which the judgment is affirmed, it is still valid and binding upon the original judgment debtor. *National Surety Co. v. Commonwealth*, 125 Va. 223, 99 S. E. 657.

A decree in general terms on a bill asserting two grounds for the same relief, one of which is proved and the other not, should be affirmed in so far as it stands on the former and reversed in so far as it is based on the latter. *Ihrig v. Ihrig*, 78 W. Va. 360, 88 S. E. 1010.

Where in an action at law brought by a wife on a bond executed to her by her husband and another party as his surety, a verdict is found and a judgment rendered against both the husband and the surety, the judgment will be reversed and the verdict set

aside as to the former, and the judgment affirmed as to the latter. *Bolyard v. Bolyard*, 79 W. Va. 554, 91 S. E. 529.

A decree of sale of property involved in a suit, to protect the creditors of a corporation whose property has been purchased by another corporation which denying such right of preference, gives debts of the old and new corporation an equal status and orders sale of the property as a whole, is erroneous for denial of the right of preference and also for direction of sale, without proper adjustment of liens as to priority. But, if sale had been made under such decree and confirmed without objection, before the appeal therefrom was taken, so much of it as directed the sale will not be reversed. On the contrary, such part of it and the decree of confirmation will be affirmed, and the decree under which the sale was made will be reversed only in so far as it denied the right of preference and modified the commissioner's report, in respect to the rank and dignity of the liens, the prejudice of appellant. *Lowther v. Lowther-Kaufmann Oil, etc., Co.*, 75 W. Va. 171, 83 S. E. 49.

Where the defendant in ejectment obtains a writ of error to the judgment of the trial court awarding the entire premises to the plaintiff, the plaintiff can not ask to have the judgment affirmed in part where the defense goes to the entire action. To grant this prayer would be putting, not the successful, but the unsuccessful litigant on terms. *Grizzle v. Davis*, 119 Va. 567, 89 S. E. 870.

K. REVERSAL.

½. In General.

Va. Code 1919, §§ 4937, 6365; W. Va. Acts, 1921, p. 171, amending Barnes Code, ch. 135, § 26; Barnes Code, ch. 160, § 7.

Where the record shows that the trial court had no jurisdiction over the defendant, then a judgment against him is plainly wrong, and must be reversed.

Bank v. Ashworth, 122 Va. 170, 94 S. E. 469. See post, JUDGMENTS AND DECREES.

The record must affirmatively show a plea and issue on it; otherwise a judgment on a verdict will for that cause alone be reversed. It is very old law that there must be an issue for a jury trial. *Good v. Chester*, 65 W. Va. 13, 14, 63 S. E. 615. See ante, APPEAL AND ERROR, p. 50.

Plainly Wrong or without Evidence in Support.—Under Code of 1919, § 6363, the Supreme Court of Appeals can only reverse the judgment of the trial court if it appears that the judgment is plainly wrong or without evidence to support it. *Du Pont, etc., Co. v. Brown*, 129 Va. 112, 105 S. E. 660.

The appellate court will set aside a verdict of a jury which is without sufficient evidence to support it, or plainly against the decided weight and preponderance of conflicting evidence. *Portsmouth v. Houseman*, 109 Va. 554, 65 S. E. 11; *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91, 49 S. E. 1012; *Chapman v. Liverpool Salt, etc., Co.*, 57 W. Va. 395, 50 S. E. 601; *Casto v. Baker*, 59 W. Va. 683, 53 S. E. 600; *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385; *Miller Supply Co. v. Crane*, 61 W. Va. 658, 57 S. E. 268; *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634; *Priddy v. Coal Co.*, 64 W. Va. 242, 61 S. E. 163; *Booth v. Camden Interstate R. Co.*, 68 W. Va. 674, 70 S. E. 559; *Kyle v. Huddleston*, 80 W. Va. 439, 92 S. E. 679.

If the evidence of the appellant sustained by the undisputed facts and circumstances plainly preponderates over that of the appellee, as shown by the records, the appellate court will reverse the decree in favor of appellee, and direct a decree in favor of the appellant. *Furst v. Galloway*, 56 W. Va. 246, 49 S. E. 146.

A verdict contrary to the decided weight and preponderance of the evidence will be set aside, notwithstanding

the evidence upon which it stands was such as to warrant the giving of instructions based upon it. *Fucy v. Coal, etc., R. Co.*, 75 W. Va. 134, 83 S. E. 301.

Notwithstanding the fact that a plaintiff in error stands in the position of a demurrant to the evidence, yet the evidence in this cause is too uncertain and indefinite to support the verdict found in favor of the defendant in error, and it is set aside. *Berkley St. R. Co. v. Simpson*, 106 Va. 548, 56 S. E. 331.

A verdict against the weight and preponderance of the evidence should not be allowed to stand, though the evidence is conflicting oral testimony of witnesses in the presence of the jury, when the testimony introduced by the party against whom the verdict is returned is so corroborated by admissions in the individual testimony of the opposite party and by other facts and circumstances appearing as to disclose that the verdict is palpably wrong. *McDermitt v. Forbes*, 73 W. Va. 240, 80 S. E. 356.

Courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially know to be incredible, and although a plaintiff in error occupies the position of a demurrant to the evidence, yet if the verdict of the jury is dependent for its support upon the testimony of a witness which is contradicted by the conceded facts in the case, it will be set aside and a new trial awarded. Testimony in conflict with conceded or undisputed facts can not, in the nature of things, be true, and hence can not form any basis for a conflict upon which to rest a verdict. A court is not bound to stultify itself by allowing a verdict to stand, although there may be evidence tending to support it, where the physical facts demonstrate such evidence to be untrue, and the verdict to be unjust and unsupported in law and in fact. *Norfolk, etc., R.*

Co. v. Crowe, 110 Va. 798, 67 S. E. 518.

"In our opinion, the circumstances relied upon to show the guilt of the prisoner, appearing in the record, are insufficient to sustain the conviction, and the trial court should have sustained the motion to set it aside. *Henderson v. Commonwealth*, 98 Va. 794, 34 S. E. 881; *Buck v. Commonwealth*, 116 Va. 1031, 83 S. E. 390; *Starke v. Commonwealth*, 116 Va. 1039, 83 S. E. 545; *Canter v. Commonwealth*, 123 Va. 794, 96 S. E. 284." *Karnes v. Commonwealth*, 125 Va. 758, 769, 99 S. E. 562.

Verdict Ignoring Evidence.—Acquiescence by an agent in statements of the account between them rendered by his principal, and his failure to object to the same in any manner supplemented by evidence showing the relation of principal and agent and a course of business between them, are sufficient evidence of liability, in the absence of opposing evidence, to call for a verdict against him, and the verdict of the jury ignoring such evidence should be set aside. *Indiana, etc., Ins. Co. v. Bowman*, 72 W. Va. 704, 79 S. E. 651.

If the evidence of the appellant sustained by the undisputed facts and circumstances plainly preponderates over that of the appellee, as shown by the records, the appellate court will reverse the decree in favor of appellee, and direct a decree in favor of the appellant. *Furst v. Galloway*, 56 W. Va. 246, 49 S. E. 146.

Verdict Based on Insecure Grounds.—While the verdict of a jury on a question of negligence ought not to be disturbed where the evidence is such that reasonable men might fairly differ as to whether or not there was such negligence, still the existence of negligence can not be left entirely to conjecture, and a verdict based upon no sure grounds of inference can not be upheld. *Adams Exp. Co. v. Allendale Farm*, 116 Va. 1, 81 S. E. 42.

Where there is an irreconcilable

conflict in the instructions, the judgment must be reversed. *Director General v. Chandler*, 129 Va. 418, 106 S. E. 226.

Where Finding for Defendant on One Issue Erroneous.—Where the court below with the assent of the parties proceeds to the trial, without a jury, of only one of issues raised by plea in bar, and erroneously finds for the defendant upon such issue, and renders judgment accordingly, this court will reverse the same, set aside the findings of the court below, and remand the cause for a trial upon the remaining issue, or issues. *Gerber Co. v. Thompson*, 84 W. Va. 721, 100 S. E. 733.

Finding of Court.—A decided and heavy preponderance of evidence against the finding of a trial court, on an issue of fact, justifies reversal thereof by the appellate court. *McGraw v. Morgan*, 81 W. Va. 331, 94 S. E. 370.

Findings of a trial court as to facts, upon issues submitted to it in lieu of a jury, upon a commissioner's report and the evidence returned therewith, will be set aside, if unsustained by evidence or contrary to the decided weight and preponderance thereof, notwithstanding their agreement with the finding of the commissioner. *Williamson v. Levine*, 75 W. Va. 143, 83 S. E. 281.

A decree determining a question of fact will be reversed, upon an appeal, where it clearly appears that such decree is against the weight and preponderance of the evidence, but not where the evidence is of such conflicting and doubtful character that different minds and different judges, equally fair, might reasonably arrive at different conclusions from such evidence. *Wallace v. Douglas*, 58 W. Va. 102, 51 S. E. 869.

A decree rescinding a deed, at the instance of the grantee, though predicated on the finding of the trial court on an issue of fact, will be reversed if the contract, as expressed in the deed, gives the grantee all the grantor could reasonably and consistently have con-

veyed, under the circumstances existing at the date of the execution thereof, and the oral evidence, respecting his alleged intention to grant more, does not preponderate in favor of either party. *Isner v. Nydegger*, 63 W. Va. 677, 60 S. E. 793.

Plain Deviation by Lower Court from Proof.—Where the mental capacity of a testator is involved on the trial of an issue *devisavit vel non*, the jury are the proper judges of the weight and credit to be given to the testimony of the witnesses, and their verdict, when sanctioned, as in the case at bar, by the trial court, is entitled to the highest respect in the appellate court, but when there has been a plain and palpable deviation from the proof, interference on the part of the appellate court is warranted. *Huff v. Welch*, 115 Va. 74, 78 S. E. 573.

Reinstating Verdict.—Where the verdict of a jury is set aside by the judgment of a circuit court based upon a misapplication of the law to conceded facts, such judgment will be reversed and the verdict reinstated. *Garrett v. Patton*, 81 W. Va. 771, 95 S. E. 437.

Extrinsic Matter Not Apparent of Record.—A final decree removing a guardian and confirming a report of commissioner stating his accounts was entered on a bill taken for confessed, so that § 3451 of the Code of 1904 was applicable thereto. Such statute authorized the court below to set it aside only for error for which the Supreme Court of Appeals on appeal might reverse it, or to amend it only to the extent that data might appear in the record for safely correcting it. But the Supreme Court of Appeals can not on appeal reverse a decree for extrinsic matter which does not appear in the record prior to or at the time of the entry of the decree, where such matter is not claimed to have been after-discovered evidence. Hence neither the court below nor the Supreme Court of Appeals is given any statutory authority to reverse or amend such decree.

Gills v. Gills, 126 Va. 526, 101 S. E. 900.

Loss of Notes of the Evidence.—Loss of the stenographic notes duly taken of the evidence adduced upon a trial is not ground for the award of a new trial by the appellate court, where the bills of exception prepared by the movant and properly signed and filed on the writ of error purport to contain all the evidence introduced before the jury and the proceedings had in the trial court, and there is no showing that such bills are incomplete. *State v. Huff*, 80 W. Va. 468, 92 S. E. 681.

Where Conclusively Shown that Appellee Not Entitled to Recover.—Where in an action by a shipper against a carrier it was conclusively shown that the carrier did not receive the goods, the supreme court of appeals will not remand the cause for a new trial, but will reverse a judgment for plaintiff pursuant to § 6365, Code of 1919. *Director General v. Chandler*, 129 Va. 418, 106 S. E. 226.

Dismissal as to One Defendant.—Where the facts proved do not establish any liability upon one of the defendants, and the evidence was as full as the circumstances of the case admitted of, and as could be reasonably expected on another trial, and full opportunity was afforded the plaintiff to introduce evidence, the supreme court of appeals on reversal will, under § 6365 of the Code of 1919, render judgment of dismissal as to that defendant. *Virginia Iron, etc., Co. v. Odle*, 128 Va. 280, 105 S. E. 107.

Partial Reversal.—See ante, "Partial Affirmance," XIV, J, 8½.

1. Entry of Such Judgment as Should Have Been Entered Below or Should Seem Right and Proper.

a. In General.

Va. Code 1919, §§ 4937, 6365; Barnes Code, ch. 135, § 26, amended by Acts 1921, p. 171; Barnes Code, ch. 160, § 7.

Section 6365 of the Code of 1919 relates entirely to procedure in the ap-

pellate court, and its enactment was clearly within the legislative power. *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

Prior to the enactment of § 6365 of the Code of 1919, the law required the appellate court to enter such a judgment as the trial court ought to have entered. The change of the law, however, required the appellate court to enter such judgment, decree or order as to the court should seem right and proper. Section 6465 of the Code relates entirely to procedure in the appellate court, and was in force when the opinion in this case was rendered. *Duncan v. Carson*, 127 Va. 306, 332, 103 S. E. 665, 105 S. E. 62.

Judgment for Plaintiff in Error.—Where the facts are fully before the court, and there is no reason to suppose that upon another trial any new or different evidence might be introduced which ought to affect the result, the supreme court of appeals, under § 6365 of the Code of 1919, will render judgment for the plaintiff in error, where in its opinion such judgment is proper. *Fourth Nat. Bank v. Bragg*, 127 Va. 47, 102 S. E. 649; *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62; *Queen Ins. Co. v. Perkinson*, 129 Va. 216, 105 S. E. 580.

Where it is evident that a new trial will not avail the plaintiff anything, the supreme court of appeals will enter such judgment as the court below should have entered in favor of the defendant. *Louisville, etc., R. Co. v. Rieley*, 121 Va. 469, 93 S. E. 574; *Connecticut Fire Ins. Co. v. Roberts Lumber Co.*, 119 Va. 479, 89 S. E. 945.

When in an action for personal injury the supreme court finds that the evidence shows the plaintiff guilty of contributory negligence and sets aside a verdict for him, if it clearly appear to the supreme court that the plaintiff can not, in fair probability, upon a new trial show a case for recovery, and that no injustice will be done by refusing a new trial, the case will not be

remanded for a new trial, and judgment will be here rendered for the defendant. *Weeks v. Chesapeake, etc.*, R. Co., 68 W. Va. 284, 69 S. E. 805.

Insertion of Saving Clause.—Where a bill in equity, by a husband against the wife to compel her to convey to him the legal title to property, is insufficient to sustain a decree establishing an exclusive trust in favor of the husband, and matter foreign to the bill is introduced by an answer praying affirmative relief, the appellate court, on reversing such decree and dismissing the bill, will insert in the order a clause, saving to the defendant all appropriate remedies, legal or equitable for the vindication of her personal and property rights. *Price v. Price*, 68 W. Va. 389, 69 S. E. 892.

Where a judgment by default was assailed in the trial court as void for want of sufficient service of process, and the creditor had ample opportunity to take whatever steps were necessary or proper to protect his interests, but, with full knowledge of the circumstances, failed to do so, this court, on reversing the decree of the trial court, will not remand the cause to be further inquired into, but will enter a decree in accordance with its own opinion. *Crockett v. Etter*, 105 Va. 679, 54 S. E. 864.

Final Judgment Where There Can Not Be Further Evidence.—Where the facts proved do not establish any liability upon one of the defendants, and the evidence was as full as the circumstances of the case admitted of, and as could be reasonably expected on another trial, and full opportunity was afforded the plaintiff to introduce evidence, the supreme court of appeals on reversal will, under § 6365 of the Code of 1919, render judgment of dismissal as to that defendant. *Virginia Iron, etc., Co. v. Odle*, 128 Va. 280, 105 S. E. 107.

Approval of Erroneous Verdict.—Where the chancellor approves an erroneous verdict and thereon predicates

a decree, it will be reversed on appeal as also erroneous, and such decree will be entered here as he should have entered upon a consideration of the facts proved upon the trial of the issue. *Di Bacco v. Benedetto*, 82 W. Va. 84, 95 S. E. 601.

Setting Aside Verdict.—If the court below erred in setting aside a verdict for the plaintiff, as contrary to the law and the evidence, the supreme court of appeals will enter the judgment thereon which the trial court should have entered. *Carter v. Washington, etc., Railway*, 122 Va. 458, 95 S. E. 464; *Zuplkoff v. Charleston Nat. Bank*, 77 W. Va. 621, 88 S. E. 116.

Insufficiency of Evidence.—Where a motion is made to exclude the plaintiff's evidence because not sufficient to support a verdict in his favor, and the motion is overruled, and the appellate court reverses the judgment because of the insufficiency thereof, it will enter judgment for the defendant without remanding the cause, although the defendant introduces his evidence, where such evidence, taken in connection with that of the plaintiff, does not support the verdict, and where it does not appear that injustice will result from so doing. *Anderson v. Tug River Coal, etc., Co.*, 59 W. Va. 301, 53 S. E. 713, cited in *Ruffner Bros. v. Dutchess Ins. Co.*, 59 W. Va. 432, 53 S. E. 943.

Where, at the conclusion of the evidence, the defendant asks for a peremptory instruction, directing a verdict in its favor, which the court refuses to give, and the appellate court reverses the judgment because the evidence is not sufficient to support the verdict or because the verdict is contrary to the evidence, judgment will be entered by the appellate court for the defendant, without remanding the cause, unless satisfied that such course would be unjust. *Anderson v. Tug River Coal, etc., Co.*, 59 W. Va. 301, 53 S. E. 713, cited in *Ruffner Bros. v. Dutchess Ins. Co.*, 59 W. Va. 432, 53 S. E. 943.

Excessive Verdict.—Where it is apparent from the record in the court of appeals that the decree appealed from is excessive and unwarranted by the evidence, the court of appeals will reverse and annul the decree and enter such judgment as the circuit court ought to have entered. *Belmont v. McAllister*, 116 Va. 285, 81 S. E. 81.

Ordinary Dismissal.—Under § 6365, Code of 1919, providing that the appellate court shall reverse the judgment, in whole or in part, if erroneous, and enter such judgment, decree, or order as to the court shall seem right and proper and shall render final judgment upon the merits whenever, in the opinion of the court, the facts before it are such as to enable the court to attain the ends of justice, where the supreme court of appeals reverses a judgment in favor of a plaintiff against a carrier on the ground that the contract of carriage was illegal, it will order that the case be dismissed. *Norfolk, etc., R. Co. v. Dehart Distilling Co.*, 127 Va. 415, 103 S. E. 594.

Reversing Judgment of Dismissal.—If the defendant in error cross-assigns error in the action of the trial court in setting aside a verdict, on the motion of the plaintiff in error, upon insufficient grounds, or upon its own motion, for lack of evidence, in a case in which the defendant in error has moved for a new trial and then withdrawn its motion and moved for judgment non obstante veredicto, on the ground of lack of evidence to sustain the verdict, the appellate court, on reversing the judgment of dismissal improperly rendered on said last motion, will reinstate the verdict and enter judgment thereon. *Holt v. Otis Elevator Co.*, 78 W. Va. 785, 90 S. E. 333.

Refusal to Enter Judgment.—In an action for damages for trespass on the case a verdict was rendered against three defendants. The evidence showed that two of the defendants were guilty of the tort. The jury returned a verdict against the

three defendants jointly, and a motion was made by defendants for a new trial while plaintiff made a motion for judgment on the verdict against two of the defendants. It was held that judgment should have been rendered for plaintiff against the two defendants on the verdict, and a refusal to do so was error. And in such a case the appellate court will proceed to render a judgment which should have been rendered by the lower court. *Pence v. Bryant*, 73 W. Va. 126, 131, 80 S. E. 137.

Where a demurrer to evidence was wholly sustained by the trial court, and the jury found a gross sum for damages, but, on writ of error, the supreme court is of opinion that the demurrer should have been overruled as to contain items of account, the amount and value of which are readily ascertainable from the record, it will enter up final judgment for the demurree for the value of such items. *Whitehead v. Cape Henry Syndicate*, 11 Va. 193, 68 S. E. 263.

b. Rulings on Demurrer.

Where the trial court erred in overruling a demurrer to the declaration, and there was a trial and judgment for the plaintiff, this court will reverse the judgment of the trial court, set aside the verdict of the jury, and enter an order sustaining the demurrer, and dismissing the case. *Baker v. Butterworth*, 119 Va. 402, 89 S. E. 849.

Where a plaintiff has been twice permitted to amend his declaration, and he has so amended it and gone to trial on his second amended declaration, it is to be presumed that he has made the strongest presentation of his case which the facts will permit, and this court, on sustaining a demurrer to the last declaration, will enter up final judgment for the defendant, which is the judgment the trial court should have rendered. *United States Spruce Lumber Co. v. Shumate*, 118 Va. 471, 87 S. E. 723.

Where a case was heard upon an amended declaration, it is presumed that the plaintiff has stated his case as strongly as the facts would permit, and this court, upon sustaining a demurrer to such declaration, will enter up final judgment for the defendant. *Radford v. Clark*, 113 Va. 199, 73 S. E. 571.

Where a demurrer to a declaration has been overruled, and the plaintiff, of his own motion, has filed an amended declaration to which a demurrer was also overruled by the trial court, it will be presumed that the plaintiff has stated his case as strongly as the facts would warrant, and the supreme court, upon sustaining the defendant's demurrer to both declarations, will enter up final judgment for the defendant. *Chesapeake, etc., R. Co. v. Wills*, 111 Va. 32, 68 S. E. 395.

Where the judgment in an action at law has been reversed by the supreme court and cause remanded, with liberty to the plaintiff to amend his declaration, and he has amended it, it will be presumed that he made, in his amended declaration, the strongest presentation of his case that the facts would permit, and, on a second writ of error calling in question the sufficiency of the declaration as amended, if it is not sufficient, the supreme court will render such judgment as the trial court ought to have rendered sustaining the demurrer to the declaration, and will enter up final judgment for the defendant. But under the facts of the case at bar, this judgment will be without prejudice to the right of the plaintiff to file a bill for the specific performance of the contract in suit, or to rescind the same and have the title to the lots mentioned in the contract, or such of them as remain unsold conveyed to him. *Nottingham v. Ackiss*, 110 Va. 810, 67 S. E. 351.

c. Case Heard without Jury.

Where all matters of law and fact were submitted to the trial court, without the intervention of a jury, the judg-

ment of the supreme court, upon a writ of error, will be final. *Edmonson v. Potts*, 111 Va. 79, 68 S. E. 254; *Worley v. Adams*, 111 Va. 796, 69 S. E. 929.

Where a case is heard by the trial court, without the intervention of a jury, this court, on reversing the judgment of the trial court, will enter up judgment for the adverse party, as that is the judgment the trial court ought to have entered. *Danville v. Danville R., etc., Co.*, 114 Va. 382, 76 S. E. 913; *United Moderns v. Rathbun*, 104 Va. 736, 52 S. E. 552.

Where a jury is waived and a case is submitted to the trial court on the law and facts the rule in this court is to treat the case as upon demurrer to the evidence, and if plaintiff's evidence is not sufficient to support the findings and judgment below in his favor to reverse the judgment and enter judgment here for defendant. *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 570, 82 S. E. 614.

On a writ of error to a judgment rendered by the trial court agreeable to its own finding, under a waiver of trial by jury, on a declaration in assumpsit, containing good common counts not sustained by any evidence at all, and a bad special count based upon documentary evidence showing no right of action in the plaintiff, the appellate court will not remand the case for amendment of the declaration, nor for a new trial, but will reverse the judgment, set aside the finding, sustain the demurrer to the special count and render a judgment *nil capiat*. *Bond v. Priest*, 77 W. Va. 671, 88 S. E. 114.

In an action of assumpsit, where there is a plea of a nonassumpsit, and issue thereon, and fair, full, and complete trial had on the merits, by the court in lieu of a jury, and a judgment for the defendant, and it appears to this court upon writ of error, that the judgment under the law and the evidence should have been for the plaintiff, this court will reverse the judgment of the circuit court and enter

judgment for the plaintiff, notwithstanding the court permitted the defendant to file a deficient plea in the case over the objection of the plaintiff. The defendant will not be heard to complain of a bad plea filed by him to which the plaintiff objected, and the plaintiff will not be injured, or have cause to complain. *Shinn v. Shinn*, 78 W. Va. 44, 88 S. E. 610.

d. In Criminal Cases.

"A motion of defendant to exclude the state's evidence, which ought to have been sustained, and an instruction to the jury to find for defendant, which was denied, but which ought to have been given, would have ended the case in the court below. As we can clearly see that a different case can not be made on another trial we are of opinion to enter judgement here for defendant non obstante veredicto, and that he go hence without delay, and be forever discharged from further prosecution on this behalf." *State v. Pishner*, 72 W. Va. 603, 606, 78 S. E. 752.

Where no offense is charged in an indictment, this court can not look to the evidence to see whether the offense intended to be charged has been proved, but must render judgment in favor of the accused, though no motion in arrest of judgment was made in the trial court. *Rose v. Commonwealth*, 116 Va. 1023, 82 S. E. 699.

Offense Barred by Statute of Limitations.—When upon appeal from the judgment of conviction of the circuit court it appears that the offense charged is already barred by the statute of limitations, the judgment below should be reversed and the accused discharged from further prosecution. The commencement of a prosecution is the date of the presentment or indictment. *State v. Harr*, 77 W. Va. 637, 88 S. E. 44, citing *Commonwealth v. Christian*, 7 Gratt. (48 Va.) 631; *State v. Beasley*, 21 W. Va. 777, 781; *Boyle v. Commonwealth*, 14 Gratt. (55 Va.) 674.

Where accused, entitled, to a discharge on a second indictment, was put on trial and convicted, the judgment will be reversed and verdict set aside on writ of error, and appellate court, rendering judgment the trial court should have rendered, may sustain motion and forever discharge accused from prosecution for the offense so charged. *State v. Crawford*, 83 W. Va. 556, 98 S. E. 615.

2. Remand.

a. When Cause Will Be Remanded.

(1) In General.

Va. Code 1919, §§ 4937, 6365; W. Va. Acts, 1921, p. 171, amending Barnes Code, ch. 135, § 26; Barnes Code, ch. 160, § 7.

Where a case must be reversed, and the facts before the supreme court of appeals are not sufficient for it to dispose of the case under § 6365, Code of 1919, the case will be remanded to the court below for a trial de novo, to be had if the defendant in error is so advised. *Latham v. Powell*, 127 Va. 382, 103 S. E. 638.

Where a complainant brings a suit in equity when his remedy is at law, the supreme court in reversing the decree will remand the cause to the lower court, with instructions to transfer the same to the law side for the appropriate amendment of pleadings and other proceedings in conformity with the provisions of § 6084 of the Code of 1919, notwithstanding the case was disposed of in the lower court before § 6084 became effective. *Pence v. Tidewater Townsite Corp.*, 127 Va. 447, 103 S. E. 694.

Improper Rejection of Evidence.

—Where the circuit court on motion excluded all of the plaintiff's evidence, directed a verdict for defendant and dismissed the action, and upon writ of error to the judgment it appears that material and proper evidence offered by plaintiff during the progress of the trial was improperly rejected to the

plaintiff's prejudice, the appellate court will reverse the judgment, set aside the verdict, award a new trial, and remand the case. *Hanley v. West Virginia, etc., R. Co.*, 59 W. Va. 419, 53 S. E. 625.

Omission of Evidence from Misapprehension of Law.—Where it appears that through a misapprehension of law plaintiff has failed to adduce sufficient evidence to sustain a judgment in his favor, the trial court should withhold its findings and judgment, and give the party in default reasonable opportunity to sustain his case; and if this has not been done, the judgment below will be reversed on writ of error and a new trial awarded. *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 570, 52 S. E. 614.

Where Decisive Evidence Might Be Produced.—When the record of a chancery cause discloses lack of development of the merits of vital issues and strong probability of the existence of evidence decisive thereof, this court will reverse the decree and remand the cause for further proceedings to be had therein. *Ellis v. Hager*, 87 W. Va. 313, 104 S. E. 607.

Want of Evidence.—When in an action for personal injuries a judgment for the plaintiff is reversed because the evidence is not sufficient to sustain it, judgment will not be rendered by the appellate court for the defendant, unless it affirmatively appears from the record that the plaintiff could not present a different case on a new trial. *Fuller v. Margaret Min. Co.*, 64 W. Va. 437, 63 S. E. 206.

When in an action against a railroad company for personal injury to a passenger the evidence is such that a verdict for the plaintiff should be set aside, the circuit court, if asked, should direct a verdict for the defendant, and if it refuses, the appellate court will reverse judgment and verdict, and remand the case for a new trial, unless the supreme court can see clearly that the plaintiff can not better his case

upon another trial. *Hoylman v. Kanawha, etc., R. Co.*, 65 W. Va. 264, 64 S. E. 536; *Soward v. American Car Co.*, 66 W. Va. 266, 66 S. E. 329.

A decree denying relief on a cross bill, or answer in the nature thereof, the averments of which are sufficient, but are not sustained by evidence taken in proper form, but the existence of which is disclosed by affidavits, which the trial court erroneously permitted to be filed as evidence, on the hearing, over objections, will be reversed and the cause remanded, to allow such evidence to be taken and filed in regular and proper form, if the appellate court can see the party would be entitled to the relief asked for in such answer when the evidence shall have been so taken. *Hager v. Melton*, 66 W. Va. 62, 66 S. E. 13.

Demurrer Erroneously Sustained.—Where the trial court erroneously overruled a demurrer to a declaration containing a misjoinder of causes of action, the judgment was reversed, the verdict set aside, the demurrer to the declaration sustained, and the case remanded to the trial court with leave to the plaintiff to amend his declaration. *Wells v. Kanawha, etc., R. Co.*, 78 W. Va. 762, 764, 90 S. E. 337.

Demurrer Improperly Overruled.—Where a demurrer to a declaration for misjoinder of counts in tort with counts in assumpsit has been improperly overruled by the trial court, and afterwards a demurrer to the evidence by the defendant and judgment thereon entered for the plaintiff, but it is manifest that all of the counts were intended to be on contract, this court, upon reversal for the error in overruling the demurrer to the declaration, will remand the case to the trial court with instructions to sustain the demurrer to the declaration, with liberty to the plaintiff to amend, if so advised, and, if not, to enter final judgment for the defendants on their demurrer to the evidence. *Pennsylvania R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567.

Where a demurrer to a bill in equity has been erroneously overruled by the circuit court, and upon appeal the demurrer is sustained, the decree reversed and the cause remanded "To be heard and finally determined according to the rules and principles of equity," although the decree contains no directions for leave to plaintiff to amend his bill, the judgment of the appellate court is not *res judicata* and the bill may be amended. *Blue v. Campbell*, 57 W. Va. 34, 49 S. E. 909.

Verdict Based on Mistake or Disregard of Instructions.—When the evidence and admitted facts before a jury show error in their verdict which can safely be attributed to a mistake in their calculation or a total disregard of the evidence, it should on motion be set aside and a new trial awarded, and if the trial court overrules such motion, this court will on writ of error thereto by the injured party reverse the judgment and award him a new trial. *Ohio, etc., Milk Co. v. Snyder*, 87 W. Va. 523, 105 S. E. 773.

Error in Amount of Verdict.—If a trial court erroneously instructs a jury to deduct a certain amount from the plaintiff's claim, and the jury does it and renders a verdict for the plaintiff for the residue, the appellate court cannot amend the judgment of the trial court in that respect, and, as amended, affirm it, but at most can only reverse the judgment and remand the case to the trial court with directions that unless the defendant will agree to the entry of a judgment in favor of the plaintiff for the full amount of his claim, the verdict be set aside and a new trial awarded. *Moreland v. Moreland*, 108 Va. 93, 60 S. E. 730.

Where Final Judgment Cannot Be Entered.—Where, with the objectionable testimony admitted by the lower court stricken out, the case is not left in such condition that final judgment can be entered in the supreme court of appeals under the provisions of §

6365, Code of 1919, it will be remanded for a new trial to be had in conformity with the opinion of the supreme court of appeals. *Gallion v. Winfree*, 129 Va. 122, 105 S. E. 539.

Decree of Sale.—Where upon an appeal from a decree for the sale of real and personal property to satisfy liens, under § 7 of chapter 75 of the Code of 1889, of West Virginia, the decree is reversed as to a lien which is in amount the larger part of all the liens decreed, and such lien held invalid, and the value of the property decreed to be sold does not appear, it is proper to reverse that part of the decree directing the sale, and to remand the cause with directions to ascertain the amount of property necessary to satisfy the lien or liens not held invalid, and, in default of payment, order a sale of such amount necessary. *Rainey v. Freeport Smokeless Coal, etc., Co.*, 58 W. Va. 381, 52 S. E. 473.

On reversing and setting aside an order, granting a new trial, on a writ of error, perfected before the new trial was had, the appellate court will not render judgment on the verdict reinstated by its action on the writ of error, if the rendition of a final judgment in the court below, on a second verdict, obtained after the writ of error was perfected, be brought to its attention. Under such circumstances, the case will be remanded, for judgment by the court below, on the verdict reinstated by the appellate court, to the end that there may not be in force two judgments at the same time on one cause of action. *DeBoard v. Camden Interstate R. Co.*, 62 W. Va. 41, 57 S. E. 279.

The acquisition of a second verdict and judgment thereon, under the circumstances, stated in the preceding paragraph does not deprive the appellate court of its jurisdiction nor constitute a settlement and adjustment of the controversy, barring prosecution

of the writ of error. *DeBoard v. Camden Interstate R. Co.*, 62 W. Va. 41, 42, 57 S. E. 279.

Failure to Fully Develop Issue.—When the record of a chancery cause discloses lack of development of the merits of vital issues in the cause and strong probability of the existence of evidence decisive thereof, the decree is reversed and the cause remanded for further proceedings. *Widdell Lumber Co. v. Turk*, 75 W. Va. 26, 83 S. E. 83.

Commissioner's Report.—Where the trial court failed to pass on a commissioner's report and sustained demurrers to the bill, this court will decline to pass on the report, deeming it safer to remand the cause to the trial court where the details of the report can be more safely worked out, as the decrees of this court are final, and an error committed here can not, in general, be corrected at a subsequent term. *McClanahan v. Norfolk, etc., R. Co.*, 118 Va. 388, 87 S. E. 731.

Where the circuit court sustains exceptions to a report of a commissioner stating an intricate account composed of many items, and restates the account and enters a decree according to such restatement, and upon an appeal from such decree the appellate court finds that both the statement of the account by the commissioner and the restatement thereof by the lower court are materially erroneous as to many of the items thereof, the appellate court will announce the principles governing the statement of such account, reverse the decree of the lower court, sustain the exceptions to the report of the commissioner in so far as the report is in conflict with the principles announced by the appellate court, set aside the report and remand the cause to be further proceeded with, and with directions to recommit the cause to a commissioner to restate the account in accordance with the principles announced by the appellate court. *Lewis*

v. Prichard, 57 W. Va. 542, 50 S. E. 743.

Setting Aside Demurrer to Evidence.—Where on demurrer to evidence and voluntary joinder therein by the demurree the trial court, on motion of the demurree, erroneously permits withdrawal of the joinder, and on grounds of surprise, and newly discovered evidence, erroneously sets aside the demurrer to the evidence and awards the demurree a new trial on all issues, this court on reversal of the judgment will remand the case to the circuit court for judgment on the demurrer to the evidence, and for further proceedings to be had therein. *Frymier v. Lorama R. Co.*, 76 W. Va. 96, 85 S. E. 28, distinguishing *Smith v. South Penn Oil Co.*, 59 W. Va. 204, 53 S. E. 152.

Error in Compelling Joinder on Demurrer to Evidence.—If, on a writ of error awarded to a defendant, it appears that the trial court erred in compelling the plaintiff to join in a demurrer to the evidence by the defendant, the effect would not be a dismissal of the writ of error as improvidently awarded, but the judgment would have to be reversed, the previous verdict of the jury set aside, and the case remanded for a new trial. *Smoot & Sons v. Johnson*, 114 Va. 454, 76 S. E. 911.

Final Decree Prematurely Entered.—Where several causes materially affecting the same subject matter have been consolidated and heard together and it appears that several issues are therein raised, some between the plaintiff and a number of the defendants and others between co-defendants, all affecting plaintiff's rights, which have not been fully developed, and it is apparent that evidence exists to establish such issues, and the court enters a final decree for plaintiff without passing on many of such issues, except inferentially, this court will not review the decree upon its merits but will reverse solely because prematurely entered and remand the causes for further proceedings. *Harri-*

son *v.* Harman, 85 W. Va. 538, 102 S. E. 224.

Decree for Trust Fund under Prayer for General Relief.—Under the prayer for general relief in a bill seeking enforcement of an alleged trust in land, praying specifically therefor, disclosing prima facie liability for a sum of money on the part of the alleged trustee, but failing as to the trust in the land, for lack of proof of investment of the fund in the land, there may be a decree for the trust fund, upon a prayer therefor at the bar of the court. But, if the bill has been dismissed without the interposition of such a prayer in the court below or the award of such relief, the decree will be reversed in so far only as it dismissed the bill, and the cause remanded with leave to the plaintiff to ask a decree for the amount of the trust fund. *Johnson v. Bee*, 84 W. Va. 532, 100 S. E. 486.

Where No Particular Amount for Which Recovery Can Be Had Embraced in Record.—In the appellate court, a judgment will be reversed when the record plainly shows that a particular amount for which no recovery can be had is embraced therein, and the action will be remanded with directions to the trial court to allow the amount to be remitted if the party in whose favor it is chooses so to do, upon such remittitur to enter judgment on the verdict for the residue, and if no remittitur is entered, to set aside the verdict and grant a new trial. *First Nat. Bank v. Bank*, 76 W. Va. 356, 85 S. E. 541.

Where Party Entitled to Continuance.—See post, CONTINUANCES.

Erroneous Decision That Court of Equity without Jurisdiction.—When a case is submitted on the bill and answers, and replications thereto, and depositions, and the court erroneously decides "that the plaintiffs have a plain, adequate and complete remedy at law for the relief prayed for, and that this court is, therefore, with-

out jurisdiction," and dismisses the cause with costs, without considering or passing upon the evidence, this court will reverse the decree, and remand it to the circuit court for further proceedings to be had therein. *Nuzum v. Nuzum*, 77 W. Va. 202, 87 S. E. 463.

Order Dissolving Injunction.—Upon an appeal from an interlocutory order dissolving an injunction upon bill and answer accompanied by affidavits, this court does not consider the pleadings and informal proof further than is necessary to enable it to determine the propriety and correctness of the dissolution order. It will not in this manner determine the rights of the parties, but will reinstate the injunction and remand the cause for formal proof by the usual and regular procedure, where it appears the injunction was dissolved prematurely. *Amherst Coal Co. v. Prockter Coal Co.*, 81 W. Va. 292, 94 S. E. 145.

Change of Position.—The case could not be remanded to enable the plaintiff to change her position with reference to the law. *Queen Ins. Co. v. Perkinson*, 129 Va. 216, 105 S. E. 580.

Putting on Terms Remittitur.—A party may be in effect put on terms in the appellate court as well as in the trial court. When a party is put on terms in the appellate court because a judgment in his favor is excessive, it may reverse the judgment of the trial court and remand the cause, with direction to the trial court to put the successful party upon terms to release the excess, or else submit to a new trial, and if the release is made, to overrule the motion for a new trial, and render judgment for the correct amount with interest and costs, or, if the error be one of mere calculation, readily corrected from the record, or if the verdict and judgment of the trial court is excessive and the record affords plain and certain proof of the amount of the excess so that it may

with safety be corrected, in either event the appellate court will amend and affirm the judgment of the trial court, and will not remand the case for such amendment. *National Surety Co. v. Commonwealth*, 125 Va. 223, 99 S. E. 657.

(2) Want of Proper Parties.

When it is made to appear that the rights of persons who are necessary parties, have been adjudicated in a cause, who are not made parties to the suit, the decree will be reversed and the cause remanded that such parties may be brought in. *Kemble v. Smallwood*, 56 W. Va. 350, 355, 49 S. E. 445; *Chartiers Oil Co. v. Moore*, 56 W. Va. 540, 49 S. E. 449; *Ralphsnyder v. Titus* 63 W. Va. 469, 60 S. E. 494; *Hayhurst v. Hayhurst*, 71 W. Va. 735, 77 S. E. 361; *Maynard v. Shein*, 83 W. Va. 508, 98 S. E. 618; *Carder v. Johnson*, 84 W. Va. 709, 100 S. E. 502; *Moore v. Bolen*, 87 W. Va. 125, 104 S. E. 304.

When in the progress of a suit or other proceeding the court discovers the absence of necessary parties, it should stop, and before proceeding to judgment or decree require the proper parties to be brought in as plaintiffs or defendants; and its failure to do so will constitute reversible error on review of the judgment or decree below by this court. *Hoge v. Blair*, 87 W. Va. 515, 105 S. E. 796.

If a decree in a suit to enforce judgment and trust deed liens is found, on appellate review thereof, to be erroneous in its ascertainment and adjustment of the liens on certain property, and it is necessary to bring in new parties, to the end that decrees may be entered in their favor, the entire decree, in so far as it affects such property will be reversed and the cause will be remanded for amendment as to parties and for a proper decree. *Simms v. Ramsey*, 79 W. Va. 267, 90 S. E. 842.

Although the point may not be made by the parties, it is the duty of an ap-

pellate court, observing the absence of necessary parties, sua sponte, to reverse the decree below, and to require the absent parties to be brought in, that a decree binding all may be pronounced. *Talbott v. Curtis*, 65 W. Va. 132, 63 S. E. 877.

This court may of its own motion reverse decrees which have been entered in the absence of necessary parties. *McIlwaine Knight & Co. v. Fielder*, 76 W. Va. 111, 85 S. E. 548.

No Enquiry Concerning Merits of Cause.—On reversing a decree for want of necessary parties, the appellate court will enter upon no inquiry, concerning the merits of the cause; but it will determine whether the subject matter of the bill is within the jurisdiction of a court of equity. *Beckwith v. Laing*, 66 W. Va. 246, 66 S. E. 354.

(3) To Allow Amendment of Pleading.

"In *Blue v. Campbell*, 57 W. Va. 34, 36, 49 S. E. 909, and *Lamb v. Laughlin*, 25 W. Va. 300, it was ruled that where the court doubts the right of the plaintiff to relief on the case stated in the bill, and a good cause for relief appears by the proofs, this court will reverse the decree and give the plaintiff leave to amend his bill. While doubting the right to relief as stated, all the judges agreed that the evidence tended strongly to show a state of facts which would have entitled the plaintiff to recover upon a different theory. The decree was, therefore reversed and the cause remanded, with leave to amend the bill as indicated." *Ritchie County Bank v. Bee*, 62 W. Va. 457, 462, 59 S. E. 181.

In *Ritchie County Bank v. Bee*, 62 W. Va. 457, 464, 59 S. E. 181, the court said: "The true reason for the rule of practice so announced, justifying this court in reversing a decree or judgment and, upon remanding the case, giving leave to correct the pleadings and proof, is, it seems to us, that, in order that justice may be done, opportunity

should be given the parties to perfect a case which seems justified by the facts and without which no proper decree or judgment can be pronounced, and that the parties may not be concluded in the same or some subsequent suit, by the plea of former adjudication or the like, from proper redress or relief in the premises."

In an action upon a renewal note, unless accepted in absolute payment of the original by express agreement, the plaintiff may of right, upon the filing of a plea of non est factum by the defendant, accept such plea and so amend the pleadings as to set up the original note. If in such case the plaintiff does not elect to accept the plea and so amend his pleading but proceeds to trial, he will be regarded as having refused to amend when opportunity was offered; and the appellate court will not reverse the judgment below upon the issue joined on such plea, and remand the case for a new trial on amended pleadings to be filed. *Ritchie County Bank v. Bee*, 62 W. Va. 457, 59 S. E. 181.

Bill Insufficient.—On reversing a decree for insufficiency of the bill, in a cause in which a good case is disclosed by the evidence, the appellate court will remand the cause with leave to the plaintiff to amend his bill. *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915.

A decree sustaining a demurrer to a bill deemed insufficient generally should grant leave to amend before dismissing it, and if upon appeal the bill appears to be amendable, the decree will be reversed, and the cause remanded, with leave to amend, but without costs to appellant, he not having asked permission to cure the defect. *Kelley v. Thompson*, 87 W. Va. 694, 106 S. E. 230.

Demurrer Improperly Overruled.—If, in a suit in which the evidence warrants a decree for the plaintiff, a demurrer to the bill is improperly overruled, the cause heard as upon its mer-

its and the bill dismissed, the decree will be reversed and the cause remanded with leave to amend the bill. *Mauch Chunk Nat. Bank v. Shrader*, 74 W. Va. 310, 311, 81 S. E. 1121.

When a demurrer to faulty counts in a declaration has been overruled and at the trial evidence enhancing the damages has been admitted under no good count, a judgment so partially resting on the bad counts must be reversed. *Wilson v. Guyandotte Timber Co.*, 70 W. Va. 602, 74 S. E. 870.

Where the trial court improperly overruled a demurrer to a declaration in tort some counts of which charged a joint tort against two defendants and others separate counts against each defendant, this court, on reversing the judgment, will not enter final judgment for the defendant, but will remand the case to the trial court with directions to permit the plaintiff to withdraw his joinder in the demurrer and amend his declaration. *Tanner v. Culpeper Const. Co.*, 117 Va. 154, 83 S. E. 1052.

Where a demurrer to a declaration for misjoinder of counts in tort with counts in assumpsit has been improperly overruled by the trial court, and afterwards a demurrer to the evidence by the defendant and judgment thereon entered for the plaintiff, but it is manifest that all of the counts were intended to be on contract, this court upon reversal for the error in overruling the demurrer to the declaration, will remand the case to the trial court with instructions to sustain the demurrer to the declaration, with liberty to plaintiff to amend, if so advised, and, if not, to enter final judgment for the defendants on their demurrer to the evidence. *Pennsylvania R. Co. v. Smith*, 106 Va. 645, 56 S. E. 576.

Omission of Necessary Matter.—A verdict rendered in a trial in which the rulings of the court are free from error and sustained by sufficient evidence, will not be set aside for omission of

necessary, but wholly separable and controlling, matter for the declaration. In such case, the judgment will be reversed and the case remanded with leave to amend the declaration, and the verdict allowed to stand pending further proceedings in the trial court for judgment thereon, if the omitted matter is supplied by averment admitted or proved. *Crockett v. Black Wolf Coal, etc., Co.*, 75 W. Va. 325, 83 S. E. 987; citing *Moss v. Campbell's Creek R. Co.*, 75 W. Va. 62, 83 S. E. 721.

On Demurrer to Evidence.—A demurrer to the evidence does not waive an objection to illegal evidence received by the trial court, but the plaintiff's situation in this court with the motion to exclude sustained, is materially different from what it would have been upon a similar ruling in the lower court. There leave might have been obtained to amend the declaration to conform to the proof; here no such opportunity is afforded, hence this court will not enter up judgment for the defendant on his demurrer to the evidence, but will remand the case to the trial court with direction to permit the plaintiff to amend his declaration if he shall be so advised. *Norfolk, etc., R. Co. v. Warden*, 117 Va. 801, 86 S. E. 103.

Decree Containing No Directions for Leave to Amend.—Where a demurrer to a bill in equity has been erroneously overruled by the circuit court, and upon appeal the demurrer is sustained, the decree reversed and the cause remanded "To be heard and finally determined according to the rules and principles of equity," although the decree contains no directions for leave to plaintiff to amend his bill, the judgment of the appellate court is not *res judicata* and the bill may be amended. *Blue v. Campbell*, 57 W. Va. 34, 49 S. E. 909, approved in *Ritchie County Bank v. Bee*, 62 W. Va. 457, 464, 59 S. E. 181.

Affidavits in Attachment.—Courts ac-

quire jurisdiction of attachments in equity alone by force of the affidavits; and, upon appeal, in a case founded upon an insufficient affidavit, the appellate court can only abate the attachment and dismiss the proceeding, in the absence of an application to the trial court to amend the affidavit. In the absence of statute, it cannot remand the case to the trial court for the purpose of amending the affidavit. *Taylor v. Sutherlin-Meade Tobacco Co.*, 107 Va. 787, 60 S. E. 132.

If, in a suit by creditors to set aside a conveyance or charge as fraudulent, the evidence establishes the fraud, but the bill is deficient in its allegations, the decree subjecting the property to sale will be reversed and the cause remanded with leave to amend the bill. *Bland v. Rigby*, 73 W. Va. 61, 79 S. E. 1013.

In a suit to reform a deed, where the evidence shows plaintiff was entitled to relief in one particular not covered by the bill, before dismissing the bill, the general rule is, to give plaintiff leave to amend his bill so as to present the case made by the proof; and if the court below omits to do this, the error in the decree appealed from may be corrected here. *Hertzog v. Riley*, 71 W. Va. 651, 77 S. E. 138.

Facts Sufficient to Avoid Tax Deed.—If the record discloses facts sufficient to avoid a tax deed, which have not been averred in the bill, and a decree has been entered on full hearing below dismissing the suit, without giving leave to amend, this court will reverse the decree and will remand the cause with leave to amend the bill to conform to facts so disclosed. *Hardman v. Brannon*, 70 W. Va. 726, 75 S. E. 74.

General Verdict for Plaintiff on Declaration Containing Bad Counts.—If a declaration contains several counts based on different causes of action, some of which are bad, a general verdict for the plaintiff will be set aside by the supreme court, as it can not be told whether it was founded on the

good counts or the bad, and the judgment of the trial court thereon will be reversed and the case remanded to the trial court with liberty to the plaintiff, if so advised, to amend the defective counts. *Chesapeake, etc., R. Co. v. Melton*, 110 Va. 728, 67 S. E. 346.

Erroneous Entry of Judgment Nunc Pro Tunc.—Where the only error in the record was the erroneous entry of a judgment nunc pro tunc, it might have been cured by entry of the same judgment by the supreme court of appeals to take effect as of the date on which it was in fact entered by the court below. But in view of the fact that the plaintiffs in error claimed to have several substantial defenses attempted to be set up by special pleas and of the fact that the defects in such pleas were formal, the supreme court of appeals granted a new trial of the case so that the plaintiffs in error might have an opportunity to amend such pleas and thus properly present their defenses to the plaintiff's demand, should they be so advised. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

Where Declaration Shows No Ground of Joint Liability of Tort Feasors.—If, on a declaration against several tort-feasors joined in one action which fails to show any ground of joint liability there has been a verdict and judgment for the plaintiff, the appellate court, on writ of error, will reverse the judgment, set aside the verdict and remand the case, with leave to the plaintiff to amend his declaration so as to show a joint right of action, if he desires to do so, or to prosecute his action against one of the defendants and dismiss it as to the others. *Farley v. Crystal Coal, etc., Co.*, 85 W. Va. 595, 102 S. E. 265.

On reversing a decree improperly canceling a contract for the sale of land, upon allegations of fraud in the procurement thereof, affirming the validity and binding force of the contract as to the husband, but denying right to specific performance thereof as to the wife,

upon a prayer therefor in a cross-bill, the appellate court will remand the cause to enable the vendee, upon an amended cross-bill, to assert, if he desires to do so, such right, if any, as he may have against the husband's heirs (he being dead), and as may be enforceable in the pending suit. *Crookshanks v. Ransbarger*, 80 W. Va. 21, 92 S. E. 78.

(4) To Determine Counsel Fees.

On an appeal from a decree dismissing a bill for divorce, and also dismissing a cross-bill of the wife for alimony, this court, on affirming the decree, will not pass on an application for the allowance of counsel fees for services rendered the appellee in this court, but will remand the cause, with leave to counsel for the appellee to prosecute their claim for compensation before the trial court, which is in a better position than this court to inquire into and do what is right and just between the parties in the first instance, with the right of appeal to this court if a proper case shall be made for its exercise. *Craig v. Craig*, 115 Va. 764, 80 S. E. 507.

Where the record in this court is so incomplete that the court can not properly pass upon the reasonableness of a fee allowed to counsel for an administrator by the trial court, it will remand the case to the trial court with directions to ascertain, by reference to one of its commissioners for further proof, or otherwise as it may deem best, what would be a reasonable attorney's fee to be allowed to the attorney of the administrator; and with further direction that in ascertaining the reasonableness of said fee it is not to be governed absolutely by the opinion of attorneys, the charge made by counsel, or the contract of employment, but should exercise its own discretion and fix the amount of the fee with reference to the labor performed, and the skill and care required, and the advantages gained to the decedent's es-

tate by the services rendered. *Lake v. Pattie*, 116 Va. 130, 81 S. E. 78.

(5) For Trial of Issue Out of Chancery.

Where a charge of fraud is involved, and the evidence is conflicting, and involves the credibility of witnesses, and the proof is not sufficiently definite and certain to satisfy the supreme court that the ends of justice have been obtained by the decree of the trial court, it will reverse the decree and remand the cause for the trial of an issue out of chancery to determine the matter in controversy. *Ewan v. Louthan*, 110 Va. 575, 66 S. E. 869.

Where the evidence relating to the principal fact in a chancery suit is conflicting, the credibility of witnesses is involved, and a charge of fraud is to be determined, and the appellate court is not satisfied that the ends of justice have been attained by the decree entered by the trial court, it will reverse the decree and remand the cause with direction to frame an issue and have it tried by a jury to ascertain the fact in controversy. *Morgan v. Booker*, 106 Va. 369, 56 S. E. 137.

(6) For Reference.

Where a decree is based upon a commissioner's report, in which many complicated accounts are involved, and to which numerous exceptions are filed, pointing out various mistakes in the calculations, which run through the whole statement and report, and affect the results thereof; and the exceptions are overruled and the report confirmed, some of the mistakes being admitted, but others thus pointed out, being so connected and intermingled with the whole statement and report that they can not be segregated and corrected without a restatement of the accounts, which is impracticable here, the appellate court, for the reasons stated, will reverse such decree; and, without passing upon them seriatim, will sustain the exceptions and remand the cause with instructions to re-commit it to a commissioner. *Clark v. Hen-*

dricks. Co., 56 W. Va. 530, 49 S. E. 455.

Where the circuit court of West Virginia sustains exceptions to a report of a commissioner stating an intricate account composed of many items, and restates the account and enters a decree according to such restatement, and upon an appeal from such decree the appellate court finds that both the statement of the account by the commissioner and the restatement thereof by the lower court are materially erroneous as to many of the items thereof, the appellate court will announce the principles governing the statement of such account, reverse the decree of the lower court, sustain the exceptions to the report of the commissioner in so far as the report is in conflict with the principles announced by this court, set aside the report and remand the cause to be further proceeded with, and with directions to recommit the cause to a commissioner to restate the account in accordance with the principles announced by the appellate court. *Lewis v. Prichard*, 57 W. Va. 542, 50 S. E. 743.

b. Admission of New Parties after Remand.

See ante, "Want of Proper Parties," XIV, K, 2, a, (2).

3. Effect.

After the reversal of an interlocutory decree on appeal, the subsequent decrees mentioned not having been set aside, reversed, or corrected by bill of review, appeal, or otherwise, the same remain firm and valid, although inconsistent with the judgment of the appellate court in reversing the first-mentioned decree. *Hopkins v. Prichard*, 59 W. Va. 363, 53 S. E. 557.

The title of an immediate purchaser, or of a remote purchaser, not parties, can not be disturbed or affected by reversal on appeal, or on setting aside of a decree of sale, for mere error therein not going to the jurisdiction of the court. This rule is applicable to infants as well as adults, proceeding by *procchein ami* before majority, as in proper person after majority, either

under § 7, chapter 132, Code 1906, or by motion, original bill or bill of review to set aside such decree. *Chapman v. Branch*, 72 W. Va. 54, 78 S. E. 235, citing *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913; *Hansford v. Tate*, 61 W. Va. 207, 56 S. E. 372.

If when land is sold and the sale confirmed in a judicial proceeding to vacate a former sale, by the owner made to defraud creditors, in which cause persons having substantial pecuniary interest in the land and the right to charge it as trust property subject to the lien of a decree against such former owner assigned to them by the receiver of an insolvent state bank of which they were stockholders and creditors, were not parties plaintiff or defendant, wherefore and for other reasons the decree of sale and confirmation were reversed, upon appeal, the title of the purchaser is not protected by § 8, ch. 132, Code, but falls with the reversal. *Morgan v. Ice*, 81 W. Va. 545, 94 S. E. 951.

"This appeal was not taken until after the sale of the property to apparent strangers to the suit and confirmation thereof, without objection. Under such circumstances, a reversal of the decree of sale for the errors noted would not affect the purchaser's title. Code, ch. 132, § 8." *Lowther v. Lowther-Kaufmann Oil, etc., Co.*, 75 W. Va. 171, 181, 83 S. E. 49.

Decree Sustaining Demurrer.—The reversal, on appeal, of a decree sustaining a demurrer to a bill of review to correct errors of record and dismissing the bill on the ground that it had not been filed within time, is an adjudication of the sufficiency of the averments, and entitles the plaintiff therein to relief, if the matters alleged are supported by the record. *Harrison v. Harman*, 80 W. Va. 68, 92 S. E. 460.

Reversal with Order of Reference.—Where a record in the appellate court discloses a mass of facts and innumerable items of claim and counterclaim between two parties, and evidence

tending to prove items of claim of one party against another, a decree remanding the cause to the lower court with instructions to refer the cause to a master to ascertain in what property, real or personal, the parties are jointly interested, does not adjudicate that there is or is not any joint property. That was the fact to be ascertained, and the effect of the instruction was simply to indicate that the appellate court was of opinion that there was evidence which rendered the aid of a master necessary to enable the trial court to deal intelligently with the case. *Coons v. Coons*, 106 Va. 572, 56 S. E. 576.

Effect of Reversal on Rights of Third Parties.—"Rights acquired bona fide by a third person under a final judgment, order or decree rendered by a court of competent jurisdiction are not affected by the subsequent setting aside thereof." *Perkins v. Pfalzgraff*, 60 W. Va. 121, 133, 53 S. E. 913. See *Wingfield v. Neall*, 60 W. Va. 106, 54 S. E. 47; *Dunfee v. Childs*, 60 W. Va. 225, 53 S. E. 209. See post, LIS PENDENS.

"One who, after final decree and termination of the suit, and before an appeal is obtained, purchases in good faith, property which is the subject of litigation, will be protected in such purchase." *Wingfield v. Neall*, 60 W. Va. 106, 54 S. E. 47; approved in *Perkins v. Pfalzgraff*, 60 W. Va. 121, 133, 53 S. E. 913.

4. Restitution.

Determination of Rights of Parties on Reversal of Decree for Re-Entry.—*Peerless Carbon Black Co. v. Gillespie*, 87 W. Va. 441, 105 S. E. 517.

K½. REMAND WITHOUT DECISION.

Suit was brought to subject certain lands to the satisfaction of the judgment. The decree dismissed the suit as to a certain tract of seventy-two acres, but expressly reserved to the complainants the right to proceed to

any other real estate that might be liable to the judgment. The decree did not show upon what grounds the seventy-two acre tract was held exempt from liability. The record was incomplete, involved and unsatisfactory, but it appeared that the land in controversy was not shown to be primarily subject to the judgment. This being true, it follows that an appeal from the decree was improvidently awarded. If the property first liable was sufficient to discharge the balance due on the judgment, then in no view of the case could the seventy-two acre tract be subjected, and its liability or non-liability would be wholly a moot question; and the supreme court of appeals does not sit to decide such questions. And, even if the ultimate liability of the seventy-two acre tract were assumed, the extent of such liability could not be ascertained until after subjecting other land, apparently primarily liable, to sale to satisfy the judgment. *Boatright v. Litz*, 125 Va. 613, 100 S. E. 547.

Leave to Transfer to Law Side.—In a suit in equity where it appears that complainant's remedy is at law, the supreme court of appeals will remand the cause to the court below, with leave to complainants, if so advised, to have the same, in accordance with § 6084 of the Code of 1919, transferred to the law side of the court, and to amend their pleadings so as to be entitled to ask for a judgment at law against the defendant. *Carle v. Corhan*, 127 Va. 223, 103 S. E. 699.

Where Order Appealed Is No Longer Effective.—Where an order concerning the custody of an infant was no longer effective, and no order in the case made by the supreme court of appeals would affect the present custody of the infant or the substantial rights of the parties, the case will be remanded for final disposition according to law. *Scott v. Rucker*, 126 Va. 624, 101 S. E. 789.

L. EXECUTION OF DECREE.

See post, MANDATE AND PROCEEDINGS THEREIN.

Entry and Enforcement of Judgment in Lower Court.—Barnes W. Va. Code, p. 1156, ch. 135, § 29; Va. Code, 1919, § 6369.

M. COSTS IN APPELLATE COURT.

See post, COSTS.

N. CERTIFICATION OF JUDGMENT TO TRIAL COURT.

Barnes W. Va. Code, p. 1155, §§ 28, 29; Va. Code 1919, §§ 4939, 6367, 6369.

O. ORDER BOOKS, DOCKETS, ETC., OF DISTRICT COURTS.

Remain in Custody of Clerk of Court of Appeals.—Va. Code 1919, § 6370.

P. MANUSCRIPT, RECORDS AND BRIEFS.

Destruction Where Records Are Printed — Binding of Records with Briefs.—Va. Code 1919, § 6371.

Q. MANDATE AND PROCEEDINGS THEREON.

See post, MANDATE AND PROCEEDINGS THEREON.

XV. CONCLUSIVENESS OF DECISIONS OF APPELLATE COURTS.

A. COURT OF APPEALS.

1. In General.

The decision of a case by the appellate court is final and can not be modified or reversed by any other court of the state, nor even by the appellate court after the adjournment of the term at which it is rendered, except as authorized by statute. The rendition of a judgment or decree settles the question of jurisdiction, and that and all other matters determined becomes res adjudicata with the finality of such judgment or decree; and this is true where the question raised upon the second appeal or writ of error was necessarily involved on the former ap-

peal or writ of error, whether actually adjudicated or not. *Norfolk, etc., R. Co. v. Duke*, 107 Va. 764, 766, 60 S. E. 96.

After a controversy has been settled by a decree of the supreme court, and a rehearing of its decree refused, the questions involved can not thereafter be reopened between the same parties, and mandamus from the supreme court to the trial court to carry into effect the decree of the supreme court is the proper remedy. *Miller v. Turner*, 111 Va. 341, 68 S. E. 1007.

Interlocutory or Final Decree.—In *Matthews & Co. v. Progress Distilling Co.*, 108 Va. 777, 780, 62 S. E. 924, the court said: "Every decision of this court, whether it be upon an interlocutory or a final decree, is in its nature final; except possibly where this court disposes of only a part of the case at one term and reserves it for further and final action at another. *Campbell v. Campbell*, 22 Cratt. (63 Va.), 649." See *Miller v. Smith*, 109 Va. 651, 654, 64 S. E. 956.

After-Discovered Evidence.—A decree of the appellate court, after the expiration of the rehearing period, becomes final and irreversible except upon the ground of after-discovered evidence. *Matthews & Co. v. Progress Distilling Co.*, 108 Va. 777, 62 S. E. 924.

A decree affirming decree of trial court confirming a report of a commissioner in chancery establishing the priority of judgment liens is final and can not be reviewed after the expiration of the time fixed by statute for filing a bill of review. *Matthews & Co. v. Progress Distilling Co.*, 108 Va. 777, 62 S. E. 924.

Where a petition for a writ of error has been rejected by this court on the ground that the judgment complained of is plainly right, and the order of rejection so states, no amended or other petition therein can afterwards be entertained. The court is without jurisdiction to entertain any other pe-

tition with respect to it. Such is the mandate of § 3466 of the Code. *Morgan v. Commonwealth*, 115 Va. 943, 79 S. E. 388.

The dismissal of an appeal from an interlocutory decree, not deciding the merits of the case, but simply refusing to permit pleading to be amended, on the ground that the appeal was improvidently awarded, is in no sense an affirmance of said decree, but leaves open the question therein decided. *Hobson v. Hobson*, 105 Va. 394, 53 S. E. 964.

Determination of Question.—In determining whether a matter is res judicata by a decision of an appellate court, when the order entered reverses a decree of the trial court, and remands the cause for further proceedings, according to directions given in the written opinion, filed at the time of the rendition of the decision, the opinion and record, as well as the order, are to be considered; and, if it appears, from the record, that the parties between whom it is claimed there was an adjudication, were before the court, and the subject matter of the alleged adjudication brought into the suit, by pleadings relating thereto, and, from the opinion and order, that the matter was expressly decided, the parties are concluded by the decision in all further proceedings in the cause in the court below, as well as in all collateral proceedings, although the pleadings in the cause viewed from the standpoint of a demurrant thereto, were insufficient. *Dent v. Pickens*, 59 W. Va. 274, 53 S. E. 154.

2. On Questions of Jurisdiction.

When the appellate court decides a case on its merits and remands it to the trial court for a new trial, the jurisdiction of the trial court is necessarily involved, and, after the period for rehearing in this court has passed, the decision of that question becomes the law of the case in all courts of the commonwealth. It is immaterial that

the question of jurisdiction was not expressly presented and decided. It was necessarily involved. *Norfolk, etc., R. Co. v. Duke*, 107 Va. 764, 60 S. E. 96.

3. On Lower Court.

A circuit court has no power, in a cause decided by the appellate court, to rehear it as to any matter so decided, and, though it must interpret the decree or mandate of the appellate court, in entering orders and decrees to carry it into effect, any decree it may enter that is inconsistent with the mandate is erroneous and will be reversed. *Johnson v. Gould*, 62 W. Va. 599, 59 S. E. 611.

When the appellate court reverses a decree as to a matter finally determined thereby, and remands the cause with direction to enter a particular decree, as upon the merits of the subject matter thereof, the mandate of the court is final and conclusive upon all parties, as to all matters and things so directed, and no new defenses, existing and known at the date of the decree so reversed, can be entertained or heard in opposition thereto. *Barbour v. Tompkins*, 58 W. Va. 572, 52 S. E. 707.

Where this court has approved an instruction which in effect construed the contract in suit to be severable, it is not error, on a second trial, for the trial court to refuse an instruction to the effect that the contract was entire. *Norfolk, etc., R. Co. v. Duke*, 107 Va. 764, 60 S. E. 96.

Water Rights.—A decision of the appellate court, declaring the right of the owner of land, on which there is a spring of water, to have the spring supplied from the land of an adjoining proprietor, to the extent of the natural flow of water therefrom, and remanding the cause for such proceedings as may be necessary to carry the decision into effect, can not be modified by the court below so as to give the spring owner only the quantity of water afforded by the flow on a given date.

Johnson v. Gould, 62 W. Va. 599, 59 S. E. 611.

Determining Interest in Land.—An adjudication by this court that a party to a cause has no interest in a tract of land, or in the proceeds arising from the sale thereof, is final and conclusive on such party, and is not subject to further investigation or controversy where the case is remanded to the trial court. *Miller v. Smith*, 114 Va. 619, 77 S. E. 462.

When the *ex parte* settlements of a trustee have been surcharged and falsified by a bill filed for that purpose, and the decree of the trial court has been affirmed by the supreme court with respect to all items of surcharge and falsification, it is a finality not only with respect to the particular items to which the attention of the court was called, but with respect to all the accounts which the trustee had settled before the institution of the suit. New items existing when the former decree was made can not, as a rule, be added by the trial court when the case is remanded. The former adjudication applies not only to matters actually then adjudicated, but to every point which properly belonged to the subject of litigation, or which the parties, exercising reasonable diligence, might have brought forward at the time. *Miller v. Smith*, 109 Va. 651, 64 S. E. 956.

4. On Rehearing.

Va. Code 1919, § 6372; Barnes Code, ch. 113, § 5.

5. On Bill of Review.

See post, BILL OF REVIEW.

A bill of review is not maintainable pending an appeal from the decree; and after affirmation thereof by an appellate court, such decree is not reviewable in the lower court for alleged error of law or fact apparent. As to such errors the questions are *res adjudicata*. *McLanahan v. Mills*, 73 W. Va. 246, 80 S. E. 351.

In order to maintain a bill of review

for newly discovered evidence pending an appeal therefrom and after affirmation by an appellate court, the evidence relied on must have been discovered after the decree, and could not by due diligence have been discovered beforehand, must be material, not cumulative, and such as ought on another trial produce a different result. *McLanahan v. Mills*, 73 W. Va. 246, 80 S. E. 331.

7. Conclusiveness on Second Appeal

Law of the Case—Doctrine Stated—

Where there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be reexamined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to reexamination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law. *Wheaton v. Doughty*, 116 Va. 566, 82 S. E. 94; *Kirkbride v. Keys Planing Mill Co.*, 116 Va. 680, 883, 82 S. E. 750; *Virginia R. Co. v. Bell*, 118 Va. 492, 87 S. E. 570; *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684; *Carter v. Washington, etc., Railway*, 122 Va. 458, 95 S. E. 464; *McClanahan v. Norfolk, etc., R. Co.*, 122 Va. 705, 733, 96 S. E. 453; *Pennsylvania R. Co. v. Jenkins*, 123 Va. 211, 96 S. E. 170; *Scott v. Doughty*, 124 Va. 358, 97 S. E. 802; *Stephen Putney Shoe Co. v. Richmond, etc., R. Co.*, 124 Va. 389, 98 S. E. 11; *Clifton Forge v. Virginia-Western Power Co.*, 129 Va. 377, 106 S. E. 400; *Beecher v. Foster*, 66 W. Va. 453, 66 S. E. 643; *Ice v. Maxwell*, 70 W. Va. 186, 188, 73 S. E. 274.

The doctrine of the "law of the case" presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal, but the ruling adhered to in the single case where it arises is not carried into other cases

as a precedent. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684.

Same — Res Adjudicata and Stare Decisis.—Closely akin to the doctrine of res adjudicata is that of "the law of the case." It is sometimes treated under "res adjudicata," and sometimes under "stare decisis," but it occupies a distinct field of its own, though it is at times confused with one or the other of the other two. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684.

The law of the case differs from res adjudicata in that the conclusiveness of the first judgment is not dependent upon its finality. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684.

Exception to Rule.—It is a general rule, with few, if any exceptions, that a matter decided on appeal becomes, in effect, res judicata in that case; or, as it is frequently expressed, it becomes the law of that case in all subsequent proceedings; but when on a second appeal or writ of error it appears that the position of the parties has not been changed, or their rights injuriously affected by an erroneous ruling of the appellate court on the first hearing, and that no injustice or hardship would result from overruling the former decision, and it becomes necessary to reverse the case for other errors, the appellate court may correct its ruling on the former appeal or writ of error, and direct the lower court on new trial to disregard the first ruling. *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009.

Necessity of Jurisdiction in First Case.—Sometimes even between the same parties and relating to the construction of the same instrument, the first judgment is neither res judicata, nor the "law of the case." It must appear not only that the question was the same in both cases, but that the court in the first suit had power and jurisdiction to determine the question.

Steinman v. Clinchfield Coal Corp., 121 Va. 611, 93 S. E. 684.

Questions Concluded.—The doctrine of the "law of the case," applies where the question raised on the second appeal was necessarily involved in the first appeal, whether actually adjudicated or not. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684.

Not only all matters that were actually litigated, but also all others that the parties were bound, by the state of the pleadings, to assert, by way of defense to, or in support of, the demand or demands set up in a cause, are *res judicata* by the decision rendered therein. *Dent v. Pickens*, 59 W. Va. 274, 53 S. E. 154.

Different Facts.—The doctrine of "the law of the case" can only be invoked where the facts reappear on the second trial the same as when originally presented. Nothing is more common than a material difference between the facts presented on a second trial from those shown on the first trial, and the "law of the case" is applicable to the state of facts existing at the time the law is announced. There is nothing in the rule to inhibit a party, on a second trial, from supplying omitted facts or from averring a different state of facts. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684; *Carter v. Washington*, etc., *Railway*, 122 Va. 458, 95 S. E. 464.

Different Parties.—If the parties are different, though the question be the same, the case is controlled by the rule *stare decisis*, and the doctrine of "the law of the case" has no application. *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 93 S. E. 684.

Matters Not Considered on Former Appeal.—All that was decided on the former appeal in this case was that the affairs of a partnership were in such a state of confusion that no decree could be safely made adjusting the account between the partners and hence

that the bill filed by the surviving partner against the representative of the deceased partner praying for a settlement of the partnership accounts should be dismissed. The opinion in no way dealt with debts against the partnership which had been proved and audited in one of the creditor's suits heard with the partnership suit. One of these partnership debts having been paid by the surviving partner since that time, he is entitled to go against the estate of the deceased partner for one-half of the amount so paid, and is not precluded therefrom by the former order of this court. *Lewelling v. Lewelling*, 114 Va. 416, 76 S. E. 903.

Decision Pending Appeal.—What was decided in a case pending on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case and must control its disposition; but this rule does not apply to expressions of opinion on matters, the disposition of which was not required for the decision, and certainly not to matters which were neither mentioned nor necessary to be considered. *United States v. Trigg Co.*, 115 Va. 272, 78 S. E. 542.

Modification of Opinion.—It is permissible to modify an opinion delivered on one writ of error, in passing upon a second one in the same case, if no injury or injustice will result from such modification. *Culp v. Virginia R. Co.*, 80 W. Va. 98, 92 S. E. 236.

Disapproval of Erroneous Instruction on Award of New Trial on Second Writ of Error.—An erroneous instruction approved on a writ of error on which a new trial is allowed for other errors and repeated on such new trial, may be disapproved on reversal of the judgment and award of a new trial on a second writ of error, for insufficiency of the verdict. *State v. Vineyard*, 85 W. Va. 293, 101 S. E. 440.

8. As to Whom Conclusive.

In order that the affirmance here of

a final decree shall operate to deprive an adult nonresident defendant, not served with process or appearing, and who did not join in the appeal, to a rehearing pursuant to the W. Va. Code provision; or an infant defendant within six months after attaining his majority, from showing cause against the same, such final decree must have been jointly against all, and the parties appealing and the parties not appealing must stand upon the same ground, and their rights be involved in the same question, and be equally affected by such decree. *White v. White*, 66 W. Va. 79, 66 S. E. 2.

Persons made parties to a cause, for the first time, after the partial reversal, by the appellate court, of a decree therein, and the remanding of the cause, are not bound by such decree in so far as it was affirmed, although they procured the filing of an amended bill by which they were so made parties and defrayed expenses incident to the issuance and service of the process thereon. *State v. King*, 64 W. Va. 546, 63 S. E. 468. See post, FORMER ADJUDICATION OR RES ADJUDICATA.

XVI. APPEALS FROM INFERIOR TRIBUNALS.

A. IN CIVIL CASES.

1. In General—Appellate Jurisdiction of Circuit Courts.

W. Va. Const. Art. VIII, § 12; Barnes Code, ch. 112, § 2.

Exclusive Jurisdiction of Circuit Courts—Constitutional Provisions. — Section 19 of article 8 of the West Virginia constitution authorizes the legislature to create courts of limited jurisdiction with the right of appeal therefrom to the circuit courts. Section 12 of said article confers upon the circuit courts appellate jurisdiction in all cases, civil and criminal, where an appeal, writ of error or supersedeas may be allowed to the judgments or proceedings of any inferior tribunal. By virtue of these

provisions of the constitution the right to review by appeal, writ of error, certiorari, or other appellate process, the judgments, decrees or proceedings of such inferior courts as may be created by the legislature, is exclusively vested in the circuit courts, and it is not competent for the legislature to provide for the exercise of such appellate jurisdiction by any other tribunal. *Robinson v. Charleston, etc.*, R. Co., 80 W. Va. 290, 92 S. E. 441.

Section 22 of chapter 109 of the Acts of the legislature of 1915, providing for appellate process from the supreme court of appeals to review the judgments, decree or proceedings of the court of common pleas of Kanawha county, is unconstitutional and void. *Robinson v. Charleston, etc.*, R. Co., 80 W. Va. 290, 92 S. E. 441.

Repeal of Statute Pending Appeal.—

A circuit court in which an appeal from the judgment of a justice of the peace, rendered in a proceeding against a husband for non-support, under §§ 16c (1) and 16c (2) of ch. 144 of Barnes Code, was pending, when chapter 51 of the Acts of 1917, relating to the same subject and greatly altering the law respecting it, both adjectively and substantively, came into effect, had jurisdiction and power to try the appeal and render judgment in the case, in accordance with the provisions of the repealed statute, by virtue of § 9 of ch. 13, Code, saving the right to punish for offenses committed under a repealed or expired law, before the repeal or expiration thereof. *Carlton v. Herndon*, 81 W. Va. 219 94 S. E. 131.

The clause in said § 9, ch. 13, relating to the procedure in such cases contemplates further procedure in cases pending, at the time of the repeal or expiration of the law under which the offense was committed, and, if for any reason, the procedure prescribed by the new law is impracticable or inapplicable, the

proceeding may be completed in accordance with any existing law that is applicable. *Carlton v. Herndon*, 81 W. Va. 219, 94 S. E. 131.

Appeals to Court of Appeals from Courts of Limited Jurisdiction. — Barnes Code, ch. 114A, § 8.

2 Review of Justice's Judgment.

a. Appeal.

(1) When Proper.

See ante, "In General — Appellate Jurisdiction of Circuit Courts," XVI, A, 1.

(a) General Rule.

Va. Code 1919, § 6027; Barnes Code, Ch. 50, § 163.

Right of Review.—Under the provisions of § 163, ch. 50, Code, an appeal lies from the judgment of a justice, though defendant did not appear in response to the process served on him, except to ask for such appeal and tender the required bond therefor. *McCreary v. Chesapeake, etc., R. Co.*, 77 W. Va. 305, 87 S. E. 374.

"True, some of our earlier cases, as *Barlow v. Daniels & Co.*, 25 W. Va. 512; *Hall v. Wadsworth*, 30 W. Va. 55, 3 S. E. 29; *Hickman v. Baltimore, etc., R. Co.*, 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455; *Barker v. Walton*, 31 W. Va. 468, 7 S. E. 452, and *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. 450, held, that under the constitution of this state, the judgment of a justice rendered upon the verdict of a jury in an action for tort or damages, whether defense was made thereto or not, can not be tried de novo by the circuit court. But the doctrine laid down by them was disapproved in *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653, holding that an appeal lies from the judgment of a justice rendered upon the verdict of a jury, just as in cases tried by him without a jury. And in *Home Sewing Mach. Co. v. Floding*, 27 W. Va. 540, we held that a party against whom such judgment was rendered is entitled

to an appeal as matter of right, upon compliance with the provisions of chapter 50. To deny defendant the right to appeal from a judgment rendered in his absence by a justice of the peace would uproot a practice long acquiesced in by members of the bar, and justified, we think, by a reasonable construction of § 163, read in the light of other provisions of the chapter." *McCreary v. Chesapeake, etc., R. Co.*, 77 W. Va. 305, 309, 87 S. E. 374.

An appeal lies from the judgment of a justice of the peace, rendered under the authority of the provisions of § 138 of ch. 50 of the Code, finding that one of two defendants is a surety for the other, and requiring the personal estate of the defendant so found to be the principal debtor to be exhausted before proceeding to the collection of such judgment from the property of the defendant so found to be surety. *Bank v. Brannon*, 81 W. Va. 359, 94 S. E. 538.

Same—Counter Affidavit.—The right of a defendant to appeal from the judgment of justice, and thereby to remove the case into the circuit court to be tried de novo and to have the cause determined without reference to the judgment of the justice on principles of law and equity, as provided by § 169, chapter 50, Barnes Code, 1916 (W. Va. Code, 1913, § 2723), is not affected or abrogated by § 50a, of said chapter, being chapter 79, Acts 1915, requiring a counter affidavit as therein provided as a pre-requisite to the filing of any answer to the action and to make defense thereto. He may notwithstanding said § 50a file with his answer such counter affidavit upon appeal in the circuit court. *Cook v. Continental Casualty Co.*, 82 W. Va. 250, 95 S. E. 835.

Appeal in Name of Assignor.—Notwithstanding assignment by plaintiff of his claim, after judgment thereon in his favor before a justice, the action, upon appeal by defendant, may still be prosecuted in the court in the name of

the assignor. *Townsend v. Brushy Run Lumber Co.*, 75 W. Va. 47, 83 S. E. 185.

What Petition Must Show.—"To warrant the allowance of an appeal by a judge of the circuit court from a judgment of a justice, the petition must show failure to obtain an appeal from the justice by diligent effort within the ten day period, or prevention of the procurement thereof by fraud or some accident or adventitious circumstances beyond the control of the party seeking it. *McClung v. Price*, 61 W. Va. 84, 85, 55 S. E. 996; *Powell v. Miller*, 41 W. Va. 371, 23 S. E. 557; *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. 867; *Ruffner v. Love*, 24 W. Va. 181. The petition under consideration here does not comply with this rule, for the reasons already indicated." *Taylor v. Campbell, etc., Co.*, 73 W. Va. 680, 681, 81 S. E. 12.

Production or Tender of Appeal Board.—The judgment of a justice is not vacated nor an appeal perfected by the mere production or tender of an appeal bond. While application and tender of a good bond gives absolute right of appeal, there must be action by the justice approving the bond and allowing the appeal; or on his neglect or refusal to act favorably thereon within ten days from the date of the judgment, such appeal must be applied for and allowed by the circuit court or the judge thereof in vacation, within ninety days from the date of such judgment. *Walton v. Ross*, 75 W. Va. 529, 84 S. E. 245.

Refusal to Set Aside Award and Judgment.—Section 95, ch. 50, Code 1906, denies the right of appeal from the judgment of a justice rendered on award, unassailed; but an appeal does lie to the circuit court from the judgment of a justice refusing, on motion of appellant, made within fourteen days after the rendition of the judgment, to set aside an award and judgment thereon, for cause, as provided by § 94, of

said chapter. *Street v. Parsons*, 68 W. Va. 517, 70 S. E. 113.

Trying Title to Property Levied on under Distress Warrant or Execution.—Va. Code 1919, § 6035.

Same—Duty of Justice and Clerk When Appeal Allowed.—Va. Code 1919, § 6036.

This section is remedial and should be construed to effectuate the purposes of its enactment. *Southern R. Co. v. Hill*, 106 Va. 501, 56 S. E. 278.

Warrants for Small Claim.—Va. Code 1919, § 6067.

Sale or Partition of Personality Owned by Two or More Persons.—Acts 1918, chap. 292; Pollard's Code Biennial 1920, p. 464.

In Unlawful Entry and Detainer.—Va. Code 1919, § 5449, Barnes W. Va. Code, p. 716. ch. 50, § 218.

Arbitration — No Appeal Allowed from Judgment of Justice Rendered Thereon.—Barnes W. Va. Code, p. 692, § 95.

Settlement of Claims of Third Persons—Appeal by Party Aggrieved.—Barnes W. Va. Code, p. 703, ch. 50, § 153.

(b) Cases Tried by Jury.

The right to an appeal from the judgment of a justice to the circuit court is not waived by the exercise of the privilege of a new trial before the justice, after an adverse verdict of a jury. *Bender v. Bigley*, 75 W. Va. 76, 83 S. E. 193.

Such an appeal is not a new suit within the meaning of § 91 of chap. 50 of the Code. *Bender v. Bigley*, 75 W. Va. 76, 83 S. E. 193.

(2) Jurisdiction.

(a) In General.

Indirect Appeal to Court of Appeals.—§ 88 of the Virginia Constitution does not confer upon the Court of Appeals the right of direct appeal from a judgment of a justice. *Southern R. Co. v. Hill*, 106 Va. 501, 56 S. E. 278.

The language of § 2956 of the Va. Code of 1887 (Code 1919 § 6037) is

broad enough to cover the right of appeal to the circuit and corporation court from a judgment of a justice of the peace involving the constitutionality of a statute, and § 3455 of the Code (Code 1919, § 6337) provides for an appeal from a circuit or corporation court to the appellate court where the matter involved is "not merely pecuniary." These statutes, being remedial, should be construed liberally so as to effectuate the purposes of their enactment, and, so construing them, they furnish the means for an indirect appeal to the court of appeals from the judgment of a justice involving the constitutionality of a statute. *Southern R. Co. v. Hill*, 106 Va. 501, 56 S. E. 278.

Jurisdiction of Appellate Court Is Dependent upon Jurisdiction Below.—

If a justice or other inferior court or tribunal has no jurisdiction to hear and determine a cause, an appeal from a judgment rendered therein does not confer upon a court of superior rank a jurisdiction not possessed by the former, though it may have had authority in the first instance to adjudicate the matter in controversy in its entirety. *Brotherton v. Robinson*, 85 W. Va. 753, 102 S. E. 700.

On an appeal from the judgment of a justice, the jurisdiction of the appellate court is no broader than that of the justice, as regards the subject-matter of the action. On such an appeal, questions of title to real estate can not be heard and determined further than the justice was authorized to hear and determine them. *Hamilton v. Canfield*, 70 W. Va. 629, 74 S. E. 878.

Avoidance of Jurisdiction.—A defendant in an action before a justice of the peace, who has allowed judgment to be rendered against him by the justice, and taken an appeal to the circuit court, cannot file in the appellate court the answer, prescribed by clause XII of § 50 of chapter 50 of the W. Va. Code, showing the title to real estate is involved in the action or will be drawn

in question. To avoid the jurisdiction, he must file such answer while the case is in the justice's court. *Hamilton v. Canfield*, 70 W. Va. 629, 74 S. E. 878.

West Virginia Intermediate Courts—Constitutionality of Statute.—Section 2, chapter 25, Acts of the Legislature 1907, giving to the intermediate court of Kanawha county, jurisdiction concurrently with the circuit court of appeals from judgments of justices, and under the same regulations provided in the general law for such appeals, is constitutional and valid, and is no infraction of section 12, Article VIII, of the constitution. *Rosin Coal Land Co. v. Martin*, 81 W. Va. 33, 94 S. E. 358.

(b) Jurisdictional Amount.

aa. In Virginia.

Ten-Dollar Warrants for Small Claims.—Va. Code 1919, § 6027.

For trial justices in counties having a population in excess of three hundred persons per square mile, the jurisdictional amount is twenty dollars. Va. Code, 1919, § 4988.

Trying Title to Property Levied on under Distress Warrant or Execution.—Va. Code 1919, § 6035.

Appeal Allowed in Cattle Guard Cases Regardless of Amount in Controversy.—Va. Code 1919, § 3954.

bb. In West Virginia.

Fifteen Dollars.—W. Va. Const. Art. VIII, § 12; Barnes Code, ch. 50, § 163.

Constitutionality of Statutes.—The statute, limiting appeals from justices to cases involving more than fifteen dollars is constitutional and valid. *Duncan v. Baltimore, etc., R. Co.*, 68 W. Va. 293, 69 S. E. 1004.

"The object of the statute limiting appeals to fifteen dollars is to prevent protracted litigation over small amounts of money, and in such case the defendant is not harmed over fifteen dollars." *Lee v. Moss*, 68 W. Va. 664, 70 S. E. 555.

In an action of detinue in a justice's

court there is judgment for recovery of the property, if to be had, and if not to be had, then for its value at a sum less than fifteen dollars, and there is no set-off or counterclaim. The defendant can not appeal. *Lee v. Moss*, 68 W. Va. 664, 70 S. E. 555.

When in an action in detinue a justice of the peace arbitrarily or fraudulently and in total disregard of the evidence adjudges the alternative value of the property sued for to be less than fifteen dollars necessary to confer jurisdiction by appeal upon the circuit court, and on request refuses to award defendant an appeal within ten days from the date of the judgment, good cause is thereby shown for the award of an appeal by the circuit court or the judge thereof in vacation within ninety days. *Kohn v. Herndon*, 78 W. Va. 650, 90 S. E. 107, distinguishing *Lee v. Moss*, 68 W. Va. 664, 70 S. E. 555.

In an action in detinue the value of the property is the criterion by which the jurisdiction of the appellate court is to be determined, irrespective of arbitrary or fraudulent findings of the justice. The judgment of the justice is only prima facie evidence of the jurisdictional fact, and may be impeached or contradicted. *Kohn v. Herndon*, 78 W. Va. 650, 90 S. E. 107, distinguishing *Lee v. Moss*, 68 W. Va. 664, 70 S. E. 555.

Fictitious Counterclaim or Set-Off.—A defendant in an action before a justice can not, by filing a fictitious counterclaim or set-off thereby raise the amount in controversy so as to bring the case within the appellate jurisdiction of the circuit court. *Rose v. O'Brien*, 77 Va. 316, 87 S. E. 378, following *McDonald Colliery Co. v. Crotty*, 69 W. Va. 407, 71 S. E. 568.

Where by filing such claim or set-off a defendant succeeds in obtaining an appeal from the judgment of a justice and on which he has offered no proof either before the justice or on the trial in the circuit court, and the ficti-

tious character of such counterclaim or set-off is so made to appear, the jurisdiction of the circuit court is thereby ousted, and the appeal should be dismissed as improvidently awarded. *Rose v. O'Brien*, 77 W. Va. 316, 87 S. E. 378; *Kohn v. Herndon*, 78 W. Va. 650, 90 S. E. 107.

Showing Jurisdictional Amount.—On writ of error to a judgment dismissing a petition filed before a justice pursuant to §§ 151 and 152, chapter 50, Code 1906, and heard on appeal in a circuit or intermediate court, the amount actually in controversy, between the petitioner, a subsequent, and the defendant, a prior, attaching creditor of the same debtor, not otherwise appearing, may be shown by affidavit or other proper evidence presented with the petition to this court. *Bank v. Loeb*, 71 W. Va. 494, 76 S. E. 883.

(3½) Proceedings for Review.

How Appeal Allowed—Stay of Execution.—Va. Code 1919, § 6027.

Joinder of Parties.—*Barnes W. Va. Code*, p. 705, ch. 50, § 166, provides: "When there are two or more plaintiffs or defendants, any one or more of them may appeal, without joining therein the others on the same side."

Transcript—Delivery of Paper to Circuit Clerk.—*Barnes W. Va. Code*, Ch. 50, § 168.

Bond.—Va. Code 1919, § 6027. *Barnes W. Va. Code*, p. 705, Ch. 50, § 164.

When and by Whom Writ Tax to Be Paid.—Va. Code 1919, § 6028.

(3) Time of Taking.

(a) In General.

Barnes Code, Ch. 50, § 174.

(b) Effect of Failure to Take within Ten Days.

aa. In General.

An appeal from a judgment of a justice of the peace, granted, under the provisions of § 174 of chapter 50 of

West Virginia Code, after the expiration of ten days from the date of the judgment, for causes which could not have injured or prejudiced the petitioner if he had been reasonably careful and diligent in attending to his interests, is properly dismissed as having been improvidently awarded. *McClung v. Price*, 61 W. Va. 84, 55 S. E. 996.

bb. What Constitutes Good Cause for Delay.

That the justice, after the trial, but before rendition of his judgment, expressed, to an attorney who had represented the petitioner in the trial, his intention to render judgment for the petitioner, but had later given judgment against him; that petitioner had heard, through his attorneys, that the judgment was in his favor, and that he had not ascertained what had actually been done, until after the expiration of the ten-day period, do not constitute good cause for not having obtained the appeal within said period. *McClung v. Price*, 61 W. Va. 84, 55 S. E. 996.

If a justice at trial announces a judgment favorable to a party, and, after the lapse of ten days allowed for appeal, enters as of the date of the trial, a wholly different judgment, one against the party, a case is made warranting the circuit court in granting an appeal within ninety days. *Krohn, etc., Co. v. Sohn*, 68 W. Va. 687, 70 S. E. 699.

A petition to the circuit court for appeal from the judgment of a justice, alleging "that for a long time before" the date of said judgment the wife of petitioner "had been seriously ill and in consequence thereof he was compelled to have her go to a hospital at Columbus, Ohio, there to undergo an operation for a disease with which she was then afflicted, and that in consequence of her sickness your petitioner failed to appear before said justice and was prevented from appearing, and in consequence thereof was prevented from taking an appeal from the judgment of the justice aforesaid within ten

days after the rendition thereof," and "that he would have taken his appeal * * * within the ten days * * * had he not been prevented therefrom* * * as aforesaid," does not show the good cause required by § 174, chap. 50, Code, the essential facts necessary to show such cause such as is due to fraud, accident, mistake or surprise, or some adventitious circumstances beyond the control of the party, and such as would justify a new trial, or a court of equity, if the suit had been in the circuit court, enjoining enforcement of judgment until a new trial could be had, not being alleged. *Johnson v. Ridgley*, 64 W. Va. 130, 61 S. E. 42.

(6) Effect of Appeal.

An appeal from a justice vacates and annuls the judgment. *Elkins v. Michael*, 65 W. Va. 503, 64 S. E. 619; *De Armit v. Whitmer*, 63 W. Va. 300, 60 S. E. 136; *Taylor v. Campbell, etc., Co.*, 77 W. Va. 347, 87 S. E. 377.

"An appeal from a justice is, more accurately speaking, a removal of the cause, and not an appellate procedure. *Elkins v. Michael*, 65 W. Va. 503, 64 S. E. 619." *Whelan v. Baltimore, etc., Co.*, 70 W. Va. 442, 444, 74 S. E. 410.

Without appeal properly perfected the judgment of the justice is not vacated but remains in full force, and a motion to quash an execution thereon, the proper remedy when the judgment has been vacated by perfection of an appeal, is properly overruled. *Walton v. Ross*, 75 W. Va. 529, 84 S. E. 245.

"An appeal by defendant from the judgment of a justice against him operates as a general appearance, and that he thereby waives all defects in the summons, and all irregularities in the proceedings before the justice. *Thorn v. Thorn*, 47 W. Va. 4, 34 S. E. 759; *Dadisman v. West Virginia, etc., Tel. Co.*, 69 W. Va. 43, 45, 70 S. E. 855; *Chesapeake, etc., R. Co. v. Wright*, 50 W. Va. 653, 655, 41 S. E. 147." *Smith v.*

Thompson, 85 W. Va. 364, 366, 101 S. E. 723.

Stay—Discharge from Custody.—Barnes W. Va. Code, ch. 50, § 167.

(6½) Proceedings on Appeal.

Proceedings in General.—Barnes W. Va. Code, pp. 706, 707, ch. 50, §§ 169-175. See *Grant v. Wyatt*, 61 W. Va. 133, 137, 56 S. E. 187.

Where Appeal Cognizable.—Va. Code 1919, § 6037.

This section of the code is remedial and should be construed to effectuate the purposes of its enactment. *Southern R. Co. v. Hill*, 106 Va. 501, 56 S. E. 278, holding that the language of this section was broad enough to cover the right of appeal to the circuit and corporation courts from a justice of the peace involving the constitutionality of a statute, but where neither the validity nor the constitutionality of an ordinance is drawn in question the appeal is to the corporation court.

A case appealed from a justice's court may be tried in the circuit or intermediate court, as the case may be, on the pleadings and issue made in the justice's court, whether the pleadings be oral or in writing. *Bachinsky v. Federal Coal, etc., Co.*, 78 W. Va. 721, 90 S. E. 227.

How Appeal Tried.—Judgment.—Va. Code 1919, § 6038.

Trial De Novo.—Upon an appeal from the judgment of a justice the case is tried de novo, the judgment of the justice in no way enters into consideration of the case upon the trial. *DeArmit v. Whitmer*, 63 W. Va. 300, 60 S. E. 136. See *Wygall v. Wilder*, 117 Va. 896, 86 S. E. 97.

An appeal from the judgment of a justice has the effect in law of transferring the controversy to the appellate court for de novo; and it is error, on the failure of the defendant to appear when called, to enter up judgment in favor of the plaintiff without proof, as the burden is on plaintiff to

prove his case. *Pickenpaugh v. Keenan*, 63 W. Va. 304, 60 S. E. 137.

The provision of W. Va. Code 1913, ch. 50, § 169 (§ 2723), that appeals may be tried upon the pleadings made up in the justice's court, or upon amended pleadings before or during the trial, interpreted in the light of other decisions relating to proceeding before justices, does not limit the parties strictly to amendment of pleadings filed before the justice, but includes new and different pleadings when necessary to the ends of justice. *Cook v. Continental Casualty Co.*, 82 W. Va. 250, 95 S. E. 835.

The affidavit of the plaintiff filed before the justice pursuant to Acts 1915, ch. 79 (Code Supp. 1918, ch. 50, § 68a [§ 2622a]), which, as in this case, omits substantial requirements of that section, should be treated as ineffectual either in the justice's court or upon the trial de novo upon appeal in the circuit court to cut off proper defenses or preclude the defendant from filing with his answer his counter affidavit as provided by said statute. *Cook v. Continental Casualty Co.*, 82 W. Va. 250, 95 S. E. 835.

Such a statute as said section 50a should be so construed as to operate in harmony with the general statute and not to infringe upon it when the terms thereof fairly and reasonably considered will permit such construction. *Cook v. Continental Casualty Co.*, 82 W. Va. 250, 95 S. E. 835.

Notice to Try Appeal—Preference over Other Cases.—Va. Code 1917, § 6039.

Duty of Justice and Clerk When Appeal Allowed.—Va. Code 1919, § 6039.

Verdict Manifestly Erroneous.—On the trial of an appeal in proceedings originating before a justice to try a claim to property levied on, the circuit court does not err in setting aside a verdict which is manifestly contrary to the very right of the controversy.

Cox v. Orndorf, 70 W. Va. 211, 73 S. E. 725.

(7) Dismissal of Appeal.

"In no case shall any appeal from any justice be dismissed when it shall appear to the appellate court that injustice might be done to the appellant or appellants." *Smith v. West Virginia Cent. Gas Co.*, 65 W. Va. 216, 218, 63 S. E. 1096.

Voluntary Dismissal.—A defendant who has appealed from the judgment of a justice, rendered against him in an action wherein the justice had jurisdiction of both the subject-matter and the parties, can not dismiss his appeal over the objection of plaintiff. *Whelan v. Baltimore*, etc., R. Co., 70 W. Va. 442, 74 S. E. 410; *Walton v. Ross*, 75 W. Va. 529, 84 S. E. 245; *Elkins v. Michael*, 65 W. Va. 503, 64 S. E. 619; *Taylor v. Campbell*, etc., Co., 77 W. Va. 347, 87 S. E. 377.

Irregularities and mistakes in the proceedings of a justice of the peace, in an action wherein he had jurisdiction of the subject matter and the parties, furnish no ground for dismissing an appeal, properly taken, to the circuit court. *Whelan v. Baltimore*, etc., R. Co., 70 W. Va. 442, 74 S. E. 410.

Failure to Pay Writ Tax—Warrants for Small Claims.—Va. Code 1919, § 6028.

Failure of Appellant to Appear—Action before a Justice for Recovery of Possession of Land, Judgment of Recovery for Plaintiff, and Appeal by Defendant.—On motion of the plaintiff the defendant is called, and not appearing, his appeal is dismissed and judgment entered affirming the justice's judgment. This is error, the burden of proving his case being on the plaintiff. The defendant is under no duty to prosecute the case. *Chenoweth v. Keenan*, 61 W. Va. 108, 55 S. E. 991.

An appeal improvidently awarded must be dismissed. *Taylor v. Campbell*, etc., Co., 77 W. Va. 347, 87 S. E.

377, citing *Taylor v. Campbell*, etc., Co., 73 W. Va. 680, 81 S. E. 12; *McClung v. Price*, 61 W. Va. 84, 55 S. E. 996; *Powell v. Miller*, 41 W. Va. 371, 23 S. E. 557; *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. 867; *Ruffner v. Love*, 24 W. Va. 181.

After an appeal to the circuit court within ten days, or on petition for good cause shown, within ninety days from the date of the judgment of the justice, such judgment is thereby vacated, and the case is thereby removed into the circuit court for trial de novo, and no issue of fact tendered by answer to such petition or otherwise will warrant the circuit court in dismissing such appeal as improvidently awarded. *Mallonee v. Taylor*, 70 W. Va. 467, 74 S. E. 415.

If, however, the petitioner in his petition and accompanying proofs does not show fraud, accident, surprise, or some adventitious circumstance beyond his control, as an excuse for not having exercised his right of appeal within ten days, the appeal may on motion be properly dismissed, as improvidently awarded. *Mallonee v. Taylor*, 70 W. Va. 467, 74 S. E. 415.

Failure to File Bond within Required Time.—A petition to a judge of a circuit court for an appeal from a judgment of a justice, showing, as ground for the appellant, failure to file the bond with the justice within the ten-day period allowed by law, because the applicant's place of business was a considerable distance from the place of trial, but disclosing omission to procure the bond for six days and the mailing of it to an attorney by reason of which it was not filed in time, the attorney being absent from his home and it not appearing that he was advised of the purpose to send it to him, even though it would have reached him before his departure, if it had been properly routed by the postal authorities, is insufficient; and the appeal allowed thereon must be dismissed, upon a motion for dismissal thereof. *Tay-*

lor *v. Campbell, etc., Co.*, 73 W. Va. 680, 81 S. E. 12.

Judgment on Dismissal. — When a defendant takes an appeal from the judgment of a justice, and abandons his appeal by asking its dismissal, the court can not allow the motion and render the same judgment for the plaintiff as the justice rendered, without proof. The plaintiff must prove his case. The former judgment can not be used as proof. *Elkins v. Michael*, 65 W. Va. 503, 64 S. E. 619.

Liabilities on Bond.—After the dismissal of an appeal from the judgment of a justice of the peace, as having been improvidently awarded, the circuit court can not enter a judgment against the surety in the appeal bond, for the amount of the judgment rendered by the justice, nor for any other amount. Owing to the dismissal of the appeal, there is no breach of the condition of the bond. *Taylor v. Campbell, etc., Co.*, 77 W. Va. 347, 87 S. E. 377.

Mandamus to Compel Reinstatement.

In dismissing an appeal from a judgment rendered by a justice of the peace against a county court, because the same had been taken by a member of the county court, without previous direction or authority from said court to do so, and because no appeal bond had been given before the justice, a circuit court does not decline or refuse to exercise its powers and jurisdiction respecting the appeal; but, on the contrary, acts judicially in determining whether there is sufficient cause for dismissal; and mandamus will not lie to compel it to reinstate the appeal and proceed with the action. *County Court v. Holt*, 61 W. Va. 154, 56 S. E. 205. See post, MANDAMUS.

(8) No Reversal for Harmless Error.

A judgment rendered on an agreed statement of facts, in an appeal from the judgment of a justice, in a case in which no issue was formally made, will not be reversed for want of an issue or

joinder therein. *Halstead v. New River Collieries Co.*, 81 W. Va. 758, 95 S. E. 208.

The judgment of a circuit court, in a case appealed from a justice's court, will not be reversed for failure of the record to disclose the entry of a plea and joinder of issue thereon. *Security Bank Note Co. v. Shrader*, 70 W. Va. 475, 74 S. E. 416.

The fact that the record of the justice shows no formal joinder of issue or entry of plea where the parties have appeared and trial was had constitutes no reversible error, much less good ground for a writ of prohibition based on alleged want of jurisdiction. *Taylor v. Stevenson*, 82 W. Va. 677, 97 S. E. 136.

If the account filed by plaintiff with a justice, and fully proved in the circuit court on appeal, is sufficient to inform defendant of the nature and amount of the claim sued on, the judgment of the circuit court will not be reversed on writ of error solely because of plaintiff's failure to file a formal complain, where it appears defendant could not have been prejudiced by the omission and did not demand such complaint or object because of failure to file it. *Townsend v. Brushy Run Lumber Co.*, 75 W. Va. 47, 83 S. E. 185.

b. Certiorari.

See post, CERTIORARI.

The circuit court shall have the supervision and control of all proceedings before justice and other inferior tribunals by certiorari. *Barnes W. Va. Code*, p. 1075, ch. 112, § 2.

2½. Civil and Police Justices.

Va. Code 1919, §§ 3094, 3106.

3. Appeals from County Courts.

a. In General.

Barnes Code, ch. 39, §§ 47, 48, ch. 112, § 14.

4. Appeal from Decision of Mayor.

Statutory Provisions. — *Va. Code* 1919, §§ 3010, 3011.

6. Appeal from Decision of City Council.

Appeal to Circuit Court of Judgment on Election Contest.—Where a contest of the right of a member of a city council to hold his seat is heard and determined by the council going out of office at the time his term of office begins, the circuit court on appeal will have no jurisdiction to try such contest *de novo* upon a writ of certiorari to the judgment rendered by such council. Nothing more can be done than to reverse the judgment of the tribunal acting without jurisdiction, and remand the case to be tried before the tribunal having jurisdiction. *Price v. Fitzpatrick*, 85 W. Va. 76, 100 S. E. 872.

"It is urged that this court should dismiss this proceeding for the reason that the notice did not give the time required by law. This question is one that must be passed upon first by the tribunal having original jurisdiction, and until that is done neither this court, nor the circuit court can give judgment thereon." *Price v. Fitzpatrick*, 85 W. Va. 76, 81 S. E. 872.

7. Appeal from Decision of Board of Supervisors.

Statutory Provisions. — Va. Code 1919, §§ 2709, 2759, 2760, 2762.

8. Appeal from Decision of County Commissioners.

In determining their appealability, orders of county courts are construed with less strictness than judgments of circuit courts. If it is apparent an order of the county commissioners was intended as a final adjudication of all matters presented upon the hearing before them, and its language is reasonably susceptible of that interpretation, it is appealable. *Tramel v. Stafford*, 75 W. Va. 98, 83 S. E. 299.

9½. Appeal from Clerk.

Refusal to Issue Marriage License.—

Acts 1918, chap. 300, par. 5, Pollard's Code Biennial, p. 467.

The right of appeal from the order of a clerk admitting a will to probate under § 2639-a of the Code (1904) is more in the nature of an appeal than a writ of error. It is assimilated to an appeal in that there is a continuation of the same case upon the same evidence, and the case is simply heard *de novo* in the higher tribunal. The appeal is not the bringing of a "new suit," but a prolongation and continuance of the old one, and hence the time for taking the appeal prescribed by § 2639-a of the Code (1904) is not extended by the provisions of § 2934 of the Code (1904) giving an extension in certain case "if there be occasion to bring a new suit." *Tyson v. Scott*, 116 Va. 243, 81 S. E. 57. See post, WILLS.

10¾. Appeal from State Entomologist.

Statutory Provision.—Va. Code 1919, § 891.

Cedar Rust Law—Provision for Assessment of Owners of Apple Orchards.—In proceedings on appeal to the circuit court by the owners of cedar trees, as provided by the cedar rust law, the question of the constitutionality of § 8 of the cedar rust law, providing for the annual assessment against owners of apple orchards, to provide a fund to reimburse the county for costs and damages paid out to the owners of red cedar trees destroyed under the statute, does not arise, as the owners are not dependent on these provisions for payment of the damage awarded them, and county and the orchard owners being alone concerned with the validity of these provisions. Moreover, in the instant case, certain persons had agreed to pay the damages in the event the statute was held to be valid, and the owners have accepted this agreement as a satisfactory guarantee to them. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141.

10½. Appeals from Public Service Commissions.

a. In Virginia.

See post, PUBLIC SERVICE AND CORPORATION COMMISSIONS.

Constitutional and Statutory Provisions in General.—Va. Const., § 156; Va. Code 1919, §§ 3734, 3736, 6336, 6354, 6369.

Proceedings for Condemnation of Property.—Va. Code 1919, § 3832.

Contempt Proceedings.—Va. Code 1919, § 3728.

The commonwealth may take an appeal from the action of the state corporation commission in all cases, irrespective of the amount involved. Va. Code 1919, § 6336.

Action in Imposing Public Duties on Public Service Corporations.—Acts 1918, p. 673, Pollard's Code Biennial, p. 645.

Apportionment for Taxation.—An appeal lies to the Virginia supreme court of appeals from a judgment of the State Corporation Commission apportioning, for purposes of taxation, the value of the rolling stock of an electric railway between a city and a county through which it runs. The value of the rolling stock and its assessment not being called in question, but only the apportionment, there is nothing in § 3454 or § 573 (a) of the Code of 1904 which precludes the right of appeal in such a controversy. *Board v. Newport News*, 106 Va. 764, 56 S. E. 801.

A county or city may petition the State Corporation Commission to reconsider and correct its judgment simply apportioning between them, for the purposes of taxation, the value of the rolling stock of an electric railway company, and from its judgment on said petition an appeal lies to the supreme court of appeals. The proceeding by such petition is an independent one and questions simply the apportionment, not the valuation or assessment. *Board v. Newport News*, 106 Va. 764, 56 S. E. 801.

Limitations of Appeals.—Va. Code 1919, §§ 6337, 6355.

Bond—When and by Whom Taken.—Va. Code 1919, § 6352.

When Clerk of Court of Appeals to Transmit its Decision.—Va. Code 1919, § 6367.

Suspending Bond on Appeal, Costs, etc.—Va. Code 1919, § 3735.

The action of the State Corporation Commission is to be regarded, on appeal, as "prima facie just, reasonable and correct," and hence can not be disturbed unless the evidence clearly shows that it was unwarranted, which, in the case at bar, it does not. *Norfolk, etc., R. Co. v. Interstate R. Co.*, 114 Va. 789, 76 S. E. 940.

The supreme court of appeals will not presume that the State Corporation Commission will act from prejudice or render an unjust or unfair decision against the railroad companies, but, on the contrary, will follow the mandate of the Constitution, "that the action of the commission appealed from shall be regarded as prima facie just, reasonable and correct." *Southern R. Co. v. Commonwealth*, 124 Va. 36, 97 S. E. 343.

Excess Freight Charges.—The state corporation commission had prescribed no rate on creosote oil in steel drums. The Commission had, however, provided that "articles not enumerated will be classified with analogous articles." In an action of assumpsit to recover excess freight charges on creosote shipped from Richmond to Norfolk, the only question settled by the judgment was to which of two different classes the creosote oil in drums belonged. Held: That the judgment did not in any way call in question any action of the State Corporation Commission and accordingly was not in contravention of § 156 of the Constitution, declaring that no court except the Supreme Court of Appeals shall have jurisdiction to review, reverse, etc., any action of the State Corporation Commission within the scope of its au-

thority. *Chesapeake, etc., R. Co. v. Williams*, 122 Va. 502, 95 S. E. 417.

b. In West Virginia.

Barnes Code, ch. 150, § 16.

Right of Review Statutory.—"The authority of this court to review the proceedings of the public service commission, on direct applications, is purely statutory, and, unless the power to do so is given by statute, it does not exist." *Howell v. Public Service Comm.*, 78 W. Va. 664, 665, 90 S. E. 105.

This court by § 16, ch. 9, Acts 1913, is given jurisdiction over corporations not by appeal, but as upon original process to review an order of the public service commission created by said act, and such jurisdiction is limited to matters purely judicial and does not extend to matters purely administrative, executive or legislative, such jurisdiction not being conferred by the constitution. *United Fuel Gas Co. v. Public Service Comm.*, 73 W. Va. 571, 80 S. E. 931.

Finding of fact by the public service commission, based upon evidence to support them, generally will not be reviewed by this court. *Charleston v. Public Service Comm.*, 86 W. Va. 536, 103 S. E. 673. See ante, "Findings of Public Service Commission," XIV, J. 1½, d.

Contempt for Violation of Order.—Barnes Code ch. 150, § 27.

Experimental Rate Order.—An experimental order entered by the public service commission fixing the rate to be charged by a public service corporation for the services rendered by it to its patrons, covering a certain period of time, or until the further order of such commission, is such an order as is subject to control by this court by the exercise of its original jurisdiction conferred by the provisions of § 16, of ch. 150 of Barnes Code. *Charleston v. Public Service Comm.*, 83 W. Va. 718, 99 S. E. 63.

Provisional orders of the public serv-

ice commission, valuing the property of and fixing rates to be charged by a public service corporation, for experimental purposes, and retaining the case on its docket for future action after the result of such experiment is ascertained, are not final orders, subject to the control of this court under § 16 of the public service commission act. *Bluefield v. Bluefield Water Works, etc., Co.*, 81 W. Va. 201, 94 S. E. 121.

The valuation of the property of a public service corporation and prescribing rates for tolls and charges for services to be rendered are purely legislative acts, not subject to judicial review except in so far and in so far only as may be necessary to determine whether such rates are void on constitutional or other grounds. *City of Bluefield v. Bluefield Water Works & Improvement Co.*, 81 W. Va. 201, 94 S. E. 121.

Authorizing Dam and Condemnation Proceedings by Hydro-Electric Company.—No appeal lies to this court from a decision of the public service commission, granting to a hydro-electric company the right to erect a dam and to institute condemnation proceedings to acquire the land within the contour lines of the water to be thereby impounded. *Howell v. Public Service Comm.*, 78 W. Va. 664, 90 S. E. 105.

Procedure.—When the public service commission, under a misapprehension as to the law, refuses an applicant relief against a public service corporation to which he is entitled, and the proceeding is transferred to this court by petition under § 16 of said act, this court, upon final hearing and decision of the matter in controversy, will suspend the order of the commission, refusing the relief, and award a peremptory writ of mandamus against such corporation, requiring it to render the service denied or perform the act wrongfully omitted by it. *Wingrove v. Public Service Comm.*, 74 W. Va. 190, 81 S. E. 734.

10¾. Appeal from Industrial Commission.

Va. Acts 1918, p. 637; 1920, p. 256, § 61; Pollard's Code Biennial, p. 627; Barnes Code ch. 15, § 43.

Section 62 of the workmen's compensation act (Acts 1918, p. 637) was clearly enacted for the purpose of providing a means not only of enforcing an award which had been affirmed on appeal to the circuit or corporation court, but also all other final awards of the commission from which there had been no appeal, as well as all agreements between the parties approved by the commission. When this section is invoked, the rights of the claimants have already been established, and the proceeding then resembles a motion for execution upon a forthcoming or delivery bond. There is neither necessity nor reason for the procedure under § 62, unless the defendants fail to pay the amounts awarded the claimants. The court is vested with no discretion, the statute is mandatory, and upon refusal to render judgment the court could be compelled by mandamus. *Richmond Cedar Works, etc., Co. v. Harper*, 129 Va. 481, 106 S. E. 516.

The supreme court of appeals is without jurisdiction to entertain appeals, either from the industrial commission, or from the circuit or corporation courts, in cases arising under the Virginia workmen's compensation act, unless possibly under § 88 of the Constitution of 1902 some constitutional question has been raised in the proceeding, or there has been some attempt to exceed the jurisdiction conferred, which would justify the exercise of the original jurisdiction of the supreme court of appeals to issue the writ of prohibition. The provisions for appeals contained in § 6336 of the Code of 1919 do not apply to proceedings before the commission under the workmen's compensation act, as the remedies provided by that act are exclusive. *Richmond Cedar Works,*

etc., Co. v. Harper, 129 Va. 481, 106 S. E. 516.

11. Procedure in Appellate Court.**b. On Appeal.****(½) In General.**

See ante, "Proceedings on Appeal," XVI, A, 2, a, (6½).

How Appeal Tried.—Va. Code 1919, § 6036.

Notice to Try Appeal—Preference over Other Cases.—Va. Code 1919, § 6039.

(4) Where Judgment Is Reversed.

Rendering Final Judgment. — On a writ of error from the circuit court of Kanawha County to a judgment of the intermediate court of that county, the former court, on reversing the judgment of the latter, should render final judgment in the case, if it is fully made up and susceptible of such disposition. *Fielder v. Adams Exp. Co.*, 69 W. Va. 138, 71 S. E. 99.

12. Review of Action of Circuit Court.

On a writ of error from the supreme court to a circuit court, the supreme court has jurisdiction to review the action of the circuit court and to determine whether or not it had jurisdiction of a writ of error from that court to the county court, and, if it had not, to reverse its judgment and enter such judgment as the circuit court ought to have entered. It is not assignable as error, therefore, in the supreme court that the writ of error from the circuit court to the county court was not perfected within the time prescribed by law. *Louisa v. Yancey*, 109 Va. 229, 63 S. E. 452.

B. IN CRIMINAL CASES.**1. Generally.**

From Conservators of the Peace Binding to Good Behavior.—Va. Code 1919, §§ 4792, 4793.

Appeal from Criminal Court for County of Mingo. — Section 16, chap. 6, Acts leg., passed at the extra-

ordinary session of 1908, creating a criminal court for the county of Min-go, provides the manner of obtaining an appeal or writ of error to the circuit court of said county from the judgment of the criminal court, and concludes as follows: "Provided, however, no such appeal, writ of error or supersedeas to said court shall be allowed unless the petition therefor be presented in six months from the date of such judgment or order." Held: The circuit court has no power to award a writ of error to a judgment of said criminal court unless application therefor be made within six months from the date of the judgment. *State v. Belcher*, 69 W. Va. 319, 71 S. E. 272.

In such case the supreme court can not review the judgment and rulings of said criminal court when the writ of error to the circuit court was not applied for in time, or when it was properly dismissed after it had been awarded too late. *State v. Belcher*, 69 W. Va. 319, 71 S. E. 272.

In such case it is not error for the circuit court to dismiss a writ of error which had been awarded by the judge in vacation more than six months after the date of the judgment of said criminal court. *State v. Belcher*, 69 W. Va. 319, 71 S. E. 272.

2. Appeal from Justice.

Va. Code 1919, § § 4989, 4990; Barnes Code ch. 50, § 230; ch. 153 § § 5, 6.

Section 230 of ch. 50 of the Code providing for appeals from judgments of justices of the peace in criminal cases grants to any one convicted before a justice of the peace the right to have the fine increased to not less than the sum of ten dollars, regardless of the penalty provided by the act creating the offense, in order that he may prosecute an appeal from the judgment of such justice of the peace to the circuit court of the county. *State v. Nangle*, 83 W. Va. 224, 95 S. E. 833.

Right of Appeal.—The constitution

of West Virginia guarantees to the accused an appeal from a judgment of a justice, in a criminal case, as a matter of right, but not a new trial for error in the exercise of the justice's jurisdiction. *Ex parte Gilbert*, 78 W. Va. 658, 90 S. E. 111.

Same—Within Reasonable Time. —

A person under conviction of a criminal offense by a justice of the peace is entitled to an appeal within a reasonable time, as a matter of right. *State v. Emsweller*, 78 W. Va. 214, 88 S. E. 787; *Nicely v. Butcher*, 81 W. Va. 247, 94 S. E. 147.

"Six days was not an unreasonable time within which to apply for an appeal." *State v. Tharp*, 81 W. Va. 194, 195, 94 S. E. 119.

Petitioner held entitled to an appeal after the expiration of ten days from the date of the judgment. *Nicely v. Butcher*, 81 W. Va. 247, 94 S. E. 147.

Personal Demand.—It is not indispensable that the prisoner should appear before the justice in person to demand an appeal. *State v. Tharp*, 81 W. Va. 194, 94 S. E. 119.

Delay of Justice.—A justice of the peace can not defeat the right of appeal by unreasonable delay in granting it, after application therefor has been duly made. *State v. Tharp*, 81 W. Va. 194, 94 S. E. 119.

Recognizance.—A person convicted of crime by a justice of the peace is entitled, as matter of right, to an appeal without giving bond or entering into a recognizance, provided he applies therefor within a reasonable time after conviction. *State v. Tharp*, 81 W. Va. 194, 94 S. E. 119.

The recognizance or appeal bond provided for by § 230, ch. 50, Code, is essential to secure the release of the prisoner, pending the appeal, but it is not a prerequisite to the right of appeal. *State v. Tharp*, 81 W. Va. 194, 94 S. E. 119.

Denial of Appeal—Remedy. — In case of the refusal of a justice to

grant an appeal from a judgment of conviction rendered by him in a criminal case, the appropriate remedy to secure the same is by petition to the court having jurisdiction to review such judgment. *Nicely v. Butcher*, 81 W. Va. 247, 94 S. E. 147.

An appeal should be allowed by the justice who rendered the judgment, if applied for within a reasonable time, and, if he refuses it, application therefor may be made to the circuit court of the county, or the judge thereof in vacation. *State v. Emsweller*, 78 W. Va. 214, 88 S. E. 787.

A doubt arising on the evidence as to whether such preliminary application was made to the justice should be resolved in favor of the applicant for the appeal. *State v. Emsweller*, 78 W. Va. 214, 88 S. E. 787.

Refusal of the justice to allow an appeal is sufficient cause for allowance thereof by the court or judge having jurisdiction, and refusal thereof by the latter, under such circumstances, justifies a writ of error from this court to the judgment of refusal. *State v. Emsweller*, 78 W. Va. 214, 88 S. E. 787.

Construction of Petition for Review.—Where a party claiming to be aggrieved by the refusal of a justice of the peace to grant him an appeal from a judgment convicting him of crime, presents a petition to the tribunal having jurisdiction to review such judgment, alleging all matters showing his right to such appeal, and from which petition it clearly appears that the relief desired is an appeal from such judgment, such petition will be treated as an application for an appeal, even though it is inappropriately designated by the pleader as a petition for a writ of mandamus, and the complaining party be granted the relief to which, from the allegations of said petition, he appears to be entitled. *Nicely v. Butcher*, 81 W. Va. 247, 94 S. E. 147.

Change of Warrant Pending Trial

—On an appeal from justice of the peace to a corporation court, the court has ample power, to correct any formal objections there may be to the warrant, and the accused can not be permitted to go to trial upon such a warrant, and, after verdict and judgment, for the first time object to informalities in the warrant. *Flint v. Commonwealth*, 114 Va. 820, 76 S. E. 308.

Under the broad powers conferred upon the trial court by the Code, it was entirely competent for the court of its own motion, pending the trial of an appeal from the justice of the peace, to direct the attorney for the commonwealth to change the warrant from an attempt to commit larceny of oats, to an attempt to obtain money by false pretenses. While it would have been more regular, perhaps, to have directed the change to have been made before the trial began, yet where the prisoner did not ask for a continuance, and there is nothing to indicate that he was prejudiced by the amendment during the trial, the irregularity is harmless. *Robinson v. Commonwealth*, 111 Va. 844, 69 S. E. 518.

3. Appeal from Decision of Mayor.

Statutory Provision.—*Barnes W. Va. Code*, p. 648, ch. 47, § 49a.

Appeal to Corporation Court.—An appeal from a judgment of the mayor of the city of Danville imposing a fine for the violation of a compulsory vaccination ordinance (when the case is appealable at all) lies to the corporation court of said city, and not to the circuit court, under § 2956 of the Va. Code (*Code 1919*, § 6037), as the case does not involve the constitutionality or validity of any ordinance or by-law of said city. *Ragsdale v. Danville*, 116 Va. 484, 82 S. E. 77.

XVII. APPEAL TO SUPREME COURT OF UNITED STATES.

Where several matters of a separate

nature have been voluntarily submitted to and decided by the supreme court, and a party having the right to appeal to the supreme court of the United States has, with full knowledge of his rights, appealed as to only one of them, and as to the others has taken no appeal

and made no complaint, the decree of the supreme court remains operative as to such other matters. *Commercial Trust Co. v. First Nat. Bank*, 112 Va. 44, 70 S. E. 532.

Statutory Provisions. — *Barnes W. Va. Code*, p. 1156, Ch. 135, § 30.

APPEAL BONDS.—See ante, **APPEAL AND ERROR**.

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CROSS REFERENCES.

See the title APPEARANCES, vol. 1, p. 667, and references there given. In addition, see ante, ABATEMENT, REVIVAL AND SURVIVAL; ACTIONS; post, ATTACHMENT AND GARNISHMENT; GUARDIAN AND WARD; HUSBAND AND WIFE; INFANTS; INSANITY; PARTIES; SUMMONS AND PROCESS.

I. DEFINITIONS, DISTINCTIONS, ETC.

See post, "General," II, B; "In General," V, A, 1.

Definition.—Appearance is the first act of the defendant in court. *Fisher, Sons & Co. v. Crowley*, 57 W. Va. 312, 330, 50 S. E. 422.

"An appearance is the first formal act of submission to the jurisdiction of the court, and is triable only by the record. *Groves v. County Court*, 42 W. Va. 587, 26 S. E. 460; *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761." *Crocket v. Reynolds*, 76 W. Va. 763, 765, 86 S. E. 881.

Purpose — Appearance Must Bear Substantial Relation to Cause. —

Though an appearance in a cause, for any purpose other than to take advantage of defective execution, or non-execution of process, constitutes a waiver of defects in the service of process, the purpose of such appearance must bear some substantial relation to the cause. In other words, it must be a purpose within the cause, not merely collateral thereto. *Fulton v. Ramsey*, 67 W. Va. 321, 68 S. E. 381, *Brannon and Williams* dissenting.

Acceptance of notice to take depositions, by a party not served with process, does not amount to appearance in the suit or action. *White v. White*, 66 W. Va. 79, 66 S. E. 2.

A motion to vacate proceedings in a cause, or to dismiss or discontinue it, because the plaintiff's pleading does not state a cause of action, is equivalent or analogous to a demurrer, and amounts to a general appearance. Nor-

folk, etc., *R. Co. v. Consolidated Turnpike Co.*, 111 Va. 131, 68 S. E. 346.

A mere inquiry, as to whether a continuance can be taken, without waiver of service, or offer to move for a continuance, provided it can be done without such waiver, does not amount to a general appearance. *Fulton v. Ramsey*, 67 W. Va. 321, 68 S. E. 381.

The distinction between a general and a special appearance is very clearly drawn by Professor Burks in his work on Pleading and Practice: "'If,' he says, 'the defendant appears generally and defends on the merits, or makes or accepts a motion for a continuance, or makes any other motion which does not involve the court's jurisdiction, he thereby waives all defects in the process and the return thereon. Generally, if a party desires to raise a question as to the sufficiency of service of process, he should enter a special appearance for this purpose, but in doing so he should be particular not to allow the appearance to assume such shape as will admit the jurisdiction of the court.' Burks' Pleading and Practice, 326, and cases cited in notes." *Shepherd v. Starbuck*, 118 Va. 682, 684, 88 S. E. 59.

II. KINDS.

B. GENERAL.

See post, "In General," V, A, 1; "Motions," V, A, 3.

What Constitutes a General Appearance.—An appearance for any other purpose than questioning the jurisdiction of the court because there was no service of process or the process was defective, or the service thereof was de-

fective, or the action was commenced in the wrong county, or the like, is general and not special, although accompanied by the claim that the appearance is only special. *Norfolk, etc., R. Co. v. Consolidated Turnpike Co.*, 111 Va. 131, 68 S. E. 346; *Fisher, Sons & Co. v. Crowley*, 57 W. Va. 312, 330, 50 S. E. 422, quoting Judge Bramon in *Frank v. Zeigler*, 46 W. Va. 614, 618, 33 S. E. 761; *Danser v. Mallonee*, 77 W. Va. 26, 28, 86 S. E. 895; *Rosenberg v. United States Fidelity, etc., Co.*, 115 Va. 221, 223, 78 S. E. 557.

Where the court has jurisdiction of the subject matter of an action, an appearance and motion to dismiss the action for want of a declaration is a general appearance, though designated special, and is a waiver of all defects in the process and the time and manner of its service. The defendant thereby submits himself to the jurisdiction of the court. *Rosenberg v. United States Fidelity, etc., Co.*, 115 Va. 221, 78 S. E. 557.

C. SPECIAL.

See ante, "Definitions, Distinctions, etc.," I; "General," II, B.

Object and Form of Special Appearance.—If a party desires to raise the question as to the sufficiency of the service of process upon him he may do so by entering a special appearance for that purpose provided his pleading does not assume such shape as to admit the jurisdiction of the court. *Shepherd v. Starbuck*, 118 Va. 682, 88 S. E. 59.

III. TIME TO ENTER OR MAKE.

W. Va. Code, Ch. 125, § 6; Va. Code 1919, § 6078.

Before Justice of the Peace.—Barnes Code, ch. 50, §§ 65, 197 (by garnishee).

Caveat against Issuing Grant on Land Warrant.—Va. Code 1919, § 446.

IV. BY WHOM ENTERED OR MADE.

A. IN GENERAL.

Before Justice of The Peace.—Barnes Code, ch. 50, §§ 21, 22.

Special Appearance in Attachment Proceedings.—Va. Code 1919, § 6403.

B. BY ATTORNEY.

See ante, "In General," IV, A.

1. In General.

Va. Code 1919, § 6331.

D. BY INFANTS.

Va. Code 1919, § 6331.

E. BY CORPORATIONS.

Appearance by Secretary of Commonwealth for Foreign Corporation.—Va. Code 1919, § 3845.

V. HOW MADE.

A. GENERAL.

1. In General.

See ante, "Definitions, Distinctions, etc.," I; "General," II, B; post, "Motions," V, A, 3; "Defects in Service of Process," VI, A, 1, a, (3).

A general appearance must be express or arise by implication from the defendant's seeking, taking or agreeing to some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than one contesting the jurisdiction only. *Fulton v. Ramsey*, 67 W. Va. 31, 68 S. E. 381; *Patton v. Eicher*, 85 W. Va. 465, 469, 102 S. E. 124.

When Defendant Replies Generally, etc.—Where a defendant, not served with process, appears and replies generally to a cross answer, or gives notice and takes and files depositions in a cause and has the cause brought on and heard thereon, without other appearance or pleading, he thereby, by such affirmative acts, enters an appearance binding him, and giving the court jurisdiction to pronounce a decree against him. *Blue v. Poling*, 68 W. Va. 547, 70 S. E. 279, distinguishing *White v. White*, 66 W. Va. 79, 66 S. E. 2.

Protestation against Jurisdiction — Nonresident's Acceptance of Notice of Depositions—Presence as Spectator. —

"The mere protestation against the exercise of jurisdiction is not such an appearance as will waive an objection based on lack of proper service of process. *Chubback v. Cleveland*, 37 Minn. 466. Acceptance of notice by a non-resident defendant to take depositions is not an appearance to the cause. *White v. White*, 66 W. Va. 79, 66 S. E. 2. The presence of an unserved defendant, though accompanied by attorney, merely as a spectator, when the case is called, is not a submission to the jurisdiction of the court, unless in some way he participates in the proceedings therein. *Fulton v. Ramsey*, 67 W. Va. 321, 68 S. E. 381." *Crockett v. Reynolds*, 76 W. Va. 763, 765, 86 S. E. 881.

2. Pleading.

a. To The Merits.

See post, "Want of Process," VI, A, 1, a, (2); "Defects in Service of Process," VI, A, 1, a, (3).

An appearance and pleading to the general issue constitutes a general appearance. *McDermitt v. Newman*, 64 W. Va. 195, 61 S. E. 300; *White v. White*, 66 W. Va. 79, 66 S. E. 2; *Franklin v. Lilly Lumber Co.*, 66 W. Va. 164, 66 S. E. 225.

b. Demurrer.

See ante, "In General," V, A, 1.

A defendant by appearing and filing a demurrer makes a general appearance. *Norfolk, etc., R. Co. v. Consolidated Turnpike Co.*, 111 Va. 131, 68 S. E. 346.

Where defendant in a suit in equity for an injunction made no special appearance, but filed four demurrers which challenged the merits of the bill generally, on the grounds that there was no allegation that complainants were without an adequate remedy at law, and for want of equity appearing upon the face of the bill, the filing of these general demurrers constituted a

general appearance, contesting the case upon its merits, and therefore the manner of service of process, or the entire lack of it, became unimportant and immaterial. *Board v. Proffit*, 129 Va. 9, 105 S. E. 666.

3. Motions.

See ante, "General," II, B.

"The making by a person in a cause of any motion which involves the merits, a motion for a change of venue, for a continuance—especially when the motion is granted; to discharge an order of arrest, to dismiss the cause on appeal, to modify judgment, for security for costs, to set aside a default, or to strike a petition from the files constitutes a general appearance." *Fisher, Sons & Co. v. Crowley*, 57 W. Va. 312, 331, 50 S. E. 422, quoting 3 Cyc. 508. See also *Rosenberg v. United States Fidelity, etc., Co.*, 115 Va. 221, 78 S. E. 557.

Appearance to Challenge Jurisdiction is Not a Submission to Jurisdiction.—A defendant who appears in a cause for the special purpose of making a motion challenging the jurisdiction of the court in which such cause is pending does not thereby submit to such jurisdiction, whether his motion does or does not prove to be well founded. *Patton v. Eicher*, 85 W. Va. 465, 102 S. E. 124.

"Respecting the question whether defendants have entered a general appearance in the cause, we are disposed to give a negative answer. If they had restricted their motion to one challenging only the jurisdiction of the court over their persons because of nonservice of process upon them, there could have been no doubt in the matter, for it is generally held that a special appearance by a defendant for the purpose of denying the jurisdiction of the court over his person or property does not subject him to the general jurisdiction of the court. *United States Oil, etc., Supply Co. v. Gartlan*, 65 W. Va. 689, 64 S. E. 933, *Lebow v. Macomber, etc.*,

Rope Co., 81 W. Va. 21, 93 S. E. 939." Patton v. Eicher, 85 W. Va. 465, 469, 102 S. E. 124.

Motion to Quash Attachment. — A defendant who appears specially and moves to quash an attachment for insufficiency of the proceedings, does not thereby, if the motion should fail, make a general appearance in the case. Lebow v. Macomber, etc., Rope Co., 81 W. Va. 21, 93 S. E. 939.

6. Taking Appeal.

Taking Appeal from Justice's Court. — An appeal by a party to a case in the justice's court operates as a general appearance in the appellate court, and gives that court jurisdiction of the person of the appellant, and as a general rule the irregularities in the proceedings before the justice are waived by an appeal, Thorn v. Thorn, 47 W. Va. 4, 34 S. E. 759; Dadisman v. West Virginia, etc., Tel. Co., 69 W. Va. 43, 70 S. E. 855.

B. SPECIAL.

See ante, "Special," II, C; "In General," V, A, 1.

It is not necessary for a defendant, in appearing in court of record to quash a defective writ, commencing an action, to cause the record to recite that his appearance is for that purpose only, in order to avoid a waiver of defect in the jurisdiction of the court. In such case whether an appearance is general or special is to be determined by the record as it stands at the time the motion is made. Fisher, Sons & Co. v. Crowley, 57 W. Va. 312, 50 S. E. 422.

VI. EFFECT.

A. GENERAL.

1. With Respect to Jurisdiction.

a. Of The Person, etc.

(1) In General.

See ante, "In General," V, A, 1.

A general or voluntary appearance

in a case by a defendant named therein, is equivalent to service of process and confers jurisdiction of the person on the court. Giboney v. Cooper, 57 W. Va. 74, 49 S. E. 939; Blue v. Poling, 68 W. Va. 547, 70 S. E. 279.

Appearance to the action, or a general appearance is a waiver of all questions of the service of process, and is equivalent to personal service. In the case at bar the parties "came by their attorneys," and the cause was "continued until the next term." Objection for want of process could not be made thereafter. Norfolk, etc., R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465.

"To operate as a waiver of notice, made imperative as the basis of a proceeding wholly statutory, the appearance must not be a doubtful or uncertain one. To be effectual as an actual submission to the jurisdiction of the court, it must be certain and general. A special appearance will not suffice." Crockett v. Reynolds, 76 W. Va. 763, 765, 86 S. E. 881.

But even if the service were irregular, the admission of the owner of its receipt, without questioning its sufficiency or the manner of service, and only objecting to the amount of damages allowed, amounted to an appearance to the proceeding, and such appearance was a waiver of all questions as to service of the notice and was equivalent to personal service. Lake Bowling Alley v. Richmond, 116 Va. 429, 82 S. E. 97.

Suit in Foreign Court.—By appearance and answer to the merits parties to a suit pending in the court of another state thereby waive any objection to the jurisdiction of the court. Citizens Nat. Bank v. Consolidated Glass Co., 83 W. Va. 1, 97 S. E. 689.

(2) Want of Process.

See ante, "General," II, B, "In General," V, A, I; post, "Defect in Service of Process," VI, A, 1, a, (3); "Defects in Process," VI, A, 1, a, (4).

A general appearance in a case is equivalent to service of process and waives objection to want of service. *Danser v. Mallonee*, 77 W. Va. 26, 28, 86 S. E. 895; *Fisher, Sons & Co. v. Crowley*, 57 W. Va. 312, 330, 50 S. E. 422; *Franklin v. Lilly Lumber Co.*, 66 W. Va. 164, 66 S. E. 225; *Lake Bowling Alley v. Richmond*, 116 Va. 429, 82 S. E. 97; *Rosenberg v. United States Fidelity, etc., Co.*, 115 Va. 221, 223, 78 S. E. 557; *Board v. Proffit*, 129 Va. 9, 105 S. E. 666.

(3) Defects in Service of Process.

See ante, "Definitions, Distinctions, etc.," I; "General," II, B; "In General," V, A, 1; "In General," VI, A, 1, a, (1); "Want of Process," VI, A, 1, a, (2).

By a general appearance the defendant waives all objections to defects in service of process. *Franklin v. Lilly Lumber Co.*, 66 W. Va. 164, 66 S. E. 225; *Fulton v. Ramsey*, 67 W. Va. 321, 68 S. E. 381; *Parfitt v. Sterling, etc., Basket Co.*, 68 W. Va. 438, 69 S. E. 985; *Rosenberg v. United States Fidelity, etc., Co.*, 115 Va. 221, 78 S. E. 557; *Board v. Proffit*, 129 Va. 9, 105 S. E. 666.

Defendant's motion to quash the defective return of service of process, after appearance at rules, and filing a plea in abatement, was properly overruled. Such appearance constituted waiver of all defects in the service of process. *Parfitt v. Sterling, etc., Basket Co.*, 68 W. Va. 438, 69 S. E. 985.

(4) Defects in Process.

See ante, "In General," VI, A, 1, a, (1); "Want of Process," VI, A, 1, a, (2); "Defects in Service of Process," VI, A, 1, a, (3).

A general appearance waives any defect in the process, and confers jurisdiction of the person. *Giboney v. Cooper*, 57 W. Va. 74, 49 S. E. 939; *Shepherd v. Starbuck*, 118 Va. 682, 684, 88 S. E. 59; *Rosenberg v. United States*

Fidelity, etc., Co., 115 Va. 221, 78 S. E. 557.

2. With Respect to Irregularities in Pleadings or Other Proceedings.

½a. In General.

A general appearance operates as a waiver of irregularities in procedure. *Dadisman v. West Virginia, etc., Tel. Co.*, 69 W. Va. 43, 70 S. E. 855; *Selvey v. Armstrong*, 73 W. Va. 13, 79 S. E. 1019.

Procedure to Correct Tax Assessment.—In the instant case the procedure to correct an erroneous assessment of an inheritance tax was substantially that which was provided for by Acts of 1918, p. 416, which was in force when the petition in the case was presented and heard, and the general appearance of the commonwealth without objecting to the form of the procedure amounted to a waiver of any right to raise such objection in the supreme court of appeals. *Commonwealth v. Herbert*, 127 Va. 291, 103 S. E. 645.

a. Commencement or Conduct of Cause.

See ante, "In General," VI, A, 2, ½a.

A defendant, who appears and answers at a term when the cause is improperly on the docket because not set for hearing at rules, waives such irregularity. *McDermitt v. Newman*, 64 W. Va. 195, 61 S. E. 300.

3. After Special Assessment.

Waiver of Special Appearance by Subsequent Notice.—Where defendant makes a special appearance for the purpose of moving to quash the attachment and order of publication of notice for insufficient service which is sustained, his subsequent motion to dismiss is a waiver of the special appearance and a submission to the court's jurisdiction. *Danser v. Mallonee*, 77 W. Va. 26, 86 S. E. 895.

B. SPECIAL.

1. With Respect to Jurisdiction.

See ante, "Special," II, C; "Special," V, B; "In General," VI, A, 1, a, (1).

Effect of Special Appearance.—An appearance in an action solely for the purpose of attacking the sufficiency of process does not, if unsuccessful, submit the party so appearing to the court generally. *United States Oil, etc.,*

Supply Co. v. Gartlan, 65 W. Va. 689, 64 S. E. 933; *Crockett v. Reynolds*, 76 W. Va. 763, 765, 86 S. E. 881.

That parties, entering a special appearance for the purpose of objecting to the jurisdiction of the court, were personally present in court was not sufficient to give the court jurisdiction. *Shepherd v. Starbuck*, 118 Va. 682, 88 S. E. 59.

APPELLATE COURTS.—See ante, **APPEAL AND ERROR.**

APPELLATE JURISDICTION.—See ante, **APPEAL AND ERROR.**

APPLES.—See ante, **AGRICULTURE.**

APPLIANCES.—Appliances of transportation includes roadbeds, tracks, cars, engines. *Jaggis v. Davis Colliery Co.*, 75 W. Va. 370, 84 S. E. 941. See post, **INTERSTATE COMMERCE; MASTER AND SERVANT; RAILROADS.**

APPLICATION OF PAYMENTS.—See post, **PAYMENT.**

APPLIED AND PAID.—See post, **PROPERTY.**

APPORTIONMENT.—See post, **CONSTITUTIONAL LAW; LANDLORD AND TENANT.**

Money coming due at fixed periods. Va. Code 1919, § 5544-5547.

APPRAISEMENT.—See post, **EXECUTORS AND ADMINISTRATORS; TAXATION.**

APPRENTICES.

CROSS REFERENCES.

See the title **APPRENTICES**, vol. 1, p. 684, and references there given.

Statutory Provisions in General. — *Pilot Apprentices.*—Va. Code 1919, § Va. Code 1919, §§ 5298-5313; *Barnes* 3620.
Code, p. 612, ch. 45, §§ 263-265; pp. 978, **County Court Has Jurisdiction in**
979, ch. 81, §§ 1-14; p. 1194, ch. 144, **Matters Relating to Apprentices.** —
§§ 16d (2), 16d (3). *Barnes* Code, p. 456, ch. 39, § 9.

Pharmacist Apprentices.—Va. Code 1919, §§ 1673, 1689.

APPROACHES.—See post, **BRIDGES; CROSSINGS.**

APPROPRIATION.—See post, **TAXATION.** As to appropriation acts, see post, **STATES.** As to appropriation of payment, see post, **PAYMENT.** As to appropriation of private property for public use, see post, **EMINENT DOMAIN.**

APPROVERS.—See ante, **ACCOMPLICES AND ACCESSORIES.**

Approvers shall not be admitted in any case. Va. Code 1919, § 4777.

APPROXIMATE.—As to approximate as equivalent to term “more or less,” see *Richmond v. Smith & Co.*, 119 Va. 198, 89 S. E. 123. See also post, **WORKING CONTRACTS**.

APPURTENANCES.—Appurtenances included in deed of land. Va. Code 1919, § 5168.

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CROSS REFERENCES.

See the title ARBITRATION AND AWARD, vol. 1, p. 687, and references there given. In addition, see post, FIRE INSURANCE. As to submission in boundary disputes, see post, BOUNDARIES. As to bribery of arbitrators, see post, BRIBERY. As to arbitration and award in building contracts, see post, WORKING CONTRACTS.

II. AGREEMENT TO ARBITRATE.

A. WHETHER A BAR TO ACTION.

Arbitration as a Condition Precedent to Action.—To prevent resort to an action at law for breach of a contract, in the first instance, on the ground that the defendant is entitled to a determination of the matter in controversy by an arbitration, it must appear, not only that the contract provides for an arbitration in such case, but also that it has been made a condition precedent to such right of action. *Lawson v. Williamson Coal, etc., Co.*, 61 W. Va. 669, 670, 57 S. E. 258.

A provision in a contract that certain differences arising under it shall be submitted to arbitrators, thereafter to be chosen, will not prevent a party from maintaining a suit, in the first instance, to enforce his rights under it, except where an award is made a condition precedent to the right to sue, either by express provision contained in the contract or by one necessarily implied from its terms. *Flavelle v. Red Jacket Consol. Coal, etc., Co.*, 82 W. Va. 295, 96 S. E. 600.

Where an award is bad, that does not end the submission, but the party must ask another arbitration, and the

submission still being valid, and the policy making an award a precedent condition, to action, the action could not be supported. *Billmyer v. Insurance Co.*, 57 W. Va. 42, 48, 49 S. E. 901.

An award under an insurance policy, the submission limited to the amount of loss by fire does not prevent action on the policy. *Billmyer v. Insurance Co.*, 57 W. Va. 42, 49 S. E. 901.

Not a Condition Precedent.—A provision in a coal lease merely requiring the parties in case of disagreement to submit to arbitrators, thereafter to be chosen, the question whether the lessee has left standing in any room, working or other opening in the mine available and merchantable coal which is not necessary to be left for the proper security of the works, does not alone create a condition precedent to the right of the lessor to sue in the first instance. *Flavelle v. Red Jacket Consol. Coal, etc., Co.*, 82 W. Va. 295, 96 S. E. 600.

C. CONSIDERATION.

A dispute between a city and a street car company, as to the car company's liabilities under its charter and under a contract, furnishes valuable consideration to support their agreement to arbitrate. *McKennie v. Charlottes-*

ville, etc., R. Co., 110 Va. 70, 65 S. E. 503. See generally post, CONTRACTS.

III. SUBMISSION.

¼A. IN GENERAL.

General Statutory Provisions.—Va. Code 1919, § 6159; Barnes Code, p. 1068, ch. 108, § 1.

A. WHO MAY MAKE A SUBMISSION.

1. Infants and Guardians.

Guardian.—Va. Code 1919, § 6163; Barnes Code, p. 1068, ch. 108, § 5.

4. Executors and Administrators.

Statutory Provision.—Va. Code 1919, § 6163; Barnes Code, p. 1068, ch. 108, § 5.

7. Municipal Corporations.

A municipal corporation has the right, as a necessary incident to its right to contract and to sue and be sued, to settle and adjust unascertained or disputed claims made against it, or made by it against others. It may also submit such claims to arbitration, and the award, when fairly made, is binding on the corporation. *McKennie v. Charlottesville, etc., R. Co.*, 110 Va. 70, 65 S. E. 503.

12. Trustees.

Statutory Provision.—Va. Code 1919, § 6163; Barnes Code, p. 1068, ch. 108, § 5.

13. Committee of Insane Person.

Statutory Provision.—Va. Code 1919, § 6163; Barnes Code, p. 1068, ch. 108, § 5.

C. CONSTRUCTION OF SUBMISSION.

Morse on Arbitration, 342, says: "The question is properly of the intention of the parties. The courts will look at the language of the submission in its every part, and from a consideration of the whole will determine the matter of intent. If the reasonable

construction appears to be that the parties intended to have every thing decided if any thing should be, then a decision of all the matters submitted will be imperatively required. And, as has been just stated, the presumption is in favor of this purpose on the part of the disputant." *Hines v. Fisher*, 61 W. Va. 565, 570, 56 S. E. 904.

E. REVOCATION OF SUBMISSION.

After an award is made and published, neither party can revoke the submission without the consent of the other. *Levy v. Scottish Union, etc., Ins. Co.*, 58 W. Va. 546, 547, 52 S. E. 449.

Submission Irrevocable Without Leave of Court.—Va. Code 1919, § 6160; Barnes Code p. 1068, ch. 108, § 2.

V. ARBITRATORS AND ARBITRATION PROCEEDINGS.

C. AUTHORITY AND POWERS OF ARBITRATORS.

See also, post, "Conformity to Submission," VII, A, 1.

"The submission furnishes the source and prescribes the limits of the arbitrator's authority, without regard to the form of submission." *Hines v. Fisher*, 61 W. Va. 565, 569, 56 S. E. 904.

"Generally speaking nothing can be determined by an award except the exact question agreed to be submitted for arbitration." *Flavelle v. Red Jacket Consol. Coal, etc., Co.*, 82 W. Va. 295, 302, 96 S. E. 600.

Agreement as Character of Authority.

—In making an award upon matters in controversy arbitrators are bound by the terms of the agreement submitting the questions to them. Such agreement is their charter of authority and if they make an award which violates or disregards some of the terms thereof, the same will not be upheld. *Bailey v. Triplett*, 83 W. Va. 169, 98 S. E. 166.

Submission of Boundary Dispute.—

A submission of a controversy as to the location of division lines between two tracts of land, as determined by the deeds and any other evidence the arbitrators may deem necessary to enable them to arrive at a just and fair settlement of the controversy, does not authorize them to make a division of the land in dispute in such proportions as they may deem just and fair. *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9.

Where, in an agreement submitting to the determination of arbitrators the proper location of a disputed boundary line, the parties agree upon the method to be pursued in order for the proper location of such line, neither such arbitrators nor an umpire selected by them, in case they fail to agree, have authority to make an award arrived at by disregarding the agreements of the parties as to the method of solving the dispute, and substituting for such agreement in this regard the opinion of the arbitrators or the umpire as to the proper method therefor. *Bailey v. Triplett*, 83 W. Va. 169, 98 S. E. 166.

Same—Evidence.—Upon a submission of a controversy as to the location of division lines between two tracts of land, the evidence the arbitrators are authorized to consider in addition to the deeds, is such extrinsic evidence only as is consistent with the deeds and aids in the application thereof to their subject matter, and, in cases of conflict, the deeds are controlling. *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9.

Disregard of Evidence Not a Deviation.—An arbitration agreement in writing submitted to the arbitration a controversy concerning a boundary line. The agreement provided that the arbitrators should hear such legal evidence pertaining to title as either party might introduce before them. Held, that the fact that the arbitrators located and reported the boundary line according to an agreement of the

parties instead of upon more formal evidence, did not constitute a deviation from their authority. The agreement was the most satisfactory evidence they could have had before them. *Fraley v. Nickels*, 121 Va. 377, 93 S. E. 636.

Where the issue in a suit to contest a will upon the petition of guardians for infants, filed pursuant to § 5 of chapter 108 of the Code, is submitted to arbitration, the arbitrators have no authority or jurisdiction to go outside of the issue submitted, and their award beyond such issue and any decrees confirming the same are absolutely void and of no effect. *Simmons v. Simmons*, 85 W. Va. 25, 100 S. E. 743.

E½. PROCEEDINGS IN GENERAL.

Barnes Code p. 1068, ch. 108, § 1.

H. COMPENSATION.

Statutory Provision.—*Barnes Code*, p. 1068, ch. 108, § 3.

I. WITHDRAWAL OF ARBITRATOR.

A working contract provided for arbitration in case of disputes. Pursuant to this agreement, three building experts were chosen as arbitrators, and when they met the arbitrator chosen by the landowner, by its direction, withdrew. The other arbitrators proceeded with their investigation and awarded the contractor the full amount of his claim. The two arbitrators who made the award were examined as witnesses in the case, and a close scrutiny of their testimony failed to indicate the slightest bias or prejudice against the landowner. Held: There was no sufficient justification for the withdrawal by the landowner from the arbitration. *Adams v. Tri-City Amusement Co.*, 124 Va. 473, 98 S. E. 647.

VI. UMPIRE OR THIRD ARBITRATOR.

Writing Not Part of Award.—An agreement to submit a controversy concerning a boundary line to arbitration, appointed two arbitrators, and provided that they should select a third. The award was signed by one of the arbitrators named in the agreement and by a third party as arbitrator. The award contained no mention of the appointment of this third party as umpire, in accordance with the submission. On a proceeding by one of the parties to the agreement to have the award confirmed, the other party moved that the proceeding be dismissed on the ground that there was no competent evidence in the record to show that the arbitrators had chosen the third party as arbitrator. The other party to the agreement then asked and was permitted, over objection of his adversary, to introduce a writing, which purported to be signed by the arbitrators named in the agreement, and certified that they had chosen such third party as third arbitrator pursuant to the agreement of submission. Held: That the writing was no part of the award and was inadmissible as hearsay. *Fraley v. Nickels*, 121 Va. 377, 93 S. E. 636.

VII. AWARD.

A. REQUISITES.

½. In General.

"Technically, to constitute a valid common-law award, it is necessary that there should be a submission, by the parties, of an existing matter of difference, for the purpose of terminating or concluding the parties as to the entire subject matter in issue between them, as distinguishing from a submission for the ascertainment of a single fact, or the submission of a particular question in the claim of evidence constituting a mere appraisalment, valuation, or reference not designed to terminate the whole controversy between the parties, which proceeding is said not to be an arbitration." *Billmyer v. Insurance Co.*, 57 W. Va. 42, 44, 49 S. E.

901, quoting 3 Cyc. 585.

1. Conformity to Submission.

See also, ante, "Authority and Powers of Arbitrators," V. C.

It is a cardinal rule of arbitration that the award must do what the submission demands. *Hines v. Fisher*, 61 W. Va. 565, 56 S. E. 904.

An award must follow and comply with the agreement of submission. Where such agreement requires a special finding, and the award does not make such finding, the award is void. *Hines v. Fisher*, 61 W. Va. 565, 56 S. E. 904.

An award of arbitrators, made under a total misapprehension of the function assigned them by the agreement of submission is a departure from the submission, justifying annulment thereof by a court of equity. *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9.

A submission authorizing arbitrators to award to one of the parties thereto standing and lying timber of the other equal in value to other timber of the former, wrongfully cut by the latter, requires a careful estimation of the quantity of the timber to be compensated for and of the timber to be allotted by way of compensation, and neglect to make such estimates, as the basis of the award, amounts to a fatal departure from the submission, justifying annulment of the award. *Raleigh Coal, etc., Co. v. Mankin*, 83 W. Va. 54, 97 S. E. 299.

"It has been held that if, on the construction of the agreement of submission, the arbitrator is to decide, separately, the matters referred, he must do so; for, if this is the bargain of the parties, it must be observed; otherwise the arbitrator does not follow the authority given him." *Hines v. Fisher*, 61 W. Va. 565, 570, 56 S. E. 904.

Award Valid in Part.—In an arbitration between a city and a street railway company as to the amount due by the latter for street paving, if the award goes beyond the submission and under-

takes to exempt the railway company from all obligations under the city ordinances, or the charter, to repair the pavement on each side of its rails for a period of five years, this part of the award is bad, but is separable from the residue and should be stricken out. *Mc-Kennie v. Charlottesville, etc., R. Co.*, 110 Va. 70, 65 S. E. 503.

Same—Confirmation by Court of Proper Method Agreed upon.—Where the location of a disputed boundary line is submitted by the interested parties to arbitrators, with the provision that in case of their disagreement an umpire selected by them shall make the award, and they do disagree, and such umpire so selected makes an award in the alternative finding that in his judgment the disputed boundary line properly located is at a certain place, but that if he follows the directions contained in the agreement signed by the parties the disputed boundary line is at a certain other place, the circuit court, upon being asked to enter judgment upon such award, will disregard the award made by the umpire based on his own opinion, and will enter judgment confirming that award made in accordance with the methods agreed upon by the parties for the location of the disputed line, in the absence of fraud, mistake or adventitious circumstances. *Bailey v. Triplett*, 83 W. Va. 169, 98 S. E. 166.

3. Certainty.

"Under a submission of several matters an award is not uncertain because it did not pass upon each matter separately, but embodies them all in one general award, unless the submission specially or impliedly requires a separate award for each matter, or one or more of them." *Hines v. Fisher*, 61 W. Va. 565, 569, 56 S. E. 904.

An award will not be void for uncertainty although it does not specify the exact amount to be paid, where it gives the rule or indicates the means by

which such sum can be calculated. *Eureka Pipe Line Co. v. Simms*, 62 W. Va. 628, 59 S. E. 618.

It is sufficient if the result is stated, and where the submission is general, of all matters, an award of a particular sum in favor of one of the parties is sufficiently certain. *Hines v. Fisher*, 61 W. Va. 565, 569, 56 S. E. 904.

Where the questions submitted are merely of mutual indebtedness or pecuniary claim, and the arbitrator finds a balance from one to the other, the award is good although the principles from which the balance results are not stated. *Hines v. Fisher*, 61 W. Va. 565, 569, 56 S. E. 904.

4. Necessity for Arbitrators to Join in Award.

Necessity of Participation of All Arbitrators—Public and Private Controversies.—In the absence of some express or implied agreement to the contrary, all the arbitrators provided for in the submission of a controversy between private persons, must participate in the deliberation; and in such a case the award must be concurred in by all of them. The rule is otherwise with reference to controversies of a public nature or of public concern. *Fraley v. Nickels*, 121 Va. 377, 93 S. E. 636.

B. VALIDITY.

3. Misconduct of Arbitrators.

In *Billmyer v. Insurance Co.*, 57 W. Va. 42, 47, 49 S. E. 901, the court said: "An objection against the award is that the arbitrators were intoxicated when acting. Evidence was admitted to prove this. We think this evidence was not admissible, because the award could not be set aside at law for cause not apparent on its face. This can be done only in equity. 4 *Minor's Inst.* 184; *Dickinson v. Railroad Co.*, 7 W. Va. 390. At common-law, 'no extrinsic circumstances or matter of fact dehors the award can be pleaded or given in evidence to defeat it. Thus, for example, fraud, partiality, misconduct or mis-

take of the arbitrators is not admissible to defeat it.' Story Eq., § 1452."

C. CONSTRUCTION OF AWARD.

Liberal Construction.—Awards are to be liberally construed to the end that they may be upheld if possible. *Fraley v. Nickels*, 121 Va. 377, 93 S. E. 636.

Upon the question whether an award is within the terms of the submission, all fair presumptions should be made in favor of the awards; and if in any fair presumption the award may be brought within the submission it should be sustained. *Eureka Pipe Line Co. v. Simms*, 62 W. Va. 628, 59 S. E. 618.

D. EFFECT OF AWARD.

1. In General.

Matters Affected.—"It is a general rule that a valid award operates to merge and extinguish all claims embraced in the submission. Thereafter the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand; and the defendant cannot, in an action to enforce the award, set up in defense thereto any matters embraced in the award." Such is the force of an award, upon all matters in controversy in a given transaction. *Billmyer v. Insurance Co.*, 57 W. Va. 42, 43, 49 S. E. 901.

Modification of Contract.—The award of arbitrators, made pending the execution of plaintiff's contracts requiring it to remove a cofferdam embankment to the satisfaction of the government of the United States, omitting the other words or the original contract, requiring that work to be done to the satisfaction of defendant also, and the acceptance thereof by the parties, properly construed, did not constitute a modification of that provision of the original contract. *Park-ersburg, etc., Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

Submission Oral or in Writing.—

An award has the same effect whether the submission is by writing under seal or not under seal. (It may not be so if award is to pass title to land.) *Billmyer v. Insurance Co.*, 57 W. Va. 42, 49 S. E. 901.

Parol Submission and Award as to Boundaries.—It would seem that both the submission to arbitration and the award between the parties as to the location of a disputed boundary line may be by parol; and that any valid award settling the question of the location of the boundary line is, as to that question, a sufficient foundation for the party prevailing in the arbitration to stand upon in a subsequent action between the same parties involving the title to land. The theory is that the arbitrators do not make new boundaries nor change old ones, but merely determine, as a conclusive fact, the true location of boundaries pre-existent. *Cox v. Heuseman*, 124 Va. 159, 97 S. E. 778.

Distinction between Award and Agreement by One of the Parties to Line.—In the instant case the question was not whether one of the parties to a dispute as to a boundary line at the time of its submission to arbitration agreed in fact to the location of the line as the same is claimed by the other, nor, indeed, what the arbitrators themselves believe as to the true location, but whether the establishment of the line was a matter embraced in the submission and award. The two questions are vitally different. The authorities in relation to the effect of a valid award in a boundary dispute, and those in regard to the effect of a verbal admission or agreement by a land owner as to the location of a line, will show that while such an award is probably sufficient to afford a basis for either the prosecution or defense of an action of ejectment between the same parties, such an admission or agreement has not that effect. *Cox v. Heuseman*, 124 Va. 159, 97 S. E. 778.

4. Conclusiveness.

An insurance policy provides, in case of disagreement as to amount of loss of goods by fire, for arbitration as to such amount, as a condition precedent to suit on it, and provides that the award shall "determine the amount of such loss." A valid award under it is final and conclusive as to the amount of loss. *Billmyer v. Insurance Co.*, 57 W. Va. 42, 49 S. E. 901.

Parol Evidence to Vary Award.—In the absence of fraud or other exceptional circumstances, the terms of an award, when reduced to writing, cannot be varied by parol testimony. In the instant case the award in question as soon as made was written out and signed. It allowed defendant a small amount in damages for timber cut and trespasses committed and in no way referred to the boundary line in dispute. It was, therefore, error to admit parol evidence to the effect that the award fixed the line in a statutory proceeding between the parties to establish the line. *Cox v. Heuseman* 124 Va. 159, 97 S. E. 778.

E. RESUBMISSION BY COURT FOR CORRECTION OF ERROR.

On setting aside an award made under a submission in pais, the court can not properly recommit the controversy to the same or any other arbitrators. *Raleigh Coal, etc., Co. v. Mankin*, 83 W. Va. 54, 97 S. E. 299.

F. ENFORCEMENT OF AWARD.**1. In General.**

Limitation of Action.—Va. Code 1919, § 5810; Barnes Code, p. 1045, ch. 104, § 6.

4. Entry of Judgment on Award.

Statutory Provision.—Va. Code 1919, § 6161; Barnes Code, p. 1068, ch. 108, § 3.

G. IMPEACHMENT OF AWARD.**2. Setting Aside Award.**

Statutory Provisions.—Va. Code, § 6162; Barnes Code, p. 1068, ch. 108, § 4.

Reason Must Appear on the Face of Award.—It is equally the rule of equity as of law that the reason for setting aside an award must appear on its face, or there must be misbehavior in the arbitrators, or some palpable mistake. *McKennie v. Charlottesville, etc., R. Co.*, 110 Va. 70, 65 S. E. 503.

Unfairness or Gross Negligence by Arbitrators.—On an answer to a bill in equity seeking specific performance of an award, supported by proof of gross unfairness and injustice in the result as well as circumstances indicative of partiality and palpable neglect of duty on the part of the arbitrators, the award may be set aside. *Raleigh Coal, etc., Co. v. Mankin*, 83 W. Va. 54, 97 S. E. 299.

Partial Invalidity.—When an award is in part bad, and in part good, if the part that is good is severable from the part that is bad, then the part that is bad may be stricken out leaving the rest of the award to stand. *McKennie v. Charlottesville, etc., R. Co.*, 110 Va. 70, 65 S. E. 503.

X. APPEAL AND REVIEW.

An award, made under a submission to arbitration, subsequent to a final decree in a cause can not be relied upon in the supreme court of appeals when introduced for the first time in the form of a "reply brief." *Solenberger v. Strickler*, 110 Va. 273, 65 S. E. 566.

XI. IN JUSTICES COURT.

Statutory Provision.—Barnes Code, p. 692, ch. 50, §§ 92-96.

XII. AWARDS IN CASE OF FIDUCIARIES.

Statutory Provision.—Va. Code 1919, § 6163; Barnes Code, p. 1068, ch. 108, § 5.

ARCHITECTS.—See post, **WORKING CONTRACTS**. As to architect's certificate, see post, **MECHANICS' LIENS; WORKING CONTRACTS**.

Statutory Regulation.—Va. Acts 1920, p. 496, Pollard's Code 1920, p. 762; W. Va. Acts 1921, p. 264.

Licenses.—Va. Code of Va. appendix, p. 3138.

ARDENT SPIRITS.—See *Donithan v. Commonwealth*, 109 Va. 845, 64 S. E. 1050. See also, post, **INTOXICATING LIQUORS**.

ARGUMENTATIVENESS.—See post, **PLEADING**.

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CROSS REFERENCES.

See the title **ARGUMENTS OF COUNSEL**, vol. 1, p. 713, and references there given. In addition, see ante, **APPEAL AND ERROR**, post, **CRIMINAL LAW; EXCEPTIONS, BILL OF; INSTRUCTIONS; OPEN AND CLOSE; TRIAL**. As to effect of argument as curing error in instruction, see post, **INSTRUCTIONS**. As to the right to open and conclude in argument, see post, **OPEN AND CLOSE**.

½I. STATUTORY PROVISIONS.

Va. Code 1919, § 6255, provides: "Not more than two counsel shall argue in a civil case, on the same side, unless by leave of the court."

Barnes Code, p. 1137, ch. 131, § 10, provides: "Not more than two counsel

shall argue in a civil case on the same side unless by leave of the court, and the argument of each counsel shall not occupy more than two hours, unless by like leave. The court may in its reasonable discretion still further limit the time of argument on each side."

I. CONTROL OF ARGUMENT BY COURT.

A. IN GENERAL.

See ante, "Statutory Provisions," ½I.

Duty of Court.—Where counsel transgress the rule allowing great latitude in discussing the facts of the case, as sometimes they may inadvertently do, the court should enforce adherence to proper proprieties in the discussion. *State v. Rice*, 83 W. Va. 409, 98 S. E. 432.

Submission without Argument — Time for Announcement. — If the attorney for the defendant does not announce his purpose to submit the case to the jury without argument, until after the attorney for plaintiff has concluded his opening argument, and he then declares such purpose, it is no abuse of discretion for the trial judge to permit plaintiff's attorney to make a second argument to the jury. *Koontz v. Mylius*, 77 W. Va. 499, 87 S. E. 851.

B. LIMITING TIME.

See ante, "Statutory Provisions," ½I.

III. LATITUDE OF ARGUMENT.

½A. IN GENERAL.

Counsel ordinarily are allowed great latitude in the argument of a case. *State v. Rice*, 83 W. Va. 409, 98 S. E. 432; *Norfolk-Southern R. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89; *State v. Clifford*, 58 W. Va. 681, 52 S. E. 864; *Sands & Co. v. Norvell*, 126 Va. 384, 401 S. E. 569; *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384; *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

Counsel should be allowed to present every view of the evidence which ought to fairly and legitimately influence the jury in arriving at a verdict. *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

It is far better for counsel to content themselves with asking a verdict of the jury based upon the law and

the evidence, without suggestions of a nature which might imperil an otherwise righteous judgment. *Lynchburg Tract., etc., Co. v. Guill*, 107 Va. 86, 57 S. E. 644.

Discretion of Court.—In an ordinary case the discretion and judgment of the trial court as to the latitude allowed counsel in argument are decisive. *Sands & Co. v. Norvell*, 126 Va. 384, 101 S. E. 569; *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

"Counsel necessarily have great latitude in the argument of a case, and it is, of course, within the discretion of the court to restrain them, but with this discretion, the appellate court will not interfere, unless it clearly appears from the record that the rights of the prisoner were prejudiced by such line of argument." *State v. Clifford*, 58 W. Va. 681, 687, 52 S. E. 864. See ante, *APPEAL AND ERROR*, p. 56.

A. LEGITIMATE ARGUMENT.

Opening Statement.—It is not error for a prosecuting attorney in an opening statement to the jury on a felony trial, to state the facts which he expects to be shown by the evidence. *State v. Barrick*, 60 W. Va. 576, 55 S. E. 652.

Reference to Success of Opposing Counsel.—In an action for personal injuries, plaintiff's counsel spoke of his confidence in the action of the jury, even though he was "opposed by two lawyers noted for their success in defending damage suits." Held: Harmless. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

B. READING AND ARGUING LAW TO JURY.

1. In Civil Cases.

a. In General.

Reading Law Books and Reports of Decisions in Similar Cases.—A court may and should refuse to allow

counsel to read law books, either text-books or reports, in addressing the jury, if objected to. *Ray v. Chesapeake, etc., R. Co.*, 57 W. Va. 333, 50 S. E. 413.

Reading reports of decisions giving evidence or facts involved in decided cases more or less similar in character, if objected to, should not be allowed, and its allowance over objection, is reversible error. *Ray v. Chesapeake, etc., R. Co.*, 57 W. Va. 333, 50 S. E. 413.

But it is not error for counsel to read to the jury the instructions of the court which embody provisions of the constitution, and, in argument, to refer to the constitutional convention and the change which it made in the law. *Chesapeake, etc., R. Co. v. Rowsey*, 108 Va. 632, 62 S. E. 363.

Reading from Statute. — Where a deputy fire warden who is paid a salary out of the state treasury is a witness in a case relating to acts performed in his official capacity, it is not error for counsel in his address to the jury to read as part of his address a statute of this state showing how the money was raised out of which the salary of the officer was paid. This would not affect the merits of the case, and permission to read the same would be within the discretion of the trial judge. *Bond v. National Fire Ins. Co.*, 77 W. Va. 736, 88 S. E. 389.

D. COMMENTS ON FAILURE OF ACCUSED OR SPOUSE TO TESTIFY.

Failure of Husband or Wife of Accused to Testify. — *Barnes Code*, p. 1258, ch. 152, § 19.

Comment by an attorney for the state in his argument in a felony case, upon the failure of the accused, who has testified in the case, to have his wife testify and corroborate statements of his own as to matters, said by him to be known to her, is improper; and, if

objected to at the time, the refusal of the court to prohibit it and direct the jury to disregard it, is reversible error. *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

D½. COMMENTS ON.

Failure to Examine Material Witness. — Ordinarily, it is not reversible error for a prosecuting attorney, in argument before the jury, to refer to failure of accused to examine material witnesses, summoned in his behalf, for the purpose of explaining incriminating circumstances disclosed by the evidence for the state. Such remarks are not within the inhibition of § 19, ch. 152, Code. *State v. Gunnoe*, 74 W. Va. 741, 83 S. E. 64.

F. ARGUMENTS NOT SUPPORTED BY EVIDENCE.

The court should always keep argument of counsel within the issues and the evidence. It is not permissible for counsel, to go outside of the record and testify as to matters not given in evidence. *Norfolk-Southern R. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89; *Norfolk, etc., R. Co. v. Allen & Sons*, 122 Va. 603, 95 S. E. 406.

Arguments made and opinions expressed by the commonwealth's attorney, when there was no evidence in the case upon which to base either, can not be said to be without prejudice to the accused. *Mullins v. Commonwealth*, 113 Va. 787, 75 S. E. 193.

Financial Standing of Defendant. — In an action against a railroad company for diminution of plaintiffs' water power, there was no evidence before the jury as to the wealth of the defendant, but counsel for plaintiffs in his address to the jury was allowed to comment over defendant's objections upon the great wealth of the defendant and its disregard of the law of God and man. Held: Error. *Norfolk, etc., R. Co. v. Allen & Sons*, 122 Va. 603, 95 S. E. 406.

In a prosecution for homicide, in concluding argument the commonwealth's attorney stated that the way a certain weapon got into the case was that after defendant shot the deceased and he fell, one indicted jointly with defendant came up and threw the weapon down by the side of the deceased. The theory of the defense was that the deceased was in the act of striking the defendant with the weapon when defendant shot him in self-defense. Counsel for defendant promptly objected to this statement of the commonwealth's attorney, on the ground that it was not supported by the evidence. Held: the statement of the commonwealth's attorney was not supported by any evidence in the case, and was highly prejudicial to the accused. *McCoy v. Commonwealth*, 125 Va. 771, 99 S. E. 644.

G. APPEAL TO PASSION OR PREJUDICE.

It is never permissible for counsel to make use of language calculated to inflame the minds of the jurors and induce a verdict not founded solely on the evidence adduced before them. *Norfolk, etc., R. Co. v. Allen & Sons*, 122 Va. 603, 95 S. E. 406.

While great latitude is allowed argument of counsel, they should not be permitted to excite and inflame the minds of the jury against one of the litigants, nor appeal to their passions and prejudices, and if, when such an argument is made and the trial court is appealed to it fails to take proper steps to correct its ill tendencies, and an exception is taken at the proper time, it is good ground for reversing the judgment and setting aside the verdict. *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

The supreme court of appeals has more than once reprobated in no uncertain terms the practice of injecting

into arguments of counsel statements calculated to inflame the minds of jurors, and tending to produce verdicts as a result of prejudice rather than a calm consideration of the evidence. Every litigant, natural or artificial, is entitled to a fair and impartial trial, and there should be excluded from the tribunal which is to try the case, whether judge or jury, everything that has no tendency to aid such tribunal in doing impartial justice between the litigants. *Norfolk, etc., R. Co. v. Allen & Sons*, 122 Va. 603, 95 S. E. 406.

In an action by a passenger against a carrier to recover damages for a personal injury resulting from the carrier's negligence, the measure of recovery is compensatory and not punitive, hence counsel should not be permitted to argue before the jury matters which would prejudice them against the officials of the carrier, tend to cause a verdict which would punish them and not merely compensate the passenger for the injury he has suffered. *Norfolk-Southern R. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89.

Arraignment of Class against Class.—In an action by a servant against his master for personal injuries, an arraignment of class against class, of labor against capital, of persons against corporations by counsel for plaintiff in his argument is highly prejudicial to the defendant. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

H. PARTICULAR INSTANCES OF ERRONEOUS ARGUMENT.

In an action by a subcontractor for work on railroad construction, against the principal contractor, a statement in argument to the effect that the railway company is behind the defense, is improper and should be excluded by the trial court, in the absence of any provision in the contract be-

tween the railway company and the contractor, making the former liable for a recovery from the latter by a subcontractor. *Sims v. Carpenter, etc., Co.*, 68 W. Va. 223, 69 S. E. 794.

Reading Writs—In Criminal Cases.

—Allowance of the use, in the argument, of writs for the defendant and returns, not introduced in evidence, for the purpose of showing incriminating conduct on the part of the accused, accompanied by refusal of permission to rebut or repel the charge of such conduct, is reversible error. *State v. Jarrell*, 76 W. Va. 263, 85 S. E. 525.

Reference to Insurance.—In an action for personal injuries, counsel for the plaintiff stated in his argument that employers were willing to go ahead and take chances and leave it to the insurance companies to take care of them if trouble occurred. Held: Clearly improper. *Lorrillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Asking Jury to Put Themselves in Place of Plaintiff.—It is improper in an action for damages for the loss of an eye for counsel for plaintiff to ask the jury what one of them would take for the loss of an eye. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Matters of Common Knowledge—Electric Locomotives Safest for Preventing Fires.—In a fire damage case the court sustained the objection of the attorney for the plaintiff when the company stated to the jury that, "It is a matter of common knowledge that electric locomotives are best and safest for preventing fires." However well known this may be to some, it is not apparent that the common knowledge of the public has progressed as far as this, and if certainly true it can be certainly proved. Under the circumstances, the remark of counsel was objectionable, in the absence of testimony making the

comparison which the attorney undertook to make in his argument to the jury. Its exclusion certainly did not constitute reversible error. *Norfolk, etc., R. Co. v. Fentress*, 127 Va. 87, 102 S. E. 588.

IV. WHEN OBJECTION TO IMPROPER ARGUMENT SHOULD BE MADE.

Objection on account of improper remarks made by counsel in his address to the jury should be made at the time, and the court be requested to instruct the jury to disregard them. Such objections come too late after verdict. *Wickham v. Turpin*, 112 Va. 236, 70 S. E. 514; *Lorrillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Remarks of counsel in an argument to the jury, regarded as improper and harmful to the opposite party, should be at once objected to, and the trial court given an opportunity to rule on the objection, and if possible counteract the effect thereof upon the minds of the jury, else the error will be regarded as waived, if afterwards urged as ground for setting aside the verdict and for a new trial. *Given v. Diamond Shoe, etc., Co.*, 84 W. Va. 631, 101 S. E. 153, cited in *Keathley v. Chesapeake, etc., Co.*, 85 W. Va. 173, 102 S. E. 244.

V. CURING ERROR.

Directing Jury to Disregard Argument.—A judgment ought not to be reversed for a statement of counsel which the court afterwards directs the jury to disregard unless there is a manifest probability that the statement has been prejudicial to the adverse party. A different rule would result in fixing an intolerable handicap upon the *nisi prius* courts. *Washington, etc., Railway v. Ward*, 119 Va. 334, 89 S. E. 140; *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384; *State v. Cooper*, 74 W. Va. 472, 82 S. E. 358; *Roberts v. United Fuel Gas Co.*, 84 W. Va. 368, 99 S. E. 549.

In an action for false imprisonment, counsel for plaintiff stated that he was not surprised that an agent of defendant company who was active in the arrest of plaintiff was no longer in the employ of defendant. Counsel for defendant objected, as there was no evidence as to the discharge of the agent and requested the court to instruct the jury to disregard the statement. Whereupon counsel for plaintiff said that the jury had the evidence before it and could draw their own conclusion; upon which the court told the jury that they could try and determine the case only by the evidence introduced before them, and not by argument of counsel, unless supported by the evidence. Held: That if defendant was prejudiced by what occurred in the argument, such prejudice could not be said to clearly appear, and the supreme court of appeals ought not, therefore, to overrule the judgment of the trial court in regard to it. *Sands & Co. v. Norvell*, 126 Va. 384, 101 S. E. 569.

Same — Remarks of Prosecuting Attorney.—Remarks or conduct by a prosecuting attorney before the jury during the progress of a criminal trial will not constitute reversible error, especially where the jury are instructed to disregard the statements and conduct, unless it is manifest the rights of the defendant were injuriously affected. *State v. Huff*, 80 W. Va. 468, 92 S. E. 681.

Substantial Elimination of Improper Argument.—A caution to counsel, by the court, against comment in argument, upon a matter not in evidence, given in response to an objection, sufficient to cause him to desist, and a judicial declaration that the matter is not in evidence, effects a substantial elimination of the remarks from jury consideration. *Hodge v. Charleston Interurban R. Co.*, 79 W. Va. 174, 90 S. E. 601.

Requiring Counsel to Desist. — In the cross examination of a witness counsel should not indulge in critical or satirical remarks as to the conduct of the witness while testifying, but where no objection is taken by the opposite party to such conduct, and the court immediately requires counsel to desist from making such remarks, and he does so, it is not ground for reversal. *State v. Alie*, 82 W. Va. 601, 96 S. E. 1011.

Opposing Counsel Offered Opportunity to Make Comments.—There is no merit in an exception to an adverse ruling of the court on an objection to a particular line of argument, where, during the continuance of the argument, the objection is withdrawn and counsel is offered the opportunity to make any comments or criticism he may desire. *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459.

Incorrect Statement of Law by the Prosecuting Attorney.—A verdict and judgment in a criminal case will not be set aside for an incorrect statement of the law by the prosecuting attorney in the course of his argument, where it appears that the jury was correctly instructed on the law of the case, and the objectionable statement was separated and segregated from the context, and the trial judge, who heard the whole argument, certifies that the accused was not prejudiced by the language used. *Robinson v. Com.*, 104 Va. 888, 52 S. E. 690.

Retraction by Counsel.—In an action for personal injuries, counsel for plaintiff in his opening argument stated that defendant would attempt to escape liability by the worn-out doctrine of contributory negligence, and stated that, were the accident to happen now, no such defense would be permitted. Upon objection the court directed counsel not to use that statement, and said that he seemed

to have confused the contributory negligence doctrine with the fellow servant doctrine as applicable to actions against common carriers. Counsel for plaintiff said that he had done so and withdrew the statement. Held: That in view of the ruling of the trial court and the withdrawal of the remark, defendant could not have been injured. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Error Not Always Cured.—There are cases where improper statements of counsel can not be overcome by a subsequent direction to the jury to disregard them. *Lorillard Co. v. Clay*, 127 Va. 734, 104 S. E. 384.

Statements of Counsel Not Supported by the Evidence.—Where the statement of the commonwealth's attorney was not supported by any evidence in the case, and was highly prejudicial to the accused, the statement of the trial judge that he did not remember such evi-

dence as to the weapon, and that the jury should not consider any statements of counsel not supported by the evidence, furnished no protection to the defendant against the improper remarks of the commonwealth's attorney. *McCoy v. Com.*, 125 Va. 771, 99 S. E. 644.

VI. APPEAL AND ERROR.

See ante, APPEAL AND ERROR.

Improper remarks of counsel for plaintiff in argument to the jury, supposed to be detrimental to defendant, should be promptly excepted to, and though objection be thus made by opposing counsel, accompanied by a motion to direct a verdict for defendant, denial of such motion will not constitute reversible error, unless the court on motion or by instruction to direct the jury to disregard such improper remarks. *Keathley v. Chesapeake, etc., Co.*, 85 W. Va. 173, 102 S. E. 244.

ARISING—RISING.—"Arising, while having a progressive and prospective meaning in some circumstances, usually signifies the present. Most frequently, indeed generally, it denotes immediate present, and only occasionally implies future events or occurrences. When we speak of 'fog rising from the river,' or 'clouds rising in the east,' expressions import an instant progressive occurrence, and not one that may arise in the future, however probable it may be. Though the present participle may, it seldom does, include a future event of a similar nature. It does not import futurity." *Moore v. Hope Natural Gas Co.*, 76 W. Va. 649, 652, 86 S. E. 564.

ARMS.—See post, CONSTITUTIONAL LAW; WEAPONS.

ARMY.—See post, MILITIA.

ARRAIGNMENT.—See post, COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED; CRIMINAL LAW.

ARREST.

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CROSS REFERENCES.

See the title ARREST, vol. 1, p. 719, and references there given. In addition, see post, CORONERS; FALSE IMPRISONMENT; HABEAS CORPUS; INTOXICATING LIQUORS; JUSTICES OF THE PEACE; MALICIOUS PROSECUTION; SEARCHES AND SEIZURES; STATE; WARRANTS. As to right of bail to arrest principal, see post, BAIL, AND RECOGNIZANCE. As to procedure before officer after arrest as "suspicious character," see post, COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED. As to arrest and extradition of fugitives from justice, see post, EXTRADITION. As to legality of arrest being question for jury, see post, FALSE IMPRISONMENT. As to arrests in liquor cases, see post, INTOXICATING LIQUORS. As to arrest of judgment, see post, JUDGMENTS AND DECREES.

I. IN CIVIL CASES.

Fraudulent Debtor—Grounds. — Va. Code 1919, §§ 6419-6425; Barnes Code, p. 683, ch. § 40, p. 703, ch. 50, § 156; p. 1064, ch. 106, §§ 30, 32.

Execution Debtor Failing to Answer Interrogatories. — Va. Code 1919, § 6506; Barnes Code, p. 1186, ch. 141, § 4.

II. IN CRIMINAL CASES.

½A. WHO MAY MAKE ARRESTS.

Special police appointed by circuit court shall arrest all persons whom they have cause to suspect have violated or intend to violate any law of the state. Va. Code 1919, § 4802.

Conductors etc., Conservators of the Peace.—Va. Code, § 3944; Barnes Code, p. 1205, ch. 145, § 31. See post, "For Misdemeanor," II, A, 2.

Game, etc., Warden.—Va. Code 1919, §§ 3197, 3320; Barnes Code, p. 875, ch. 62, § 4.

Member of Commission of Fisheries, Inspector, etc.—Va. Code 1919, § 3266.

Officers and Agents of Humane Society.—Va. Code 1919, § 4555; Barnes Code, p. 203, ch. 15J, § 15.

Commissioner and Inspectors of Weights and Measures.—Barnes Code, p. 687, ch. 59, § 20.

Officer of Wharf or Landing and Officer of Vessel, etc., to Be Conservators of the Peace.—Va. Code 1919, § 4025.

At Fair Grounds, etc. — Va. Code 1919, § 3005; Barnes Code, p. 1223, ch. 149, § 22a (2).

Private Person. — See post, "What Arrests May Be Made without Warrant," II, A.

A. WHAT ARRESTS MAY BE MADE WITHOUT WARRANT.

1. For Felony.

It shall be the duty of every conservator of the peace to arrest without a warrant for felonies committed in his presence, or upon reasonable suspicion of felony. Va. Code 1919, § 4789.

An officer may, without a warrant, arrest one whom he has reasonable ground to suspect of having committed a felony. *Hill v. Smith*, 107 Va. 848, 59 S. E. 475.

Either an officer or a private individual seeing a felony committed may lawfully arrest the felon without waiting for a warrant of arrest. *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811.

Belief that Offense Was Felony.—A peace officer may legally arrest, without a warrant, for an offense not committed in his presence, if he has reasonable ground to believe the offense so committed was a felony, thought it was not. *Allen v. Lopinsky*, 81 W. Va. 13, 15, 94 S. E. 369.

But a private person can not justify an arrest made without a warrant, by himself, or by an officer at his instance, for a felony, unless the felony has been actually committed. *Allen v. Lopinsky*, 81 Va. 13, 94 S. E. 369.

2. For Misdemeanor.

Offenses in Presence of Officer.—Va. Code 1919, § 4789; Barnes Code, p. 717, ch. 50, § 221; p. 1261, ch. 153, § 9.

A peace officer may legally arrest, without a warrant, for a misdemeanor committed in his presence. *Allen v. Lopinsky*, 81 W. Va. 13, 94 S. E. 369. See *State v. Gum*, 68 W. Va. 105, 108, 69 S. E. 463.

"For an offense of which a justice has jurisdiction, committed in his presence or the presence of a constable, an arrest made without a warrant. Code, ch. 50, § 221, § 2775. In other cases, there must be a warrant and it can be

issued only on information under oath of a credible person; and it must describe the offense alleged to have been committed, 'as heretofore required in such cases by law.' Code, ch. 50, § 223, ser. § 2777. *State v. Harr*, 77 W. Va. 637, 88 S. E. 44." *State v. Emsweller*, 78 W. Va. 214, 224, 88 S. E. 787.

Swearing—Instruction.—On a trial for murder the court instructed the jury that if they found from the evidence that shortly before or at the shooting, the accused in the presence of the constable was guilty of contending with angry words to the disturbance of the peace, that such swearing was an offense under the laws of this state justifying his arrest without warrant: Held, such instruction not erroneous as assuming by the words "such swearing" the fact submitted to the jury, the evidence on which the instruction was based tending to show that the angry words attributed to the prisoner were words of swearing. *State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

When Offense Committed in Officer's Presence.—An offense can be said to be committed in the presence of an officer only when he sees it with his own eyes, or sees one or more of a series of acts constituting the offense, and is aided by his other senses or by information as to the others, when it may be said the offense was committed in his presence. *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434.

Confession Not Taking the Place of Actual Sight of the Offense.—A confession elicited from the accused by an invasion of his person by the officer, as by slapping his hands on his pockets, will not, in the absence of statute authorizing it, take the place of actual sight of the offence. *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434.

Offense Must Be Breach of Peace.—The rule of the common law, not changed by any statute in this state applicable to municipal police officers

of the city of Grafton, is that an officer could not arrest without warrant for a misdemeanor even when committed in his presence, unless involving a breach of the peace. *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434.

Past Misdemeanor Liable to End in Felony.—For a past offense lower than felony, an officer can not make an arrest without warrant; unless for example, it is such dangerous assault as may end in felony, by the death of the injured person. *State v. Gum*, 68 W. Va. 105, 69 S. E. 463.

Violation of Municipal Ordinance.—Defendant's instruction number twelve, which would have told the jury in substance that under an ordinance of the city of Grafton, relating to intoxicating liquors, a police officer had no authority to make an arrest for a violation thereof without a warrant, and that the defendant's arrest by the deceased was unlawful, stated a correct legal proposition and was erroneously rejected. *State v. Lutz*, 85 W. Va. 330, 101 S. E. 434.

Violation of Statutes Relating to Weights and Measures.—Barnes Code, p. 867, ch. 59, § 20.

Carrying Dangerous Weapon to Place of Religious Service.—Va. Code 1919, § 4578.

Disorder at Fair Grounds, etc.—Va. Code 1919, § 3005; Barnes Code, p. 1223, ch. 149, § 22a, (2).

Offences Relating to Elections.—Va. Code 1919, § 196; Barnes Code, pp. 71, 72, ch. 3, §§ 46, 50.

Arrest by Private Person.—"Under no circumstances can a private person justify an arrest made without a warrant by himself or by an officer at his instance for a misdemeanor." *Allen v. Lopinsky*, 81 W. Va. 13, 94 S. E. 369, 370.

A "conservator" is one whose duty requires him to prevent and arrest for breaches of the peace in his presence, but not to arraign and try for them. *Marcuchi v. Norfolk, etc.*, R. Co., 81 W. Va. 548, 94 S. E. 979.

A conductor as a conservator of the peace has authority, under sec. 31, ch. 145, Code, to arrest without a warrant and eject from a car or train of cars conveying passengers any person, whether a passenger or not, who in his presence and the presence of other passengers and the public then assembled contends with angry words to the disturbance of the public peace and tranquility. And an instruction that tells the jury a conductor has no such right is erroneous. *Marcuchi v. Norfolk, etc.*, R. Co., 81 W. Va. 548, 94 S. E. 979.

3. Offense Committed in Another State.

An offense committed in one state does not justify arrest of the perpetrator thereof in another, otherwise than upon a warrant for his arrest as fugitive from justice. *George v. Norfolk, etc.*, R. Co., 78 W. Va. 345, 88 S. E. 1036.

B½. RESISTING ARREST IN GENERAL.

See post, "Killing Officer in Resisting Illegal Arrest," II, C. As to homicide in resisting lawful arrest, see post, HOMICIDE.

Resisting an arrest, which a proper officer is trying to make in a lawful manner by one charged with crime and knowing the officer's authority, is an unlawful act, and such officer has the legal right to use such reasonable force as may be necessary to overcome the resistance. *State v. Weisen-goff*, 85 W. Va. 271, 101 S. E. 450.

Using Deadly Weapon to Resist Unlawful Arrest.—If an attempted arrest be unlawful, the party sought to be arrested may use such reasonable force, proportioned to the injury attempted upon him, as is necessary to effect his escape, but no more; and he can not do this by using or offering to use a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest. *State v. Gum*, 68 W. Va. 105, 69 S. E. 463. See post, HOMICIDE.

Presumption as to Lawfulness of Arrest.—When an officer armed with a lawful warrant attempts to make an arrest in obedience to its mandate, the prima facie presumption, in the absence of evidence to the contrary, is that he will discharge his duty in a lawful manner; and the burden rests on the accused, who undertakes to resist the arrest, to show that the officer's conduct was such as to justify such resistance. *Looney v. Commonwealth*, 115 Va. 921, 78 S. E. 625.

C. KILLING OFFICER IN RESISTING ILLEGAL ARREST.

In exercising one's right to resist an illegal arrest he has no right, in order to retain or regain his liberty, to take the life of the officer, unless he has reason to believe and does believe he is in imminent danger, and that it is necessary to do so in order to save his own life, or to save himself from great bodily harm; and an instruction purporting to define such right, which omits to so state the law to the jury, is erroneous. *State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

E. ARREST BY OFFICER OUTSIDE OF JURISDICTION.

Right of Officer with Warrant to Arrest in Any Part of State.—Va. Code 1919, § 4825; Barnes Code, p. 1265, ch. 156, § 3.

Same—Person Escaping from State Hospitals.—Va. Code 1919, § 1044; Barnes Code, p. 858, ch. 58, § 17.

F. MANNER OF MAKING ARREST.

See ante, "Resisting Arrest in General," II, B½.

Shooting Suspected Misdemeanant on Refusal to Stop When Ordered.—An officer seeking to arrest a misdemeanor is not justified in shooting or wounding a traveler on the highway whom he has reason to believe is the misdemeanor, and whom he has ordered to halt for the purpose of

ascertaining if he is the person for whom he is seeking, where the traveler simply refuses to obey the command, and pursues his journey hurriedly and in such manner as would lead the officer to believe he is the misdemeanor, indicating an escape. *State v. Boggs*, 87 W. Va. 738, 106 S. E. 47.

"Shooting with firearms by officers in pursuit of fugitives charged with minor crimes, as a ruse to prevent further flight, is illegal as a reckless use of firearms, and was disapproved in *State v. Cunningham*, 65 So. 115, where the court said 'an officer must not intentionally shoot a misdemeanor who is a fugitive, nor must he discharge a firearm while in pursuit, in such manner as to cause such fugitive injury.'" *State v. Boggs*, 87 W. Va. 738, 745, 106 S. E. 47.

G. REFUSAL TO MAKE, OR AID IN MAKING, ARREST.

Refusal to Make Arrest.—Va. Code 1919, § 4510; Barnes Code, p. 1212, ch. 147, § 13.

Refusal to Aid in Making Arrest.—Va. Code 1919, §§ 4511, 4512; Barnes Code, p. 1213, ch. 147, §§ 14, 15.

IV. PRIVILEGE FROM ARREST.

Guards Proceeding to Secure Prisoner.—Barnes Code, ch. 160, § 17.

Members of Congress.—Va. Code 1919, § 48; Va. Code 1919, §§ 297, 299-302; W. Va. Const., Art. 6, § 17; Barnes Code, p. 486, ch. 41, § 13.

Voter During Election.—Va. Const. § 29; Va. Code 1919, § 2823; W. Va. Const. Art. 4, § 3; Barnes Code, p. 486, ch. 41, § 13.

Judges, Grand Jurors, Witnesses, Militia, Ministers.—Va. Code 1919, § 2823; Barnes Code, ch. 41, § 14; ch. 18, § 51.

President of United States and Members of Congress.—Va. Code 1919, § 2823.

ARREST OF JUDGMENT.—See ante, **APPEAL AND ERROR**, post, **JUDGMENTS AND DECREES**; **VERDICT**.

ARSON.

III. Subjects of Arson, etc.

V. Pleading and Practice.

- A. The Indictment.
- 2. Property.

VI. Evidence.

- C. Admissibility.
 - 2. Circumstantial Evidence.
 - 5. Impeaching Testimony.
- D. Sufficiency.

VIII. Duties and Powers of Commissioner of Insurance.

CROSS REFERENCES.

See the title **ARSON**, vol. 1, p. 722, and references there given. In addition, see post, **INSTRUCTIONS**; **NEW TRIALS**.

III. SUBJECTS OF ARSON, ETC.

Arson and Burnings.—Barnes Code, ch. 145, §§ 1-10; Va. Code 1919, §§ 4428-4432.

Intent to Injure Insurer.—Va. Code 1919, § 4436; Barnes Code, ch. 145, § 10.

V. PLEADING AND PRACTICE.

A. THE INDICTMENT.

2. Property.

Value of Property. — It is unnecessary in an indictment for arson, under § 6, chap. 145, Code 1906, to charge the value of the building and the property therein separately; and indictment charging the value of the building and contents as a whole is good on demurrer. *State v. Huffman*, 69 W. Va. 770, 73 S. E. 292.

VI. EVIDENCE.

C. ADMISSIBILITY.

2. Circumstantial Evidence.

Other Fires.—Where evidence tends to show that the other fires were a part of one connected scheme or purpose of the defendant; or as tending to show that the particular fire with which the accused is charged was not

accidental; or when, together with other evidence, it tends to show motive or intent, or to identify the accused with the offense charged, it is admissible. 5 Am. & Eng. Ency. Law and Prac. 633; *State v. Huffman*, 69 W. Va. 770, 773, 73 S. E. 292.

Same—Habit of Defendant. — The evidence showing that most of such other fires and depredations occurred on Sunday, when the owner of the property and his family were absent at church, evidence of defendant's general habit of absenting himself from church on that day was not incompetent, on the question of opportunity of defendant to commit the other offenses occurring on that day, and as tending to connect him therewith, and, under an exception to the general rule, as tending to show intent, malice and the like, and bearing on the question of his guilt or innocence of the offense charged in the indictment. *State v. Huffman*, 69 W. Va. 770, 73 S. E. 292.

Rate of Insurance. — In a prosecution for arson evidence that the rate of insurance in the town where the fire occurred was higher than that in

most other towns of the state was admissible as bearing upon the question of defendant's motive for carrying so large an amount of insurance. *State v. Gebhart*, 70 W. Va. 232, 73 S. E. 964.

Evidence to Contradict Malice.—In a prosecution for arson where the defense alleged was, that the property was set on fire by an enemy of the defendant for motives of malice, it was proper to admit the testimony of the sister of the person who the defendant claimed started the fire as to the value of certain property which she owned, situated in the same block with defendant's property, and the amount of insurance thereon. *State v. Gebhart*, 70 W. Va. 232, 73 S. E. 964.

5. Impeaching Testimony.

In a prosecution for arson where the evidence showed that a son of the accused had made certain statements regarding the fact that his father's store had been burglarized and that immediately thereafter when questioned by his sister as to why he made such statements he called her aside and talked to her in a whisper, it was held that it was proper for the state to impeach the testimony by showing that the store had not been burglarized, and that any error in allowing a third person to testify as to this conversa-

tion was harmless where the son of the accused practically admitted everything testified to by the witness. *State v. Gebhart*, 70 W. Va. 232, 73 S. E. 964.

D. SUFFICIENCY.

In a prosecution for arson the evidence, while entirely circumstantial pointed strongly to defendant's guilt. It was held that it was sufficient to warrant a verdict of guilty. *State v. Gebhart*, 70 W. Va. 232, 73 S. E. 964.

Question for Jury.—In a prosecution for arson whether defendant was paying a high rate of insurance for legitimate purposes or for the purpose of securing the insurance by burning his property were, in view of the evidence, questions for the jury. *State v. Gebhart*, 70 W. Va. 232, 73 S. E. 964.

VIII. DUTIES AND POWERS OF COMMISSIONER OF INSURANCE.

Investigation of Fires. — Barnes Code, ch. 48A, § 23.

Record of Origin of Fires. — Va. Code 4184, amended by Acts 1918, p. 123.

Report of Arson—Arrest.—Va. Code 1919, § 4188, amended by Acts 1916, p. 123.

AS.—As president and as directors are not words of mere description or identification of the person. The word *as* designates the official relation of the obligees to the real beneficiary. *Clark v. Nickell*, 73 W. Va. 69, 79 S. E. 1020. See post, SURETYSHIP.

AS SOLD.—See *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515. See post, SALES.

ASCERTAIN.—"To ascertain 'is to find out.' " *Coons v. Coons*, 106 Va. 572, 577, 56 S. E. 576.

AS FIXED BY THEM.—See *Homestead Fire Ins. Co. v. Ison*, 110 Va. 18, 26, 65 S. E. 463.

ASSAULT.—For the word *assault*, employed in a verdict to comprehend the words "hit, beat and wound," as used in an indictment, see *State v. Arbruzino*, 67 W. Va. 534, 68 S. E. 269.

ASSAULT AND BATTERY.

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CROSS REFERENCES.

See the title ASSAULT AND BATTERY, vol. 1, p. 729, and references there given. In addition, see post, CARRIERS; DAMAGES; HOMICIDE; HUSBAND AND WIFE; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; MAYHEM; PUBLIC OFFICERS; RES GESTAE; TORTS; TRESPASS. As to assault and battery in self defense, see post, HOMICIDE. As to right of employee to sue person assaulting servant, see post, MASTER AND SERVANT. Assault with intent to kill, see post, MAYHEM. As to assault on militia, see post, MILITIA. As to assault on officer by convict, see post, PRISONS AND PRISONERS.

I. DEFINITION AND WHAT CONSTITUTES.

Assault Defined.—In law an assault is a verbal threat of violence against another accompanied with the present capacity to execute such threat, or is a movement which virtually implies a threat to strike or otherwise do violence to the person of another.

State v. Terrall, 79 W. Va. 358, 363, 92 S. E. 127.

Expelling Trespasser—Unreasonable Force.—A proprietor may order a trespasser off his premises and, if he refuses to go, may use such reasonable force as may be necessary to expel him. But if he exceeds the bounds of reasonable force he is guilty of an

assault. *State v. Flanagan*, 76 W. Va. 783, 86 S. E. 890.

II. AS A CRIME.

½A. PERSONS LIABLE.

One who is present at an assault, and who encourages the person who commits it, is liable criminally in the same manner and to the same extent as the person committing the assault. *Wooden v. Commonwealth*, 117 Va. 930, 934, 86 S. E. 305.

In cases of assault all who are guilty are principals and there are no accessories. *Wooden v. Commonwealth*, 117 Va. 930, 934, 86 S. E. 305.

The mere presence of a person at the time and place of an assault, without any act, word or gesture in aid or encouragement of it, and without anything to show that he advised the assault, will not render him guilty; nor will the mere fact that the defendant knew of assault justify a conviction. He must do something. He must aid or encourage by words or gestures, or do some act in the way of encouragement of the actual participants in order to make him guilty. *Wooden v. Commonwealth*, 117 Va. 930, 86 S. E. 305.

A. JURISDICTION.

Assault and battery is an offense at common law, and cognizable as such by our circuit courts, and other courts which exercise like jurisdiction in such cases. *State v. McKain*, 56 W. Va. 128, 49 S. E. 20.

Justice Has Jurisdiction. — Barnes Code, p. 716, ch. 50, § 219, ch. 1. See post, **JUSTICE OF THE PEACE.**

Jurisdiction of Legislature to Punish Assault of Member. — W. Va. Const., § 26.

F. PUNISHMENT.

½. In General.

Upon conviction of the accused upon an indictment for assault and battery, the court may impose upon him a fine, or imprisonment, or both,

at its discretion, limited only by the constitutional inhibition that excessive fines shall not be imposed nor cruel and unusual punishment inflicted. *State v. McKain*, 56 W. Va. 128, 49 S. E. 20.

Shooting, etc., with Intent to Maim, Kill, etc. — Va. Code 1919, § 4402; Barnes Code, p. 1192, ch. 144, § 9.

Shooting at Another in Place of Public Resort. — Va. Code 1919, § 4404; Barnes Code, ch. 144, § 11.

Shooting at Another in Street. — Barnes Code, p. 1192, ch. 144, § 11.

Shooting, etc., in Committing or Attempting to Commit a Felony. — Va. Code 1919, § 4403; Barnes Code, p. 1192, ch. 144, § 10.

Assault on Militia or Guard. — Barnes Code, p. 280, ch. 18, § 59.

G. DISCHARGE ON COMPROMISE.

Statutory Provision. — Va. Code 1919, § 4849. See Barnes Code, p. 716, ch. 50, § 219, cl. 1.

III. AS A CIVIL INJURY.

A. PERSONS LIABLE.

Liability of Principal for Assault of Agent. — A principal is liable for an assault committed by his agent in discharging the command of the principal. *Eggleston v. Tanner*, 86 W. Va. 385, 103 S. E. 113. See ante, **AGENCY.**

Same—Agent an Officer Acting without Authority. — A doctor, who notifies his patient that he intends to hold an automobile in which the patient was riding, until he pays his bill for professional services, just previously rendered in dressing a wound, and who immediately sends for an officer, who does actually hold such car without authority and assaults the owner thereof when he demands to see his authority, and injures him without further provocation, is liable for such assault. *Eggleston v. Tanner*, 86 W. Va. 385, 103 S. E. 113.

Liability of Master for Assault by Servant.—See post, CARRIERS; MASTER AND SERVANT.

B $\frac{1}{2}$. VENUE.

An action of trespass for an assault and battery is transitory, and may be brought in the county of defendant's residence. *Hunt v. DiBacco*, 69 W. Va. 449, 71 S. E. 584. See generally, post, VENUE.

C. PLEADING.

1. Declaration.

Necessary Allegations—Time. — A declaration in trespass for assault and battery need not allege the exact time when the trespass was committed. *Hunt v. DiBacco*, 69 W. Va. 449, 71 S. E. 584.

3. Matters in Justification or Excuse.

Not Provable under General Issue.

—In an action for damages for assault and battery, matters in excuse, or justification, are not admissible under the general issue, but must be specially pleaded. *Hunt v. DiBacco*, 69 W. Va. 449, 71 S. E. 584; *Shires v. Boggess*, 68 W. Va. 137, 69 S. E. 466.

Self-defense must be specially pleaded. *Pendleton v. Norfolk, etc., R. Co.*, 82 W. Va. 270, 95 S. E. 941.

The defense of son assault demesne must be pleaded specially. *Shires v. Boggess*, 68 W. Va. 137, 69 S. E. 466.

4. Matters in Mitigation of Damages.

In an action for assault and battery evidence tending to show that the assault was committed by the defendant in self-defense may be introduced under the plea of not guilty, in mitigation of damages, but not in justification of the assault. *Pendleton v. Norfolk, etc., R. Co.*, 82 W. Va. 270, 95 S. E. 941.

5. Failure to File Replication.

If a proper plea averring matters which legally justify the assault and battery made the basis of an action for damages is not replied to or con-

troverted, a valid defense stands confessed, and no issue exists. *Shires v. Boggess*, 68 W. Va. 137, 69 S. E. 466.

6. Issues, Proof and Variance.

See ante, "Matters in Justification or Excuse," III, C, 3; "Matters in Mitigation of Damages," III, C, 4.

In an action for assault and battery, evidence of loss or damage from interruption to a particular vocation or calling under contract with a certain employer, is admissible under a general charge in the declaration, that the injuries inflicted upon the plaintiff prevented charge in transacting his necessary affairs and business, in the absence of a demand for a bill of particulars, specifying the character of the vocation or employment and the nature and extent of the loss. *Jacobs v. Williams*, 67 W. Va. 377, 67 S. E. 1113.

D. DEFENSE TO CIVIL ACTIONS.

Absence of Malicious Intent Not a Defense.—

In the instant case, defendant claimed immunity upon the ground that the cutting was accidental, that he intended to cut the plaintiff's brother, and that plaintiff got in the way. Held: It was not essential, in a civil suit for damages, that there be an intent to injure the particular person who is injured. *Bannister v. Mitchell*, 127 Va. 578, 104 S. E. 800.

It is clear that where one commits a wanton, reckless and dangerous act, which may result in injury to any one of a number of others, such as shooting into a crowd, he is guilty of assault and battery, though he has no specific intention to injure any particular person. *Bannister v. Mitchell*, 127 Va. 578, 104 S. E. 800.

E. EVIDENCE.

1. Admissibility.

See also post, RES GESTAE.

In a civil action to recover damages for assault and battery, evidence of complaints and representations

made by plaintiff indicative of present pain and exhibiting the natural symptoms and effects of the injury, is admissible. *Stevens v. Friedman*, 58 W. Va. 78, 51 S. E. 132.

In a civil suit to recover damages for an assault and battery, it is not proper to admit in evidence the record of a justice of the peace showing the conviction of the plaintiff in the civil suit of an assault and battery upon the defendant for the very same transaction which affords the basis for the civil suit, from which conviction an appeal was taken, and which charge still remains undetermined upon the appeal. *Pendleton v. Norfolk, etc., R. Co.*, 82 W. Va. 270, 95 S. E. 941.

2. Sufficiency.

Evidence Not Showing Justification.

—In an action for damages for personal injuries resulting from an alleged felonious assault, defendant contended that he struck plaintiff in defense of his property rights, and that plaintiff at the time was in the very act of stealing potatoes from him, but the evidence plainly showed that the real occasion of the assault was plaintiff's alleged offensive language at the time, and his alleged previous misappropriation of the products of defendant's farm upon which plaintiff was employed. By defendant's own statement the difficulty was not precipitated by an attempt to recover his property, but was occasioned by plaintiff cursing him and by plaintiff's previous conduct. Held: That viewing the evidence in its most favorable light for defendant, there was nothing in it to support any theory of justifiable assault. *Turk v. Martin*, 124 Va. 103, 97 S. E. 351.

E½. INSTRUCTIONS.

Instructions as to Defense of Property Rights. — In the instant case plaintiff occupied defendant's farm, and the trial court refused an in-

struction setting forth defendant's theory that plaintiff was not his tenant. It appeared from the evidence that defendant may have struck plaintiff because he believed that his property rights had been violated, but there was no ground upon which he could plausibly contend that he had to commit the assault in order to protect his property or to save himself anything belonging to him which might be lost if he did not make an attack upon the person of the plaintiff. Therefore the materiality of the character of the plaintiff's occupancy was eliminated and it was not error to refuse the instruction. *Turk v. Martin*, 124 Va. 103, 97 S. E. 351.

Exemplary Damages.—In an action for assault the jury were instructed that "if the defendant made a premeditated, wilful or malicious assault upon the plaintiff, then the jury should award the plaintiff punitive damages." It was contended that whether punitive damages should be awarded or not is always a question for the jury, and that the court ought to have used the word "may" instead of the word "should" in the instruction. The supreme court of appeals was of opinion that the proper practice in such cases is to use the word "may" instead of "should," "ought to" or "must." But in the instant case the instructions, as a whole, could not have substantially prejudiced the defendant, and presented no reversible error. *Turk v. Martin*, 124 Va. 103, 97 S. E. 351.

Compensatory Damages.—As in an action for assault and battery, only compensatory damages are recoverable, unless malice be present, or there be criminal indifference to civil obligations on the part of the defendant, an instruction to the jury calling for such damages, should clearly cover these phases of the issue. *Shires v. Boggess*, 72 W. Va. 109, 77 S. E. 542, citing *Jopling v. Bluefield, etc.*,

Inprov. Co., 70 W. Va. 670, 74 S. E. 943; *Smith v. Fahey*, 63 W. Va. 346, 60 S. E. 250.

Instructions for compensatory damages held to call for reversal of the judgment. *Shires v. Boggess*, 72 W. Va. 109, 114, 77 S. E. 542.

Duty to Instruct.—Defendants were indicted upon the charge of having “unlawfully and feloniously” cut and wounded another. The indictments contained no charge of “malicious” cutting. The clerk read the indictments to the jury, and, in charging them as to the punishment for the alleged offense, read to them, over the objection of counsel, section 3671 of the Va. Code of 1904, which provides the punishment for maliciously cutting or wounding another, etc., and also if the act be done unlawfully, but not maliciously. The court refused an instruction requested by counsel for defendants that under the indictment defendants could not be found guilty of maliciously cutting or stabbing. Held: That the court erred in permitting the clerk to read to the jury section 3671 without explaining to them that they were not to regard that portion of it which related to the punishment for maliciously doing the acts therein described; and, further, that it was error, in these circumstances, to refuse the instruction requested. *Hummer v. Commonwealth*, 122 Va. 826, 94 S. E. 157.

In the instant case, a civil action for assault and battery, defendant had an altercation and affray with plaintiff's brother, who was a small one-legged man, older than defendant, and after plaintiff's brother had been pushed off the running board of an automobile by the brother of defendant, defendant and his brother left the automobile, and defendant renewed the fight. Plaintiff came to the assistance of her brother, striking defendant with a lady's umbrella, and the defendant cut plaintiff with his

pocket knife. Defendant was indicted and pleaded guilty to the assault. Held: That the wounding of the plaintiff, under the circumstances, constituted a wanton and grievous assault and warranted an instruction embodying the proposition of law contained in the first syllabus. *Bannister v. Mitchell*, 127 Va. 578, 104 S. E. 800.

Instructions Held Erroneous. — Instructions for defendant, intended to cover his theories of defense, and which his evidence tends to support, namely, that he was assaulted by plaintiff, in his own dwelling house or castle, and was not required to retreat, but had the right to stand and defend himself, and to repeal his assailant, using such force as then appeared to him to be reasonably necessary to accomplish his purpose, if he then had the right to believe and did believe plaintiff intended to do him some bodily harm, were erroneously modified by interpolation of the word “great” before the words “bodily harm” employed therein. *Shires v. Boggess*, 72 W. Va. 109, 77 S. E. 542.

Instructions for defendant treating plaintiff as a trespasser and the first to make assault, and proposing to tell the jury, that if so assaulted in his own house defendant had the right to defend himself and to eject plaintiff, using such force as appeared to him at the time necessary to accomplish his purpose, and that plaintiff could not recover, are bad, for not limiting defendant to such reasonable force as was proportioned to the injury attempted or inflicted upon him, and were properly refused. *Shires v. Boggess*, 72 W. Va. 109, 77 S. E. 542.

F. DAMAGES.

3. Excessive or Insufficient.

The amount of damages which may be awarded is largely in the discretion of the jury, the court having the right to set aside the verdict if the jury awards an unreasonable amount.

Bannister v. Mitchell, 127 Va. 578, 104 S. E. 800.

In a case where exemplary damages for assault and battery may properly be awarded, the verdict of a jury will not be set aside on the ground alone that the damages awarded are excessive, unless the amount is so large as to evince passion, prejudice, partiality or corruption in the jury. *Stevens v. Friedman*, 58 W. Va. 78, 51 S. E. 132.

4. Exemplary or Punitive.

See post, **EXEMPLARY DAMAGES**.

As Compared with Compensatory Damages.—The allowance of exemplary damages seems to be especially applicable in actions for assault and battery, though sometimes in practice it seems to be a matter of little consequence. Compensatory damages in such cases include an allowance for mental suffering, and for the indignity and disgrace to which the plaintiff is subjected by the defendant's assault, so that, in assessing damages in such cases, the juries may fail to appreciate the distinction between compensatory damages for wounded feelings, malice, insult, etc., and exemplary damages for punishment to the defendant. There being no rule for computing such damages, the distinction may be of slight consequence. *Bannister v. Mitchell*, 127 Va. 578, 104 S. E. 800.

When Awarded.—Punitive damages should not be awarded in any case unless there is evidence from which the jury may conclude that the defendant acted with malice toward the plaintiff, or with reckless and wanton disregard of the plaintiff's rights. *Pendleton v. Norfolk, etc., R. Co.*, 82 W. Va. 270, 95 S. E. 941. See *Fink v. Thomas*, 66 W. Va. 487, 66 S. E. 650.

"Only compensatory damages are recoverable, unless malice be present, or there be criminal indifference to civil obligations on the part of the defendant." *Shires v. Boggess*, 72 W.

Va. 109, 114, 77 S. E. 542, citing *Jopling v. Bluefield, etc., Improv. Co.*, 70 W. Va. 670, 74 S. E. 943; *Smith v. Fahey*, 63 W. Va. 346, 60 S. E. 250.

Whenever an assault is of a grievous or wanton nature, manifesting a wilful disregard of the rights of others, actual malice need not be shown to entitle the aggrieved party to exemplary damages; and, whilst the existence of malice may be shown in aggravation of such damages, its absence does not defeat the right to their recovery. *Bannister v. Mitchell*, 127 Va. 578, 104 S. E. 800.

If the conduct of one in beating another is wanton, or malicious, punitive damages may be awarded against him, in addition to compensation for the actual injuries. *Smith v. Fahey*, 63 W. Va. 346, 60 S. E. 250.

Same—Instruction. — Where in an action for assault and battery there is evidence tending to show that the defendant acted with malice toward the plaintiff, or with reckless and wanton disregard of the rights of the plaintiff, it is proper to instruct the jury that if they believe that the defendant did so act they may in their discretion award damages in excess of that which would compensate the plaintiff for his injury, as a punishment to deter the defendant and others from the commission of like offenses. *Pendleton v. Norfolk, etc., R. Co.*, 82 W. Va. 270, 95 S. E. 941.

When Compensatory Damages Is Sufficient Punishment.—Punitive damages should not be awarded in a case where the amount of compensatory damages is adequate to punish the defendant, and in a case where such compensatory damages are not in the judgment of the jury adequate for the purpose of punishment, only such additional amount should be awarded as taken together with the compensatory damages will be sufficient for that purpose. *Pendleton v. Norfolk, etc., R. Co.*, 82 W. Va. 270, 95 S. E. 941.

Must Be Proportionate to Compensatory Damages.—In a case where it is proper to award punitive damages the amount of such award must bear some reasonable proportion to the amount of compensatory damages. *Pendleton v. Norfolk, etc., R. Co.*, 82 W. Va. 270, 95 S. E. 941.

Where in a civil action to recover damages for assault and battery the actual damages found by the jury are substantial as in this case, an award of punitive damages for ten times the amount of the actual damages awarded will not be sustained. *Pendleton v. Norfolk, etc., R. Co.*, 82 W. Va. 270, 95 S. E. 941.

Financial and Social Standing Parties—To Be Considered.—In a case in which it is proper for a jury to award punitive damages, it is competent to consider the station of the parties, and particularly the financial and social standing of the defendant, in order that it may be determined what will be adequate and sufficient punishment, and where, after considering these elements, as well as the nature and character of the offense committed, the amount found is so out of proportion to the injury inflicted that it is patent that the jury were actuated by motives of ill feeling toward the defendant in ascertaining such damages, and not alone by the purpose to punish the defendant, such verdict will be set aside as excessive. *Pendleton v. Norfolk, etc., R. Co.*, 82 W. Va. 270, 95 S. E. 941.

Plea of Guilty in Criminal Prosecution.—In the instant case, a civil action for assault, defendant's plea of guilty in a criminal prosecution for the same assault, together with the evidence introduced in behalf of the plaintiff, were sufficient to show that the use of his knife by the plaintiff, under the circumstances, was entirely unnecessary for his own defense; that he was the aggressor in unnecessarily continuing the affray, and that the

wounding of the plaintiff with his knife, under the circumstances, constituted a wanton and grievous assault, for which the jury might impose punitive damages. *Bannister v. Mitchell*, 127 Va. 578, 104 S. E. 800.

IV. DEFENSES.

A. PROVOCATION.

To Repel Interference by Peace Maker.—A man is not justified in striking another with a deadly weapon, nor indeed at all, merely because he meddles in a controversy or encounter between other persons, to the extent of approaching and asking the prevailing party to desist. *Teel v. Coal, etc., R. Co.*, 66 W. Va. 315, 320, 66 S. E. 470.

Insulting words and epithets can not justify an assault upon a passenger by those in charge of the train, though they may be given in evidence in mitigation of damages. *Norfolk, etc., R. Co. v. Brame*, 109 Va. 422, 63 S. E. 1018.

Abusive language at the time and previous conduct do not justify an assault. *Turk v. Martin*, 124 Va. 103, 97 S. E. 351.

B. SELF DEFENSE.

The law of self-defense does not vary in the application thereof to felony, misdemeanor and civil cases. *Teel v. Coal, etc., R. Co.*, 66 W. Va. 315, 66 S. E. 470. *State v. Miller*, 85 W. Va. 326, 102 S. E. 303.

Right of Self-Defense to Aggressor.—One assaulted by another is not bound to retreat, but if he is the aggressor, or unnecessarily pursues his assailant after the latter has declined the combat and inflicts upon him bodily injury, he is guilty of assault and battery. *State v. Miller*, 85 W. Va. 326, 102 S. E. 303.

In an action for damages for injuries resulting from a beating, the doctrine of self-defense can not be successfully invoked where defendant

Bannister v. Mitchell, 127 Va. 500, S. E. 800.

In a case where execution for assault and battery was awarded, the verdict should not be set aside on the ground that the damages were excessive, unless there is evidence to evince partiality or corruption. *Friedman v. Friedman*, 100 Va. 100, 101 S. E. 100.

4. Execution

S.
AC

PROTECTION OF PROPERTY.

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DEFENSE OF INTRUDER FROM HOME.

DEFENSE OF INTRUDER FROM HOME.

DEFENSE OF INTRUDER FROM HOME.

DEFENSE OF INTRUDER FROM HOME.

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DEFENSE OF INTRUDER FROM HOME.

DEFENSE OF INTRUDER FROM HOME.

without resisting with force slight assaults of an intruder or trespasser, and until he believes or has reason to believe that he is about to sustain some great bodily harm. But he must not use force disproportionate to that used against him, and may not use a deadly weapon unless his own life is imperiled or it is necessary to ward off great bodily harm. *Shires v. Boggess*, 72 W. Va. 109, 77 S. E. 542.

ASSESSED VALUE.—See post, TAXATION; VALUE.

ASSESSMENT.—See post, BENEFICIAL AND BENEVOLENT ASSOCIATIONS; LICENSES; SPECIAL ASSESSMENTS; TAXATIONS.

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CROSS REFERENCES.

See the title ASSIGNMENTS, vol. 1, p. 745, and references there given. In addition, see post, ATTACHMENT AND GARNISHMENT; CONTRACTS; COVENANTS; FIRE INSURANCE; JUSTICES OF THE PEACE; LANDLORD AND TENANT; LICENSES; MECHANICS' LIENS; MINES AND MINERALS; WAREHOUSES AND WAREHOUSEMEN. As to assignment of druggist license for sale of intoxicating liquor, see post, INTOXICATING LIQUORS. As to assignment of lease by lessee, see post, LANDLORD AND TENANT. As to effect of general contractor's assignment of debt upon owner's liability to materialmen, see post, MECHANICS' LIENS.

I. DEFINITIONS AND DISTINCTIONS.

Assigns. — The word "assigns" generally comprehends all those who take either immediately or remotely from or under the assignor, whether by con-

veyance, devise, descent, or act of law. *Ferrell v. Deverick*, 85 W. Va. 1, 100 S. E. 850.

III. WHO MAY MAKE AN ASSIGNMENT.

Negotiable Instrument — Infant or

Corporation.—Va. Code 1919, § 5584; Barnes Code, ch. 98A, § 22.

IV. VALIDITY.

½A. IN GENERAL.

In Fraud of Conditions.—Va. Code 1919, §§ 5184-5186; Barnes Code, ch. 74, § 1; ch. 145, § 23.

V. WHAT MAY BE ASSIGNED.

¼A. STATUTORY PROVISIONS.

The Virginia statute making choses in action assignable, and authorizing an assignee to maintain in his own name any action which the original obligee might have brought, does not create any new causes of action, and has no application to cases in which there is no assignment. *Commonwealth v. Wampler*, 104 Va. 337, 51 S. E. 737.

B. CHOSE EX CONTRACTU.

1. In General.

Money Due at Certain Dates.—Barnes Code, ch. 95, §§ 1, 2; Va. Code 1919, § 5544.

Incorporator's Interest in Charter.—Va. Code 1919, § 3785.

Nonnegotiable Chose in Action.—Va. Code 1919, § 5768; Barnes Code, ch. 99, § 14.

License.—Va. Code 1919, § 2377; Barnes Code, ch. 32, § 37.

Stock.—Va. Code 1919, § 3837; Barnes Code, ch. 53, § 22.

Wages.—Va. Code 1919, § 4154; Va. Acts 1918, ch. 402; Barnes Code, ch. 15H, § 76.

Protection of Laboring Men — Exemptions.—Va. Code 1919, § 6557; Barnes Code, ch. 41, §§ 20a (1), (2).

Water Power Site, Permits, etc.—W. Va. Code Supp. 1918, § 3174f.

County orders are assignable, subject to a right, in the sheriff or collector, to deduct any taxes due from the payee thereof. *State v. Melton*, 62 W. Va. 253, 57 S. E. 729.

Subrogation.—The right of a surety, who has paid the debt of his principal, to be subrogated to the rights and remedies of the creditor against his co-

sureties, may be assigned to, and, under the assignment, enforced by, the assignee. *Weimer v. Talbot*, 56 W. Va. 257, 49 S. E. 372.

Claim against Federal Government.

—The object of § 2377, Rev. Stat., of the United States, declaring void assignments of claims against the government except upon very restricted conditions, was to protect the government, and not the claimant, and to prevent frauds upon the treasury. Such transfers may be disregarded by the government, but may be made in the legitimate course of business, in good faith, to secure any honest debt. A transfer of a claim against the United States government, though not made in accordance with § 3477, Rev. Stat., if valid, will be enforced where the government has voluntarily paid the money due by it into a state court to be disposed of in accordance with the rights of the parties as ascertained by that court. *Hawes v. Trigg Co.*, 110 Va. 165, 65 S. E. 538.

An executory contract for personal services, founded on personal trust or confidence, is not assignable. *Epperson v. Epperson*, 108 Va. 471, 62 S. E. 471.

Where the personal services of another are expressly contracted for, or are necessarily involved in the subject matter of the contract, the contract is founded on personal trust and confidence, and is not assignable until the services have been performed. *McGuire v. Brown*, 114 Va. 235, 76 S. E. 295.

"Every one has a right to select and determine with whom he will contract, and can not have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'you have a right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' * * *. Rights arising out of contract can not be transferred if they are coupled with liabilities, or they involve a relation of personal

confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." *McGuire v. Brown*, 114 Va. 235, 242, 76 S. E. 295.

Interest of Pledgee.—When there has been a total failure of consideration for a negotiable note, which was pledged by the payee as collateral for a sum less than the amount of the note, and the amount for which it was pledged has been paid, and subsequently a judgment is obtained in the name of the pledgee against the maker, the pledgee having received his debt was a mere nominal plaintiff and owned no beneficial interest which he could assign. *Selden v. Williams*, 108 Va. 542, 62 S. E. 380.

4. Accounts.

At common law an unsettled account was not assignable. Under the law as it exists at present such accounts are assignable, and suit may be brought thereon in the name of the assignee. *St. Lawrence, etc., Mfg. Co. v. Price*, 49 W. Va. 432, 38 S. E. 526; *Phillips v. Portsmouth*, 112 Va. 164, 70 S. E. 502.

A debt due from another, though evidenced by an open account, is a chose in action, and the beneficial owner thereof may maintain an action therefor in his own name under the provisions of § 2860 (§ 5768 Va. Code 1919), of the Code. *Phillips v. Portsmouth*, 115 Va. 180, 78 S. E. 651.

6. Agreement to Convey.

Under a contract in writing by which one party, for a valuable consideration, agrees to sell and convey to the other, a tract of land for a specified price within a certain time thereafter, the whole amount of the purchase money to be paid in cash within such time stipulated, or the contract to be void, before payment or tender of the purchase money within the time stipulated, such contract does not vest in the person to whom the offer of sale is made

any title to the land, either legal or equitable, and his assignment of his rights under the contract passes no title to the assignee. *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150.

Option to One and His Assigns.—“In *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150, it was held that where an offer is made to a particular person, and not to a party and his assigns, it could be accepted and enforced by the optionee alone, but the appellate court did not hold that where an option is made to one and his assigns that it is not assignable, but this question was expressly left open. The correct rule appears to be that it is assignable, and the assignee will be invested with all the rights of the original optionee.” *Fulton v. Messenger*, 61 W. Va. 477, 483, 56 S. E. 830.

8. Liens.

Where an attorney has a lien upon a judgment obtained by him for his client, for his services in the case, such lien is assignable and may be enforced by the assignee though the assignor by his assignment, has lost his right to enforce it. *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276. See post, ATTORNEY AND CLIENT.

9. Covenants.

Breach of Covenant.—Right of action for a breach of covenant is assignable. *Millan v. Bartlott*, 78 W. Va. 367, 89 S. E. 711.

13. Insurance Policies.

See post, LIFE INSURANCE.
Life Insurance Policies.—Va. Code 1919, § 5767.

14. Leases.

Va. Code 1919, §§ 5512, 5515; Barnes Code, ch. 93, §§ 2, 4.

“It is settled law that, in the absence of express prohibition, all leases are assignable.” *Wainwright v. Bankers' Loan, etc., Co.*, 112 Va. 630, 633, 72 S. E. 129. See post, LANDLORD AND TENANT.

C. CHOSSES EX DELICTO.

Va. Code 1919, § 5790, as amended by Va. Acts 1920, p. 27.

Injury to Property.—A right of action against a common carrier for injury to goods while in course of transportation is assignable. *Williamsport Hardwood Lumber Co. v. Baltimore, etc., R. Co.*, 71 W. Va. 741, 77 S. E. 333.

Where a lower proprietor of land is damaged by the permanent diversion of water from a stream by a city, and after the diversion such proprietor sells and conveys his property thus damaged to a third person and assigns to him all the assignor's rights to and claims for damages resulting from such diversion, the purchaser is thus clothed, as grantee and assignee, with all the rights which belonged to the owner of the property at the time of the diversion, and has the right to recover the damages resulting from such diversion. Such damages are a legitimate subject of assignment, and it is immaterial that the assignee was also the grantee of the land who purchased it at a reduced price in consequence of the diversion. *Lynchburg v. Mitchell*, 114 Va. 229, 76 S. E. 286.

Vendor's Fraud.—A cause of action for fraud or deceit by the grantor respecting the acreage in the sale and conveyance of land is assignable. *Miller v. Starcher*, 86 W. Va. 90, 102 S. E. 809.

Liability of Individual Members of Board of Education.—A cause of action from the liability of the individual members of a board of education to a party prejudiced by the acts of such board in making contracts, or incurring obligations in excess of its available funds, in violation of § 25 of chapter 45 of the Code, is assignable. *Doss v. O'Toole*, 80 W. Va. 46, 92 S. E. 139.

Penalties.—A right of action for a penalty, given by § 7 of chapter 79 of the Code (Barnes Code, ch. 79, § 7), is not assignable. *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083.

"Obviously, the penalty given by the statute here in question is not intended as compensation for coal taken or damage to property. It may be incurred without the taking of any coal from the land of the party entitled to sue. The taking of any coal at all within five feet of the division line and out of the land belonging to the taker himself, inflicts the penalty. The foundation of the right of action, therefore, is not benefit obtained by the defendant from the plaintiff. It rests upon no consideration, nor is it given as compensation for any actual injury. The enactment of it seems to have been nothing more than an exercise of the police power of the state and the penalty to have been prescribed by way of sanction for the enforcement of the policy declared by the statute." *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083.

"The assignability of statutory rights, not all of which are penalties by any means, is said to depend upon the language of the statute conferring them. 'If the statute forbids the assignment of a right conferred by it, or if the legislative intent, as shown by the act, is to confer a right strictly personal to the person upon whom it is conferred, then such act is not assignable. In the absence of such express or implied prohibition, the assignability or non-assignability of rights conferred by statute is to be governed by the principles governing the assignability or non-assignability of choses in action in general. Statutory rights giving compensation for property loss suffered are, generally, said to be assignable, whereas rights to recover penalties and rights given by statute for the redress of personal wrongs are not assignable.'" *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083.

D. EXECUTORY DEVISE.

See post, REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS.

Where a possible taker under an executory devise is designated by class, and he should die before the testator, if the will speaks as of that time in designating the person to take, the survivors of the class will take; but if he survives such time, his interest, under an executory devise, equally as if it were a contingent remainder, is descendible, and assignable in equity, and also at law, certainly by virtue of the statute (§ 2418, Code of 1887 [§ 5147, Va. Code 1919]) in Virginia. Many of the authorities hold that the same is true at common law since the statute of uses and of wills dispensing with livery of seisin. *Prince v. Barham*, 127 Va. 462, 103 S. E. 626.

In such case, it is true, the interest which is thus transmissible may be reduced in quantum, pro tanto, by the number in the class being increased, as permitted by the terms of the will; for example, by after-born children (when children of a certain person is the designation of the class), pending the happening of the event appointed for the vesting of the estate in possession. *Prince v. Barham*, 127 Va. 462, 103 S. E. 626.

VI. WHAT CONSTITUTES AN ASSIGNMENT.

1/2A. IN GENERAL.

Land Office Warrants.—Va. Code 1919, § 460.

License.—Va. Code 1919, § 2377; Barnes Code, ch. 32, § 37.

Check.—Va. Code 1919, § 5751; Barnes Code 1919, ch. 98A, § 189.

Bill of Exchange.—Va. Code 1919, § 5699; Barnes Code, ch. 98A, § 127.

Lien for Purchase Money.—W. Va. Acts 1921, ch. 62, p. 175, amending Barnes Code, ch. 76, § 2.

Mortgage Liens.—W. Va. Acts 1921, ch. 62, p. 175, amending Barnes Code, ch. 76, § 2.

A contract, purporting to be a sale or transfer of wages due, held to be a collateral security for a loan; and whether it was made with intent to

defraud, held to be a question for the jury. *Fetty v. Huntington Loan Co.*, 70 W. Va. 688, 74 S. E. 956.

Unaccepted Draft.—Under § 127 of the negotiable instruments act, a draft does not operate as an assignment of the funds in the hands of the drawee available for its payment, and the drawee, not having accepted the same, is not liable thereon, nor has the holder any lien on, title to, or ownership in the fund of the drawer in the hands of the drawee. *Jones v. Crumpler*, 119 Va. 143, 89 S. E. 232.

A. NO PARTICULAR FORM NECESSARY.

See post, "Equitable Assignments," VI, C.

1/2. In General.

No particular form of words is essential to pass the right; words manifesting a clear intention to assign are sufficient. *Millan v. Bartlett*, 78 W. Va. 367, 89 S. E. 711.

"The law is that a note may be assigned either in writing or by word of mouth with delivery." *Horner v. Amick*, 64 W. Va. 172, 174, 61 S. E. 40, citing *Wilt v. Huffman*, 46 W. Va. 473, 33 S. E. 279.

Assignment of Chose in Action by Delivery.—A chose in action may be assigned by delivery without writing or other formality. (Chancery Court for City of Richmond.) *New York Life Ins. Co. v. Farthings*, 1 Va. Law Reg., N. S. 587.

1. Intention.

See post, "Equitable Assignments," VI, C.

3. By Parol.

See ante, "In General," VI, A, 1/2.

Where a valid and binding contract for the sale of a chose in action has been entered into between parties, the obligation of the parties thereunder is not affected by the failure of the seller to execute a formal assignment thereof to the buyer; and the buyer can not escape liability for the agreed price on

account of the failure of the seller to make a formal assignment, which he has, at all times, been ready and willing to make. The contract is not incomplete. *Hughes v. Burwell*, 113 Va. 598, 75 S. E. 230. See post, INSTRUCTIONS.

Stock.—A certificate is not necessary to a sale of shares. The beneficial interest in them is assignable by parol, the ownership passing immediately on consummation of the sale, by force of the contract, as in the case of ordinary choses in action, and not by operation of law. *Lipscomb v. Condon*, 58 W. Va. 416, 49 S. E. 392.

B. NECESSITY FOR DELIVERY, ETC.

In order to constitute a valid assignment of a chose in action, the assignor must part with his power of control over it, and the evidence of the assignment must be so delivered as to be irrevocable by the assignor. *Coffman v. Liggett*, 107 Va. 418, 59 S. E. 392.

C. EQUITABLE ASSIGNMENTS.

Form. — Equity looks at the substance of a transaction, and not its mere form. No particular form of words is necessary to constitute a valid assignment in equity of a chose in action. The intention of the assignor is the controlling consideration. If the owner of a chose in action, for a valuable consideration, signs and delivers a writing whereby he intends to part with his ownership, whether it be to the use of the assignee or of a third person, or to apply the proceeds to a specific purpose other than for the use and benefit of the assignor, it is a valid equitable assignment, regardless of the particular language used. It is sufficient if the debtor would be protected in making payment thereon. *Rinehart, etc., Co. v. McArthur*, 123 Va. 556, 96 S. E. 829.

"Words which show an intention of transferring or appropriating a chose in action to or for the use of another,

if based upon a valuable consideration, will, in contemplation of a court of equity, operate as an assignment." *Hawes v. Trigg Co.*, 110 Va. 165, 172, 65 S. E. 538.

Gift of Chose in Action.—Although the gift of a chose in action is an equitable gift, it must be executed in order to be valid. The delivery of some instrument by using which the chose is to be reduced into possession, as a bond or a receipt or the like, is absolutely essential to the validity of the gift. The delivery of such instrument need not be actual; it may be symbolical. *Poff v. Poff*, 128 Va. 63, 104 S. E. 719.

Where a previously existing debt is sought to be given of which there is no documentary evidence, as where there is but an implied promise of the debtor to pay the creditor, "there is nothing of which even a symbolical delivery can be made, and therefore, there can be no valid, binding, and executed gift." *Poff v. Poff*, 128 Va. 62, 104 S. E. 719.

Contract with United States.—If a shipbuilding company deposits with a bank, as a security for loans, a contract with the United States government for the construction of a vessel, and executes to the bank a power of attorney, authorizing the bank to collect all payments made by the government under said contract, and, on the faith of such deposit and power of attorney, the bank makes loans to said company, this transaction constitutes, under the laws of this state, a valid assignment or hypothecation of said contract with the government. *Hawes v. Trigg Co.*, 110 Va. 165, 65 S. E. 538.

Orders—Assignment in Equity—Sufficiency.—An order for the payment of money is a sufficient assignment in equity if the debtor would be protected in making payment thereon. No particular form is necessary. *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

Where an order is drawn for a certain sum to be paid out of a particular

fund, and the amount of the order is not equal to the entire fund, such order operates as an equitable assignment of such fund or debt pro tanto, and while a court of law will not so recognize it by permitting an action to be maintained thereon, yet a court of equity will recognize and enforce it. *Wamsley v. Ward*, 61 W. Va. 65, 55 S. E. 998.

An order was drawn for \$750 by a contractor on a landowner, payable to a materialman who had furnished materials for a residence being erected on the land by the contractor. The landowner had notice of the order. Held: That the order was an equitable assignment, pro tanto, of the fund in the hands of the landowner then due or thereafter to become due, to the contractor from the landowner, on the contract price of the residence. *Watson v. Brunner*, 128 Va. 600, 105 S. E. 97.

Order by Mother to Attorneys to Pay Daughter Part of Judgment Never Collected by Them.—The daughter could not recover against the administrator, as the writing in question did not operate either as a gift or an equitable assignment of a part of the judgment. *Gardner v. Moore*, 122 Va. 10, 94 S. E. 162.

The instrument described in the preceding syllabus does not purport to be an assignment, and makes no mention of the judgment or other fund out of which it is to be paid. It measures up exactly to what § 126 of the negotiable instruments law (§ 5688, Va. Code 1919) declares to be bill of exchange, and which by the next section it declares, "of itself does not operate as assignment of the funds in the hands of the drawee available for the payment thereof." Code, § 2841a, clauses 126, 127 (§§ 5688, 5689, Va. Code 1919). The court can not declare that to be a common law assignment which the statute says is a negotiable bill of exchange, nor that such a bill shall operate as an assignment when the stat-

ute says it shall not so operate. The fact that the donor had no other estate than the judgment can not affect the legal interpretation of the instrument of supposed donation. The same results would have followed if the donor had used an insufficiently executed will as the instrument of donation. As the instrument was not an assignment delivery of it was not a sufficient delivery to complete the gift. *Gardner v. Moore*, 122 Va. 10, 94 S. E. 162.

Conditional.—A valid equitable assignment may be conditional. *Russell v. Passmore*, 127 Va. 475, 103 S. E. 652.

A mere agreement to pay a debt out of a designated fund, when received, does not give an equitable lien on the fund, nor operate as an equitable assignment of it. Something more is necessary. To constitute an equitable assignment there must be an assignment or transfer of the fund or some definite portion of it, so that the person owing the debt or holding the fund on which the order is drawn can safely pay the order, and is compellable to do so, though forbidden by the drawer. *Ward v. Winchester*, 11 Va. Law Reg. 501.

D. PARTIAL ASSIGNMENTS.

A paper, assigning a demand, in general terms, to a named person and others therein named, and declaring the purpose of the assignment to be payment of a certain debt, described, to each of the persons named, and the residue, if any, to be intended for the assignor, is construed and held to be an assignment of certain parts of the debt to each of the persons named. *Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507.

A deed of trust on a chose in action is an assignment pro tanto of the chose, and an action thereon in the name of the assignor for the benefit of himself and the creditor secured is properly brought. *Newton v. White*, 115 Va. 844, 80 S. E. 561.

A single cause of action can not be subdivided by various assignments,

without the consent of the debtor, so as to enable each assignee to institute an action at law in his name for the part so assigned to him. Such subdivision is not in accord with the debtor's contract, and might subject him to many embarrassments and responsibilities not contemplated in his original contract. *Phillips v. Portsmouth*, 112 Va. 164, 70 S. E. 502; *Newton v. White*, 115 Va. 844, 850, 80 S. E. 561.

As to jurisdiction of a suit to recover partial assignments, see post, "Pleading and Practice, etc.," VIII.

E. NECESSITY FOR AND SUFFICIENCY OF CONSIDERATION.

An order upon a fund deposited with a clerk of court to abide the future decree of the court, given as security, in part, for an existing debt, is founded upon a valuable consideration, and it is immaterial that the beneficiary did not know of the order when it was given. The subsequent acceptance of it related back to the time it was given. *Rinehart, etc., Co. v. McArthur*, 123 Va. 556, 96 S. E. 829.

VII. EFFECT OF ASSIGNMENT.

½A. IN GENERAL.

Assignment "Without Recourse."—The fact that a note is assigned without recourse casts no suspicion upon the holder's title. *Dollar Sav., etc., Co. v. Crawford*, 69 W. Va. 109, 70 S. E. 1089.

Revocation—Case at Bar.—M., by his counsel, deposited a fund with a clerk of court to abide the event of a suit pending. Thereafter, M. gave an order in writing to his counsel to pay over the fund when "of not further service in" the suit pending to the R. & D. Co. Counsel for M. was also counsel for the R. & D. Co. The order was supported by a valuable consideration and M. intended by it to transfer the fund to R. & D. Co. Held: That this constituted a valid equitable assignment of fund, which was irrevocable

by M. *Rinehart, etc., Co. v. McArthur*, 123 Va. 556, 96 S. E. 829.

Conditional Equitable Assignment—When Title Passes.—A valid equitable assignment may, of course, be conditional. And if the condition be a subsequent condition, although it has power to divest the equitable title to the gift, yet if that condition does not arise, the title, by relation, is regarded as complete and absolute from the time of the gift. And when such condition involves a possible revocation of the gift by the donor in his lifetime, on his death without having exercised such power, upon the same principle as that which is involved in gifts causa mortis, the equitable title does not await until after the death of the donor to pass to the beneficiary, so as to become a testamentary disposition, but is regarded as having passed in the lifetime of the donor at the time of the gift—where the gift is in proper form to be effectual, as, of course, is unquestionably true where the possession of the subject of the gift is given by the donor to a trustee who accepts the trust, all in the lifetime of the donor. *Russell v. Passmore*, 127 Va. 475, 103 S. E. 652.

A. ASSIGNEE TAKES SUBJECT TO EQUITIES.

1. In General.

Where a judgment debtor of an insolvent person is surety for such insolvent person, and the amount of his liability as such surety has not yet been determined, a court of equity will enjoin the collection of the judgment against him in favor of such insolvent party until such amount has been ascertained, and if paid by him applied as an offset against the judgment, or until he has been indemnified against loss because of his suretyship, and the fact that such insolvent party may have assigned such judgment to another will make no difference. The assignee will occupy no higher ground than his

insolvent assignor. *Hughes v. McDermitt*, 86 W. Va. 86, 102 S. E. 767.

The assignee of a nonnegotiable obligation can take no rights which his assignor did not possess, and generally make no defense he could not make. *Selden v. Williams*, 108 Va. 542, 62 S. E. 380.

In an action by the pledgee of a promissory note which has been pledged for a less sum than the amount of the note, the pledgee can not deprive the maker of all equitable defenses against the pledgor who is still a part owner of the note. *Selden v. Williams*, 108 Va. 542, 62 S. E. 380.

The recovery of a judgment by the payee of a negotiable note against the maker destroys its further negotiability, and the assignee of such judgment takes it subject to all equities of the debtor against the assignor existing at the date of the assignment or arising thereafter before the debtor had notice of it. Such assignee can take no rights which his assignor did not have, and generally can make no defense which he could not make. This is the rule of the law though the assignment were bona fide, for value, and without notice of the equity. *Selden v. Williams*, 108 Va. 542, 62 S. E. 380.

B. ASSIGNMENT OF THE CHOSE CARRIES THE SECURITY.

The endorsement or assignment of a note or other evidence of debt, secured by trust deed, carries with it and incident thereto the benefit of the lien of such trust deed, unless excluded expressly or by fair and reasonable implication. *Emmons v. Hawk*, 62 W. Va. 526, 59 S. E. 519.

C. RIGHTS AND LIABILITIES OF PARTIES.

½. In General

Execution — Assignees of County Treasurer.—Va. Code 1919, § 2433.

Assignee of Purchaser of Delinquent Land.—Va. Code 1919, §§ 2484, 2486; Barnes Code, ch. 31, §§ 18, 19, 33. See post, TAXATION.

Assignee of Incorporator's Interest.—Va. Code 1919, § 3785. See post, CORPORATIONS.

Stock—Liability of Assignee.—Va. Code 1919, § 3837; Barnes Code, ch. 53, § 37. See post, STOCK AND STOCKHOLDERS.

Assignee of Lease.—Va. Code 1919, § 5512; Barnes Code, ch. 93, §§ 2, 4. See post, LANDLORD AND TENANT.

Rent—Assignee of Lessee.—Va. Code 1919, § 5521; Barnes Code, ch. 93, § 9. See post, LANDLORD AND TENANT.

Same — Liability of Goods of Assignee.—Va. Code 1919, § 5523; Barnes Code, ch. 93, § 11. See post, LANDLORD AND TENANT.

Contract of Contractor or Subcontractor.—Va. Code 1919, § 6435. See post, CONTRACTS; INDEPENDENT CONTRACTORS.

Lien of Employees of Transportation Companies, etc.—Va. Code 1919, §§ 6438, 6439.

Labor or Supply—Lien against Corporation.—Va. Code 1919, § 6440. See post, LIENS; MECHANICS' LIENS.

Property Subject to Lien of Execution.—Va. Code 1919, § 6501. See post, EXECUTIONS.

Partner's Interest.—Va. Acts 1918, chap. 365. See post, PARTNERSHIP.

Chose in Action.—The assignee of a chose in action assigned as collateral for a debt of less amount may recover the whole amount, but will hold the surplus as trustee for the assignor. *Selden v. Williams*, 108 Va. 542, 62 S. E. 380. See ante, "Assignee Takes Subject to Equities," VII, A.

Subsequent Transaction between Assignor and Debtor.—After notice of an assignment of a note and a promise to the assignee to pay the same, no subsequent transactions between the assignor and the debtor can invalidate the note in the hands of the assignee. *Eberly & Co. v. Gibson*, 107 Va. 315, 58 S. E. 591.

Want of Consideration in Assign-

ment.—Where an assignee of an open account maintains an action at law thereon in his own name under § 14, ch. 99, Code of 1899, of West Virginia (Barnes Code, ch. 99, § 14), the debtor will not be permitted to defeat the action by showing want, or inadequacy, of consideration for the assignment. *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243.

1. Rights of Assignor after Assignment.

If a broker be employed by contract in writing to sell land on commission, and before or after procuring from his principal the execution of an option contract to a prospective purchaser, for a valuable consideration, sells and assigns to the optionee in such contract, all his right, title and interest in and to his commission contract, he can not thereafter, on consummation of such sale recover of his principal the commissions stipulated for in his brokerage contract. *Harne v. Pike*, 70 W. Va. 489, 74 S. E. 514.

3. Assignee May Make Same Defenses as Assignor.

Set-Off.—Va. Code 1919, §§ 6148-6150.

4. Warranties of Validity by Assignor.

Sale of an interest in a logging contract, accompanied by a representation by the vendor of his clear right to sell and assign it and inducement of the vendee to forego inquiry as to such right, made and done with knowledge that the right of assignment was denied and would be resisted by the party for whom the logging was to be done, amounts to a warranty and is broken by the inability of the vendee to obtain the benefit thereof by reason of the assignment. *Myers v. Cook*, 87 W. Va. 265, 104 S. E. 593.

In such case, the vendee is entitled to an abatement from the purchase money to the extent of the damages occasioned by the breach of the warranty, by way of recoupment. *Myers v. Cook*, 87 W. Va. 265, 104 S. E. 593.

Where Assignment without Recourse.—In the transfer of a chose of action by an assignment "without recourse," there is an implied warranty by the assignor against loss to the assignee by entire or partial failure of consideration. *Trustees v. Siers*, 68 W. Va. 125, 69 S. E. 468.

Failure of Consideration.—Loss by an assignee of a portion of a bond, given by a building and loan association, for the supposed ultimate value of certain of its shares, by reason of a great excess in the amount of the bond above the actual value of the shares, at the date of the execution thereof, is attributable to failure of consideration, in an action by the assignee against the assignor, not insolvency of the association, the latter being regarded in law as a mere remote and antecedent cause, superinducing the real, proximate cause of loss between the parties to the assignment. *Trustees v. Siers*, 68 W. Va. 125, 69 S. E. 468.

5. Right to Go against Assignor.

a. In General.

See ante, "Warranties of Validity by Assignor," VII, C, 4.

6. Priority of Assignments.

A valid assignment of a chose in action made by a manufacturing company is superior to liens for labor and supplies (under § 2485 of the Code, Va. Code 1919, § 6438) furnished more than two years thereafter. *Hawes v. Trigg Co.*, 110 Va. 165, 65 S. E. 538.

Where a commissioner is directed to convey to a purchaser land sold at a judicial sale, subject to the lien of a judgment, reserving a vendor's lien in the conveyance to secure the sums due assignees of different parts of the judgment, respectively, the liens of the assignees are of equal dignity where there is no supervening equity growing out of the order of assignment which disturbs the equality of the rights of the assignees. *Davis v. Rolter*, 106 Va. 46, 55 S. E. 4.

As between two bona fide assignees

for value of an insurance policy, the second assignee will be preferred where it appears that he not only took his assignment in good faith and for full value and without notice or knowledge of the prior assignment, but also gave notice of his assignment in writing to the insurer, and was recognized and accepted by it in writing as such assignee, and acquired the complete legal and equitable title to the policy; whereas, the first assignee did not even know of the existence of his assignment and hence took no steps to protect his interest. Where equities are equal, the law will prevail. *Coffman v. Liggett*, 107 Va. 418, 59 S. E. 392.

7. Attachment and Garnishment.

See post, ATTACHMENT AND GARNISHMENT.

Assignment Ground for Attachment.—Va. Code 1919, § 6379.

D. RIGHT TO SUE.

See ante, "Partial Assignments," VI, D.

1. At Law.

Conditions Precedent.—The verbal promise of a debtor to pay the assignee of a claim, upon performance by him of conditions precedent to the maturity of the cause of action, binding upon his assignor, will not, because without consideration, support an action based on such promise. The assignee can not recover the debt assigned, except upon performance of the obligations of his assignor, by contract made on conditions precedent to the maturity and payment of such debt. *Whan v. Hope Natural Gas Co.*, 81 W. Va. 338, 94 S. E. 365.

Nonnegotiable Instruments.—Barnes Code, ch. 99, § 14.

Assignees of Nonnegotiable Choses in Action.—Va. Code 1919, § 5768; Barnes Code ch. 106, § 1.

The assignee or beneficial owner of a contract may, under the express provisions of § 2860 of the Code (§ 5768 Va. Code 1919), maintain an action thereon in his own name. *Oliver Re-*

fin. Co. v. Portsmouth, etc., Refin. Corp., 109 Va. 513, 64 S. E. 56.

Life Insurance Policies.—Va. Code 1919, § 5767.

Rent.—Va. Code 1919, § 5520; Barnes Code, ch. 93, § 8.

The assignment of a judgment does not carry with it, as an incident, the right to sue the sheriff and the sureties on his official bond for a breach of the condition thereof occurring prior to the assignment by reason of his failure to return, in the time and manner required by law, a forthcoming bond taken upon such judgment. *Commonwealth v. Wampler*, 104 Va. 337, 51 S. E. 737.

Remote Assignor.—"There being no charge nor evidence of fraud or deceit, on the part of the defendant, this action could not have been maintained against him at common law, because he is a remote assignor with whom the plaintiff had no contract. * * *. His transaction was had with Boughner and Sons. It was they, not the plaintiff, that paid him money for the bond. He made no contract with the plaintiff. But our statute, chap. 99, § 15 (Barnes Code, ch. 99, § 15), overcomes this difficulty. The assignee may sue a remote assignor on his implied warranty." *Trustees v. Siers*, 68 W. Va. 125, 127, 69 S. E. 468.

Cause of Action for Fraud.—A cause of action for fraud and deceit by the grantor respecting the acreage in the sale and conveyance of land, is assignable, and the assignor, notwithstanding § 14 of chapter 99 of the Code (Barnes Code, ch. 99, § 14), may in his own name maintain an action against the grantor in such deed for the use and benefit of his assignee. *Miller v. Starcher*, 86 W. Va. 90, 102 S. E. 809.

Reassignment.—In an action on a note by an assignee thereof, which before judgment is reassigned by him to the payee, the assignee, in whose name the suit is brought, will not by such reassignment be divested of the title to the note, so as to prevent re-

covery thereon in his name, for the benefit of said payee. *Watkins v. Angotti*, 65 W. Va. 193, 63 S. E. 969.

Right to Maintain Action in Name of Alleged Assignor.—A claimant of a penalty by an attempted assignment from the person entitled to sue therefor can not maintain an action for it, in the name of his alleged assignor. *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083, distinguishing *Stevens v. Brown*, 20 W. Va. 450.

2. In Equity.

Assignees of Chose in Action.—Va. Code 1919, § 5770; Barnes Code, ch. 99, § 14.

VIII. PLEADING AND PRACTICE, ETC.

¼A. JURISDICTION.

Equity.—Va. Code 1919, § 5770; Barnes Code, ch. 99, §§ 14, 16. See generally, post, EQUITY.

Partial Assignments.—For the enforcement of payment of a part of a debt, assigned by the creditors without the assent or acceptance of the debtor, there is no jurisdiction in a court of law, but such partial recovery may be had in a court of equity. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507; *Phillips v. Portsmouth*, 112 Va. 164, 70 S. E. 502.

½A. PLEADING IN GENERAL.

In an action against the debtor by an assignee of the debt it is unnecessary to aver the date of the assignment or notice thereof to the defendant. *Danser v. Mallonee*, 77 W. Va. 26, 86 S. E. 895.

Demurrer.—The objection of the non-assignability of a penalty given by § 7, ch. 71 of the Code of 1906 is available on demurrer to the declaration. *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083.

A. ALLEGATIONS OF PAYMENT OR NONPAYMENT.

But the declaration in an action founded upon an assignment, which

fails to aver non-payment to the assignor and to all other persons who at any time subsequent to the maturity of the debt were entitled to receive payment, is fatally defective on demurrer and the demurrer should be sustained. *Danser v. Mallonee*, 77 W. Va. 26, 86 S. E. 895.

B. PROOF OF ASSIGNMENT.

Necessity for.—Va. Code 1919, § 6125; Barnes Code, ch. 125, § 40.

Assignment of Policy—Sufficiency of Evidence.—Evidence of the declarations of the insured together with the facts of the transfer to him of property by the assignee was held sufficient proof that the policy was assigned with intent to pass title. (Chancery Court for City of Richmond.) *New York Life Ins. Co. v. Farthings*, 1 Va. Law Reg., N. S. 587.

West Virginia Statutes.—"The statute, the Code, chap. 125, § 40 (Barnes Code, ch. 125, § 40), dispensing with proof of written assignment where a written assignment is alleged, has no application to an oral assignment. It applies only to a written assignment written as such." *Horner v. Amick*, 64 W. Va. 172, 174, 61 S. E. 40, citing *Clason v. Parrish*, 93 Va. 24, 24 S. E. 471.

In a suit on a promissory note by an assignee the bill simply stating that the note was assigned to the plaintiff by its payee, not alleging a written assignment, and an answer denies the assignment, the plaintiff must prove it, though such answer is unsworn. *Horner v. Amick*, 64 W. Va. 172, 61 S. E. 40.

D. STATUTE OF LIMITATIONS.

Voluntary Assignments.—Va. Code 1919, § 5820; Barnes Code, ch. 104, § 14.

Unauthorized Expenditures by Board of Education.—A cause of action from the liability of the individual members of a board of education to a party prejudiced by the acts of such board in making contracts, or incurring ob-

ligations in excess of its available funds, in violation of § 25 of chapter 45 of the Code (Barnes Code, ch. 45, § 25), is assignable and the right to sue therefor is barred by the statute of limitations in five years under the provisions of § 12 of chapter 104 of the Code (Barnes Code, ch. 104, § 12). *Doss v. O'Toole*, 80 W. Va. 46, 92 S. E. 139.

F. PARTIES.

Plea of Set-Off.—Va. Code 1919, § 6150.

Where the plaintiff sues as assignee of a bond and the defendant relies upon payments to, and set-offs against, the assignor before notice of the assignment, in excess of the amount of the bond, and the defense is sustained, and the assignor is not made a party to the suit, judgment should simply be entered for the defendant. *Newberry v. Watts*, 116 Va. 730, 82 S. E. 703.

Defendants — Joinder.—Va. Code 1919, § 5769; Barnes Code, ch. 99, § 15.

Assignees.—A party who has parted with the legal title to, and beneficial ownership in, a chose in action can not maintain a suit thereon for its enforcement to which the beneficial owners are not parties. If it is sought to annul the assignment of the beneficial ownership and to enforce the contract against the other party thereto in the same suit, the beneficial assignees are necessary and indispensable parties to the suit. All persons interested in the subject matter of a suit, and to be affected by its results, are necessary parties. *Sweeney v. Foster*, 112 Va. 499, 71 S. E. 548. See post, PARTIES.

"Speaking of partial assignments, Burks on Pleading, at page 56, says: 'If partial assignments have been made,

the action must be in the name of the assignor. A single cause of action arising on an entire contract can not be divided by partial assignments so as to enable each assignee to sue for the part assigned.' Citing *Phillips v. Portsmouth*, 112 Va. 164, 70 S. E. 502." *Newton v. White*, 115 Va. 844, 850, 80 S. E. 561.

IX. EVIDENCE.

See ante, "Proof of Assignment," VIII, B.

1/2A. PRESUMPTIONS AND BURDEN OF PROOF.

Acceptance of Assignment.—An assignment as security for an existing debt is founded on a valuable consideration, and its acceptance will be presumed until the contrary appears. *Rinehart, etc., Co. v. McArthur*, 123 Va. 556, 96 S. E. 829.

Notice of Assignment.—In an action of debt on a bond by an assignee where the only pleas are payments to and set-offs against the assignor, the burden of proving notice of the assignment is upon the plaintiff. *Newberry v. Watts*, 116 Va. 730, 82 S. E. 703.

X. RECORDATION OF ASSIGNMENTS, ETC.

W. Va. Acts 1921, ch. 61, p. 173, amending Barnes Code, ch. 74, by adding thereto § 11; Va. Code 1919, § 6457.

Necessity.—A bill of sale or assignment of a lease of real estate, giving an estate therein for a term of three years, is not required to be recorded, in order to give title as against creditors of the vendor. *Speidel Grocery Co. v. Stark & Co.*, 62 W. Va. 512, 59 S. E. 498.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

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CROSS REFERENCES.

See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799, and references there given. In addition, see post, BANKRUPTCY AND INSOLVENCY; BANKS AND BANKING; CORPORATIONS; JUDICIAL SALES AND RENTINGS; MORTGAGES AND DEEDS OF TRUST.

III. WHO MAY ASSIGN.

A. CORPORATIONS.

Although a bank is hopelessly insolvent, directors have not power to execute a general deed of assignment of all its property for the equal benefit of

all of its creditors. Such a deed can only be lawfully executed by the stockholders. If executed by the directors, however, though in excess of their authority, it is not wholly void, but is capable of being rendered valid by ratification or acquiescence, and.

in the case in judgment, the whole course of dealing bearing upon the subject and the conduct of the litigation shows that the deed executed by the directors has been ratified and acquiesced in by the stockholders and the conduct of directors has been such as to estop them to deny its due execution. *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756. See generally, post, BANKS AND BANKING.

VI. REQUISITES AND VALIDITY. ½A. IN GENERAL.

Debts Secured. — A provision in a deed of trust executed with the declared purpose of securing all the debtor's creditors without discrimination, which secures in addition to the debts named in the deed, such debts as may have been inadvertently omitted, and which may be admitted by the grantor or otherwise shown to be correct is valid. *Davis Co. v. Augustus*, 105 Va. 843, 54 S. E. 985.

A description in a deed of trust to secure creditors of the property conveyed as "all the stock of goods owned by the grantor situated in the storehouse now occupied by him. No. 1028 Main Street, Lynchburg, Va.; and also all cash in bank, any and all accounts or other choses in action which may be owned by the said A.; also the lease on the said storehouse, his merchant's license, and any other right owned by said A. in connection with his business at said place," is sufficient. *Davis Co. v. Augustus*, 105 Va. 843, 844, 54 S. E. 985.

VII. PREFERENCES.

B. UNDER THE STATUTES.

Preference Void as to Creditors. — *Barnes Code*, ch. 74, §§ 1, 2; *Va. Code* 1919, § 5185.

It is lawful in Virginia for a debtor, though insolvent, to prefer certain of his creditors in a deed of assignment, and such preference is neither fraudulent, per se nor a badge of fraud. *Breeden v. Peale*, 106 Va. 39, 55 S. E. 2.

Where no actual fraud is charged or proved, § 2, chapter 74, *Code* 1906 (*Barnes Code*, ch. 74, § 2), does not avoid a deed intended as a preference in toto; it only avoids it as a preference, and thereby converts it into a general assignment for the benefit of all creditors, on suit brought for that purpose within the time limited by the statute. *Westinghouse Lamp Co. v. Ingram*, 70 W. Va. 664, 74 S. E. 941.

VIII. RESERVATIONS AND STIPULATIONS AND OTHER PROVISIONS.

½A. IN GENERAL.

Debts Admitted by Grantor. — A provision in a deed of trust to secure creditors for the payment of debts admitted by the grantor or otherwise shown to be correct, and that the approval of the grantor may be taken by the trustees as conclusive of the correctness of the debts, accompanied by a provision authorizing the trustees to adjust and correct any debt incorrectly stated in the deed and to pay the same according to the true amount thereof, is not objectionable on the ground that it binds the trustees to pay all debts that are admitted by the grantor without reference to their correctness. Under the accompanying provisions the trustees may take the approval of a debt by the grantor as conclusive of its correctness, but they are not bound to do so, and even independently of this provision it would be the duty of the trustees to determine the true amount of the claims to be paid by them. *Davis Co. v. Augustus*, 105 Va. 843, 845, 54 S. E. 985.

Submission of Statement to General Creditors. — A provision in a deed of trust to secure creditors that after the trustees have ascertained all creditors and after all the money to be realized has come into their hands, or a sufficient proportion thereof to enable the creditors to approximate the amount, they shall submit such statement to the general creditors as will enable them

to approximate the proportion of their claims which will be paid from the trust fund, and to act advisedly, is not objectionable in that it does not afford the creditors a reasonable time within which to make their election, and fails to specify a time within which they may obtain such information as the deed does not afford them, and decide understandingly whether or not to accept the deed. Such provision means that when the statement is furnished a reasonable time will be given the creditors in which to act, and this is all that can be asked or required. *Davis Co. v. Augustus*, 105 Va. 843, 54 S. E. 985.

C. STIPULATIONS FOR RELEASE OF DEBTOR.

1. In General.

A provision in a deed of assignment by a debtor of all his property for the payment of his debts, which stipulates for his release by his creditors from personal liability for such part of their debts as the funds may not discharge, is valid. *Davis Co. v. Augustus*, 105 Va. 843, 54 S. E. 985.

D. DISCRETIONARY POWERS OF TRUSTEES.

3. Compromises by Trustee.

A clause in a deed of trust to secure creditors authorizing the trustees to compromise and adjust on such terms as they may deem expedient any claims which may be in dispute as to validity or amount, is unobjectionable. This provision does not authorize the trustees to compromise and adjust any or all claims, but only such as to which there is a bona fide dispute or question, leaving them to pay the amount due. *Davis Co. v. Augustus*, 105 Va. 843, 54 S. E. 985.

E. PRESENTMENT OF CLAIMS.

A provision in a deed of trust to secure creditors that the trustees may give notice to any creditor not named in the deed, by advertising in a daily paper for a period of five days, to pre-

sent his claim, and that after the expiration of ten days from the first publication the trustees shall proceed with the execution of the trust upon the hypothesis that there are no other creditors than such as may have then presented their claims, unless such other claims shall thereafter be presented before the actual distribution of the fund, does not apply to the creditors named in the deed. *Davis Co. v. Augustus*, 105 Va. 843, 54 S. E. 985.

IX. FRAUD.

A. HOW ASCERTAINED.

See ante, "In General," VI, ½A.

A clause in a deed of trust to secure creditors providing for the payment out of the money realized a fee to the trustees, in addition to commissioners, for such legal services as they may render the trust in their capacity as lawyers, does not show on its face a conclusive purpose or intention to hinder, delay, or defraud creditors, though from considerations of prudence it might have been best not to have embraced it in the deed. *Davis Co. v. Augustus*, 105 Va. 843, 845, 54 S. E. 985.

The omission, through the inadvertence of the draftsman and not by the intention of the grantor, of certain personal property of small value, from the property conveyed by a deed of trust to secure creditors, is not fraudulent per se, especially where there is nothing on the face of the deed to suggest that any property was omitted, and it is conceded that no actual fraud was intended, and the mistake was corrected by a supplemental deed executed the next day. *Davis Co. v. Augustus*, 105 Va. 843, 54 S. E. 985.

The provisions of a mortgage or deed of trust may be of such a character as of themselves to furnish conclusive evidence of fraudulent intent, but the presumption of law is in favor of honesty, and the court can not presume fraud unless the terms of the deed preclude any other inference. In any

case, the intent with which the deed was made is the vital subject of inquiry. In the case at bar the provisions of the deed do not show any fraudulent intent. *Davis Co. v. Augustus*, 105 Va. 843, 54 S. E. 985.

While a deed which reserves to the grantor powers inconsistent with the avowed object of the deed, is fraudulent per se, a provision in a deed for the benefit of creditors of a grantor which authorizes a sale of the trust subject at an earlier date than that fixed by the deed, if desired by the grantor, is not repugnant to and inconsistent with the avowed object and purpose of the deed so as to render it invalid. *Bowling, etc., Co. v. Davidson*, 107 Va. 389, 59 S. E. 368.

A general deed to secure creditors is not fraudulent per se, because of the fact that the trustee is permitted to continue the business for six months and to extend the time for another six months, if it is demonstrated to be to the advantage of the creditors secured, but provides for a sale at any time, upon request of creditors holding as much as \$2,000 of the debts secured, or at any time the trustee deems it wise or is requested in writing by the grantor to sell. Whether or not a deed is fraudulent per se is a question to be determined by the court from an inspection of the deed. *Bowling, etc., Co. v. Davidson*, 107 Va. 389, 59 S. E. 368.

D. EVIDENCE OF FRAUD.

See ante, "How Ascertained," IX, A.

Although evidence may point strongly to fraud, unless the fraud complained of is clearly charged in the pleadings and clearly established by proof, it can not be made the basis of a decree for relief. *Frey v. Tillett*, 125 Va. 723, 100 S. E. 457.

XI. EFFECT OF ASSIGNMENTS.

½A. IN GENERAL.

Notice of Dishonor of Negotiable Paper after Assignment. — Va. Code

1919, § 5663; Barnes Code, ch. 98A, § 101.

Presentment of Bill of Exchange for Acceptance after Assignment. — Va. Code 1919, § 5707; Barnes Code, ch. 98A, § 145.

Protest of Bill of Exchange after Assignment.—Va. Code 1919, § 5720; Barnes Code, ch. 98A, § 158.

Subsequent Sale of Land by Grantor.

—Where land conveyed in trust to secure creditors is subsequently sold by the grantor, the proceeds of the sale are impressed with the trusts which rested upon the land, and can not be diverted to an unsecured debt by the grantor or anyone else except with the consent, express or implied, of the creditors secured. If the trustee and creditors secured unite in a deed releasing the land to the grantor, in which it is recited that the land has been sold and the proceeds applied in payment of the debts secured, and in consideration thereof the release is made to the grantor, this affords no warrant for an appropriation of those proceeds to an unsecured debt, and if they are applied to an unsecured debt of one of such beneficiaries the application will be set aside at the instance of other creditors secured by the deed. *Timberlake v. Moore*, 106 Va. 668, 56 S. E. 571.

Rights of Prior Purchasers from Grantor — Estoppel—Set-Off. — The vendor of lumber made an assignment for the benefit of his creditors and included in the assignment "all the remainder of the purchase price due" from the vendees. Under the contract of sale title to the lumber had passed to the vendees. Held: That the acquiescence of the vendees in the assignment did not estop them from asserting title to the lumber, or any right of set-off against the purchase money for such lumber by reason of any advances or loans made by them to the vendor of the lumber under the contract. *Ellis, etc., Co. v. Hubbard*, 123 Va. 481, 96 S. E. 754.

Nor, under these circumstances, will the acquiescence of the vendees in the delivery of the lumber by the trustees at the shipping point specified in the contract, and its inspection and acceptance by them, estop the vendees from asserting their title to the lumber, where by the terms of the contract of sale, if the vendor failed to deliver the lumber at the shipping point, the vendees were authorized to do so and deduct the expense thereof from the amount due the vendor. *Ellis, etc., Co. v. Hubbard*, 123 Va. 481, 96 S. E. 754.

E. RIGHTS ACQUIRED BY THIRD PERSONS.

Right of Executor to Object to Release of Property by Trustees.—R. held the legal title to a tract of land owned jointly in fee by H. and himself. H. conveyed his equitable interest to R. as security for a debt and subsequently conveyed the same interest, subject to his homestead, to a trustee to secure his general creditors. H. thereafter paid the debt due R. and at his instance the trustee in the deed for the benefit of the general creditors made a deed of release to R. who held the legal title. It was objected by R.'s executor that the trustee had no right to make the release. Held: Whatever effect, if any, that release had, inured, not to the benefit of R. who had the legal title, but to him as trustee and to his cestui que trust, at whose instance and for whose benefit it was made, in order to get the beneficial title then outstanding in the trustee united with the legal title then in R., and hence the executor could not raise the question *Hammond v. Ridley*, 116 Va. 393, 82 S. E. 102.

XII. RIGHTS OF ASSIGNOR AFTER ASSIGNMENT.

A deed of trust to secure creditors does not divest the grantor of all interest in the property conveyed. His beneficial interest continues, subject to liability for the debts secured, and he can further encumber it by mortgage

to secure other creditors. *Hammond v. Ridley*, 116 Va. 393, 82 S. E. 102.

XIII. RIGHTS, DUTIES AND LIABILITIES OF TRUSTEES GENERALLY.

1/A. IN GENERAL.

Duties of Trustees, etc. — Barnes Code, ch. 72, §§ 6, 6a, 7; Va. Code 1919, § 5167.

Title of Trustee.—A trustee in a deed of trust to secure creditors is a purchaser for value. *Liquid Carbonic Co. v. Whitehead*, 115 Va. 586, 592, 80 S. E. 104.

Same — Protection of Recording Acts.—Trustees in deeds to secure creditors and the creditors secured are purchasers for value within the provisions of our recording acts, and are entitled to their protection. *Marshall v. McDermitt*, 79 W. Va. 245, 90 S. E. 830.

Disputing Title of Trustees.—If a defendant to a suit by trustees holding real estate for the benefit of creditors intends to dispute their title to a part of the real estate, he should do so by an answer to be treated as a cross-bill, setting up his title thereto, and not by an exception to the master's report of debts secured. *Scott Roller Mill Co. v. Sowder*, 112 Va. 607, 72 S. E. 108.

Duty to Conform to Code Regulations—Avoidance of Penalties.—While performed in course of administration of the proceeds of property assigned to secure creditors, the acts of the trustee are subject to the regulations prescribed by chapter 87 (Barnes Code, ch. 87), for the government of fiduciary proceedings, and with them such a trustee is required to conform in administering funds under his control, in order to avoid the penalties therein prescribed. *Elk Milling, etc., Co. v. Lewis*, 79 W. Va. 233, 90 S. E. 885.

Compensation.—A lump-sum allowance of compensation to the trustees in a deed of assignment for the benefit of creditors, by a court administering

the assets of the insolvent debtor, must be founded upon clear proof that the amount so allowed does not exceed the actual value of the services rendered. *Hartley v. Ault Woodenware Co.*, 82 W. Va. 780, 97 S. E. 137. See post, "Compensation," XIII, A, 7.

Although within the sound discretion of the trial court, such an allowance is reviewable and, if deemed excessive by the appellate court, it will be reduced to such an amount as, in its opinion, is clearly within the proof of the value of such services. *Hartley v. Ault Woodenware Co.*, 82 W. Va. 780, 97 S. E. 137.

Counsel Fees — Power to Contract for.—When the trustee and the creditors in a deed of trust to secure the payment of debts are before the court, the trustee can not contract for counsel fees payable out of the trust fund to prosecute an appeal from an adverse decree when the creditors secured already have counsel of their own choosing, and the trustee is a mere formal party, having no interest in the suit. This is particularly true where the trustee, in his answer, has not asked that counsel fees be allowed. *Wilson v. Langhorne*, 105 Va. 64, 52 S. E. 841.

Liability for Interest.—A trustee in an assignment to secure creditors who, without sufficient cause therefor, unduly delays application of funds, entrusted to his management, to the payment of the liabilities secured, is chargeable without interest thereon after the expiration of six months from the receipt thereof until the next ensuing annual settlement of his accounts required by chapter 87, Code, and thereafter on the balance therein found to be due from him, unless (as provided in § 7 of that chapter [*Barnes Code*, ch. 87, § 7]) "within six months after the end of any one year" he gave "to the parties entitled to the money received in such year a statement of the said money and actually settled therefor with them." A year, as here

used, means one year from the receipt of cash collections pertaining to the trust funds. *Elk Milling, etc., Co. v. Lewis*, 79 W. Va. 233, 90 S. E. 885.

A. SALE OF TRUST PROPERTY.

3. Publication of Notice of Sale.

Barnes Code, ch. 72, § 7; *Va. Code* 1919, § 5167.

6. Title of Trust Property.

See ante, "In General," XIII, ½A.

7. Compensation.

See ante, "In General," XIII, ½A.

Commissions.—A trustee in a deed of trust to secure creditors who neither sells the property conveyed nor receives the proceeds thereof is not entitled to the commission provided for by the deed, nor will a court of equity decree the payment of such proceeds to the trustee merely that he may receive his commission, where all parties, trustee and creditors, are before the court in a suit in which the trust subject has been sold and the proceeds thereof collected by officers of the court; but will distribute the funds directly to the creditors entitled therein. *Wilson v. Langhorne*, 105 Va. 64, 52 S. E. 841.

Defeat of Commissions.—Where the insolvent assignor and assignee agree that the former shall remain in possession and sell the property and apply the proceeds to the payment of his debts, and he does so remain in possession for a considerable time and sells a portion of the property, but does not apply all the proceeds on his debts, and, ascertaining that fact, the assignee obtains possession of the remaining property, sells it and satisfies the creditors out of the proceeds, the assignor can not, by bringing a suit to compel the assignee to settle his accounts before the expiration of six months after his sale, defeat his commissions. *McElwain v. Woods*, 85 W. Va. 54, 100 S. E. 750.

10. Rights and Liabilities of Purchaser.

Failure of Original Seller to Record

Lien.—Where at the time of a sale of personal property, by a trustee for the benefit of creditors, the purchaser was fully informed of the claim and lien of the original seller on the property, it was held that the failure of the seller to properly docket and record his claim would not avail the purchaser from the trustee. *Liquid Carbonic Co. v. Whitehead*, 115 Va. 586, 80 S. E. 104.

11. Return of Trustee.

Time for Return by Trustee on Sale of Assets.—The trustee of an insolvent debtor who assigns all his property in trust for the payment of his debts, has six months after making sale of the property within which to make a return to the clerk's office of his receipts and disbursements and vouchers therefor. *McElwain v. Woods*, 85 W. Va. 54, 100 S. E. 750.

XIV. RIGHTS OF CREDITORS.

Rights of Creditors of the First Class and Creditors of the Second Class.—Where property conveyed in a deed of trust for the benefit of creditors was in good faith applied to the debts of creditors of the first class, then the estate of a creditor of the second class has no right to complain, even though after the application was made a creditor of the first class should have seen fit to relinquish any part or all of his interest to the wife of the debtor, there being no allegation in the bill, and no proof of any fraud on the part of the debtor in the execution of the deed of trust, or of anything fictitious in the first preferred debts. *Frey v. Tillett*, 125 Va. 723, 100 S. E. 457.

Right of Secured Creditors to Participate in General Fund.—Where a debtor makes a general assignment of all his property for the benefit of all his creditors; a secured creditor is entitled to prove and receive dividends upon the face of his claim as it stood at the time of the assignment, or declaration of insolvency, without credit-

ing the value of his security or the proceeds of the sale thereof, made in a suit brought by the assignee to convene the creditors and wind up the affairs of the debtor's estate. The court in this case said: "The point of the syllabus is fairly supported by our case of *Williams v. Overholt*, 46 W. Va. 339, 33 S. E. 226; but more particularly by *Merrill v. National Bank*, 173 U. S. 136; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 639; *Bank v. Armstrong*, 59 Fed. 380, 8 C. C. A. 163; *Bank v. Willamette, etc., Co.*, 80 Fed. 227; *Doe v. N. W. Coal, etc., Co.*, 78 Fed. 72; *Central Trust Co. v. Richmond, etc., Co.*, 68 Fed. 99; *First Nat. Bank v. Trigg Co.*, 106 Va. 327, 56 S. E. 158." *Price v. Hosterman Lumber Co.*, 70 W. Va. 12, 73 S. E. 55. However, see the dissenting opinion in this case distinguishing the case of *Williams v. Overholt*, 46 W. Va. 340, 33 S. E. 226.

Burden of Proving Notice.—A creditor who charges that a trustee in a deed of trust to secure creditors had notice of a prior right to or lien upon the property conveyed to him, has the burden of showing such notice. *Liquid Carbonic Co. v. Whitehead*, 115 Va. 586, 80 S. E. 104.

Manner of Proving Notice.—The fact of notice of a prior right to or lien upon property conveyed to a trustee, may be inferred from circumstances as well as shown by direct evidence, but the proof must be such as to affect the conscience of the purchaser, and so strong and clear as to fix upon him the imputation of bad faith. *Arbuckle Bros. v. Gates*, 95 Va. 802, 30 S. E. 496, and authorities cited. *Liquid Carbonic Co. v. Whitehead*, 115 Va. 586, 592, 80 S. E. 104.

Sufficiency of Evidence Showing Notice.—Evidence held sufficient to show that the trustee, as well as the purchasers of the trust assets from him, had actual notice of the rights and claims of the creditor. *Liquid Carbonic Co. v. Whitehead*, 115 Va. 586, 80 S. E. 104.

Personal Judgment.—Section 2462 of the Code (§§ 5189, 5190, Va. Code 1919), as amended by the act of 1904, in relation to the reservation of title or liens on personal property and the method of enforcing the same, is a remedial statute and should be liberally construed so as to give effect to the legislative intent. The purpose of the amendment was to furnish a remedy co-extensive with any case that might fall within its purview or influence. Under the provision authorizing the court to hear and determine all questions arising out of or under the contract, which are properly raised by the pleadings, and to "render such judgment thereon as may be required by the rules of law or equity applicable to such questions," the court has the power and it is its duty to render personal judgments against parties before it who, by reason of their wrongful dealings with the property, have put it beyond the reach of the seller, and have rendered themselves personally liable for the value of the property or the amount of the lien thereon. *Liquid Carbonic Co. v. Whitehead*, 115 Va. 586, 80 S. E. 104.

Laches of Creditor. — In 1894 a debtor made an assignment for the benefit of his creditors, placing two debts in the first preferred class and in the second preferred class a debt of complainant's decedent and a number of smaller debts. In 1906 complainant's decedent attacked the disposition of a part of the funds by the trustee in the deed of assignment and collected one-half of his debt from a fund in the

hands of a guardian of one of the children of the debtor, his demand not being resisted by the child on his attaining his majority. Nothing further was done until 1915, when the present suit was instituted by the complainants, the debtor and the creditors of the first class having in the meantime died and the trustee having disappeared. Held: That the complainants were barred from recovery by their laches and the laches of their decedent. *Frey v. Tillett*, 125 Va. 723, 100 S. E. 457.

XV. REMOVAL OF TRUSTEES AND OTHER PENALTIES.

Grounds.—Relationship of the trustees in a deed of assignment for the benefit of creditors to the grantors therein, their failure to convene the creditors and their compromise of claims against the assets with funds not alleged to have been derived from the property in their hands do not warrant their removal by the appointment of a receiver. *Wilson v. Hawker Lumber Co.*, 74 W. Va. 65, 81 S. E. 568.

Removal of Trustees and Appointment of Receiver—Sufficiency of Bill.—A bill to remove a trustee to whom personal property has been assigned for the benefit of creditors, and to appoint a receiver, to be sufficient must contain full and precise allegation showing the necessity for the removal, and that there is danger of loss or misappropriation of the trust property. *Baltimore Bargain House v. St. Clair*, 58 W. Va. 565, 52 S. E. 660.

ASSIGNS.—The word "assigns" generally comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law. *Ferrell v. Deverick*, 85 W. Va. 1, 100 S. E. 850.

ASSOCIATIONS.

- I. In General.
- II. Laws Rules and Regulations.
- III. Officers and Meetings.
- IV. Expulsion of Members.
- V. Liability of Member.
- VI. Suits by and against Associations.
- VII. Social Club.

CROSS REFERENCES.

See the title ASSOCIATIONS, vol. 1, p. 843, and references there given. In addition, see post, BENEFICIAL AND BENEVOLENT ASSOCIATIONS; INTOXICATING LIQUORS. As to sale of liquor by social club, see post, INTOXICATING LIQUORS. As to taxation, see post, LICENSES; MUNICIPAL CORPORATIONS; TAXATION. As to gaming on grounds of fair associations see post, THEATERS AND SHOWS.

I. IN GENERAL.

Prohibiting Unlawful Use or Wearing of any Insignia or Button of any Association or Society, etc.—Va. Code 1919, § 4719.

Property of Religious, Educational and Benevolent Associations.—Barnes Code, pp. 846-848, ch. 57, §§ 1-11.

Incorporated Non-Stock Associations.—Va. Code 1919, §§ 3872-3880; Barnes Code, ch. 55, §§ 1-21a (10); W. Va. Acts 1919, Reg. Sess., ch. 37.

Co-Operative Associations.—Va. Acts 1920, pp. 305, 568; Pollard's Code 1920, §§ 3855, 3857, pp. 175, 176.

Agricultural Associations.—W. Va. Acts 1921, Reg. Sess., ch. 121, pp. 458-465.

II. LAWS, RULES AND REGULATIONS.

Construction — Conclusiveness.—Like other written instruments, the laws, rules and regulations of an unincorporated association are proper subjects of interpretation, and the reasonable construction given them by the officers and tribunals expressly or impliedly charged with the duty of interpretation, or of which they are reasonably and fairly susceptible, is binding upon the members and subordinate organizations

of the order, and also upon the courts in the administration of justice in causes involving the rights of members. if it does not contravene public policy or any public law. *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580.

III. OFFICERS AND MEETINGS.

See post, "Expulsion of Members," IV.

Authority of Masonic Grand Master.—A grand master of Masons within his jurisdiction has not authority to postpone, either temporarily or indefinitely, an annual communication of the Masonic grand lodge that elected him, where the constitution of the order designates the time and the last preceding annual communication selected the place therefor. *Hundley v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

In the event of an emergency rendering undesirable or inadvisable the holding of an annual communication of a Masonic grand lodge at the time and place regularly appointed and selected therefor, the grand master may convocate a special communication of the Masonic grand lodge at such time and place as he may select, and, when so convoked, it alone may determine the

feasibility and necessity for such postponement. *Hundley v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

The word "communication" is the Masonic equivalent of the word "meeting." *Hundley v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

Annual Grand Communication—**"Quorum."**—Where an association, as an incorporated Masonic grand lodge of colored Masons, within its jurisdiction, is composed of an indefinite number of members, and subject to change from death, suspension or expulsion, revocation of the charters of subordinate lodges and the grant of additional charters, and the constitution of such grand lodge, by-laws, edicts, rules and regulations do not, nor does any rule of law or legislative provision, prescribe a constitutional quorum, the members present at the time and place regularly appointed and selected for such annual grand communication, and qualified and competent to transact the business thereof, constitute a quorum for that purpose, though less than a numerical majority of such body. *Hundley v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

Mandamus — Surrender of Masonic Offices.—Mandamus lies to compel the retiring grand master of Masons, the grand secretary and grand treasurer of a grand lodge of Masons to surrender their offices and deliver the books, papers and other documents, funds and other things in their possession and under their control pertaining to such official positions, to their successors in office, when their right thereto is established by clear and competent proof, and the property is within the jurisdiction of the court awarding the writ. *Hundley v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

IV. EXPULSION OF MEMBERS.

Wrongful Expulsion.—An inquiry as to the liability of an unincorporated association and members thereof, for alleged wrongful and illegal expulsion,

participated in by a subordinate body acting under the orders of a superior officer constituting the official head of the association, involves consideration of the rights, duties, powers, and obligations of the members, the subordinate bodies and superior officers and tribunals, as determined by the constituting articles of agreement, by-laws, rules and regulations, often designated as the constitution, statutes, and rules, and the usages and precedents of such organizations. *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580.

Conclusiveness of Action of Superior Officer—Appellate Power.—Right of an officer of an unincorporated association, designated in its constitution, as its official head and authorized by that instrument to exercise full control over the order in general and to sign all charters and decide all controversies appealed to him, subject to a power of review by a triennial convention of the order, whose enactments and decisions upon all questions are declared to be the supreme law of the association, and to whom such officer reports his transactions, to exercise appellate power in a case in which a member tried on a charge of infraction of a rule, justifying his expulsion, if guilty, has been acquitted, in the absence of an appeal and of his own volition, falls within a reasonable and fair construction of the laws and rules conferring his authority, wherefore a court can not consistently deny its existence, in the trial of an action for damages for illegal expulsion, in the absence of a denial thereof by the association's tribunal of last resort. *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580.

Nor can it be judicially determined by a civil court, that such an officer having additional power and authority to suspend the charter of the subordinate organization in which such trial has occurred, may not exercise his appellate power in such manner and his

power of suspension conjointly and simultaneously, so as to compel expulsion or loss of the charter, the evidence adduced on the trial affording bases for two honest and reasonable opinions as to whether it preponderates decidedly against the innocence of the accused member. *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580.

Second Trial of Member.—The legal presumption, if any, against the right in the tribunals of an unincorporated association, to subject a member thereof to a second trial for the same offense, is overthrown and excluded by the terms of the constitution of such an association, making the enactments and decisions of its highest tribunal its supreme law. *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580.

Malice of Superior Officer.—Nor does the presence, on the occasion of the expulsion, of a member between whom and the accused there has been previous animosity or ill feeling, and who advised and encouraged a superior officer to demand rescission of what was deemed an unjustifiable acquittal and, on the occasion of the expulsion, gave his reason for doing so, but was excused from voting, on his own motion, raise an inference of malice sufficiently strong to sustain a finding thereof. *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580.

Damages — Malice.—An inference of malice on the part of members of a subordinate association, in voting for an expulsion of a member, after having voted for his acquittal of the charges preferred against him, sufficient to sustain a verdict predicated on such theory, is not deducible from their mere change of attitude, especially when a superior officer claiming authority to do so, not negatived by any express provision of the laws and regulations of the order, nor by any decision of the association's tribunal of

last resort, has intervened and annulled the first decision on the ground that the acquittal was plainly contrary to the weight of the evidence. *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580.

V. LIABILITY OF MEMBER.

An action ex delicto against an unincorporated association and individual members of one of its subordinate lodges or divisions predicated upon alleged wrongful and illegal expulsion from such subordinate organization, may be prosecuted to judgment against the individual defendants, on failure of jurisdiction of the association itself, the parties being liable jointly and severally, if liable at all. *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580.

VI. SUITS BY AND AGAINST ASSOCIATIONS.

Statutory Provision.—Va. Code 1919, § 6058.

In the absence of a statute authorizing such procedure, an unincorporated society or association can not be sued as an entity by its name, nor can a judgment be rendered against it merely by name. To confer jurisdiction, the persons composing it, or some of them, must be named as parties and process served upon them individually. *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580.

Action Dismissed for Want of Evidence of Defendant's Corporate Existence—New Suit against Proper Parties Not Barred.—*Mitch v. United Mine Workers*, 87 W. Va. 119, 104 S. E. 292.

VII. SOCIAL CLUB.

Social clubs authorized to be chartered under the statutes of this state are manifestly intended to be purely social. It was clearly never intended to confer upon such organizations authority to conduct a business which an individual can not lawfully conduct. A charter of incorporation may be

granted by the state corporation commission to an association to conduct any business that an individual may lawfully conduct, but never to conduct a business which an individual may not lawfully conduct under existing laws. *Hanger v. Commonwealth*, 107 Va. 872, 60 S. E. 67. See post, CORPORATIONS.

Fraudulent Purpose — Violation of Sunday Laws.—The evidence in this case shows that the object in obtaining a charter for a social club and the pre-

tended organization thereunder was for the fraudulent purpose, on the part of the incorporators, of securing the privilege of selling tobacco, cigars, cigarettes, soda water and other soft drinks on Sunday—a privilege which they could not exercise as individuals without violating existing statutes—and the charter of said pretended social club was therefore properly vacated and annulled. *Hanger, v. Commonwealth*, 107 Va. 872, 60 S. E. 67.

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CROSS REFERENCES.

See the title ASSUMPSIT, vol. 2, p. 1, and references there given. In addition, see ante, AGENCY; AMENDMENTS; post, CARRIERS; CONTINUANCES; CONTRACTS; DEMURRERS; EVIDENCE; GUARDIAN AND WARD; JUDGMENTS AND DECREES; PLEADING.

I. DEFINITION, NATURE AND DISTINCTIONS.

"The action of assumpsit is a liberal and equitable one. It is applicable to almost every case where money has been received which in equity and good conscience ought to be refunded." *Mankin v. Jones*, 68 W. Va. 422, 426, 69 S. E. 981.

An action of assumpsit upon a quasi-contract is equitable in its nature. No recovery will be allowed in such an action which does violence to natural equity. *Grice v. Todd*, 120 Va. 481, 91 S. E. 609.

The common counts in assumpsit constitute a kind of equitable action, applicable to almost every case where money has been received by one, which, in justice and conscience, ought not to be retained. *Burke v. Nutter*, 79 W. Va. 743, 91 S. E. 812.

The fiction of an implied promise will not be indulged in every case, but only where, in equity and good conscience, the duty to make such a promise exists. When the defendant has derived no right from the plaintiff, has not by mistake or fraud usurped or gotten the benefit of any original right of the plaintiff to the detriment or injury of the right of the latter, but relies upon a bona fide hostile claim or right, no such duty exists of the defendant to the plaintiff and the law will not indulge the fiction of the existence of an implied promise of defendant to plaintiff, for that would, in such case, be in itself inequitable. *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820.

I½. ORIGIN AND GROWTH.

"In early times the want of a common law remedy suited to cases of non-performance of simple promises caused frequent recourse to equity for relief, but in the twenty-five years of Henry VII, it was settled by the judges that an action on the case would lie as well for nonfeasance as for malfeasance, and in that way assumpsit was introduced. In theory it was an action for the nonperformance of simple contracts and the formula and proceedings were constructed and carried on accordingly. Very early, however, there were successful efforts to apply it beyond its import, and from the reign of Elizabeth this action has been extended to almost every case where an obligation arises from natural reason and the just construction of law, that is, quasi ex contractu; and is now maintained in many cases which its principles do not comprehend and where fictions and intendment are resorted to, to fit the actual cause of action to the theory of the remedy." *Norfolk v. Norfolk County*, 120 Va. 356, 361, 91 S. E. 820, quoting from 2 Ruling Case Law, "Assumpsit."

II. GROUNDS OF ACTION.**½A. IN GENERAL.**

When Assumpsit Lies.—Barnes Code, pp. 1037, 1038, ch. 99, §§ 10, 16a.

Assumpsit is not the proper form of action for the recovery of damages for a mere wrong. It only lies to recover from the defendant that which is in his hands and belongs to the plaintiff. *Wilson v. Shrader*, 73 W. Va. 105, 113, 79 S. E. 1083.

There are three classes of cases in which the action of assumpsit properly lies for the recovery of money, viz.: 1. Where there is an express contract in fact and privity in fact between the parties plaintiff and defendant. 2. Where there is an implied contract in fact and privity in fact between the parties plaintiff and defendant. 3. Where there is an implied contract in law and no privity in fact, but an implied privity in law, between the plaintiff and defendant. *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820.

The distinctions between the classes of cases mentioned are admirably stated in 2 Ruling Case Law. In its treatment of the subject, "Assumpsit," with respect to the first and second classes of cases above mentioned this work says: "Express and Implied Contracts—The action of assumpsit lies for the enforcement of a contract express or implied, but the contract must necessarily contain all the essentials of an enforceable contract; thus it must be based upon a valid and sufficient consideration, and there must be privity of contract established between the parties. As ordinarily understood, the only difference between an express contract and an implied contract is that in the former the parties arrive at their agreement by words, either oral or written, sealed, or unsealed, while in the latter their agreement is arrived at by a consideration of their acts and conduct. In both of these cases there is, in fact, a contract existing between the parties; the only difference being in the character of evidence necessary to establish it. To constitute either the one or the other the parties must occupy towards each other the contract status, and there must be that connection, mutuality of will, and intention of parties, generally expressed, though not very clearly, by the term "privity." Without this a contract by implication

is quite impossible." *Id.* § 6. *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820, 821.

"With respect to the third class of cases above mentioned this work (2 Ruling Case Law) says: 'Quasi Contracts—We have seen that assumpsit will lie for the breach of an express contract or one implied in fact; but, after subtracting express contracts and those implied in fact, there is still left another large class of obligations, to enforce which the action of general assumpsit is a well-established remedy. The principle upon which this latter class of obligations rests is equitable in its nature, and was, like most other equitable principles, derived from the civil law. This obligation was under the civil law designated quasi contractus. Stated as a civil law principle, it was an obligation similar in character to that of a contract, but which arose, not from an agreement of parties, but from some relation between them or from a voluntary act of one of them, or, stated in other language, an obligation springing from voluntary and lawful acts of parties in the absence of any agreement. In quasi contracts the obligation arises, not from consent, as in the case of contracts, but from the law or natural equity. The class of obligations now under consideration, and which are treated in works on contracts implied in law or quasi contracts, is recognized and enforced by common-law courts by means of a general assumpsit. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. In this class of cases the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded, while in cases of express and implied contracts in fact the intention is of the essence

of the transaction. In the case of contracts the parties fix their terms and set the bounds upon their liability. As has been well said, in the case of contracts the agreement defines the duty, while in the latter class of cases the duty defines the contract. *Id.* § 8." *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820, 822.

"It will be observed that it is common to the second and third class of cases above mentioned that 'the contract in fact' is implied in law in the former; and 'the contract in law' is implied in law in the latter. Therefore 'contracts in fact' and 'contracts in law' are both implied in law under certain circumstances, and are spoken of as 'implied contracts' frequently in the cases, without discrimination, which sometimes leads to confusion of thought." *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820, 822.

A valid and sufficient consideration, either of benefit moving from, or of detriment to (in change of status of), the plaintiff, is absolutely essential to support the action of assumpsit in all three classes of cases enumerated above. *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820.

When Law Imports a Request to Make a Payment and a Promise to Repay.—Whenever one person requests, or allows, another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter—a request to make the payment, and a promise to repay—and the obligation, thus created, may be enforced by assumpsit. *Bartlett v. Armstrong*, 56 W. Va. 293, 49 S. E. 140.

Implied Promise of Grantee Accepting but Not Signing Deed.—Where land is conveyed reserving a lien, the acceptance of the deed by the grantee though not signed by him, and the entry into the possession of the land creates an implied promise on the part

of the grantee to pay the amount secured, for which an action of assumpsit will lie. *Barnes v. Crockett*, 111 Va. 240, 68 S. E. 983.

Under a wrongful discharge of a servant his appropriate remedy is assumpsit. *Conrad v. Ellison-Harvey Co.*, 120 Va. 458, 91 S. E. 763.

A. NECESSITY OF CONTRACT.

An action of assumpsit lies only where damages are sought for the breach of a contract express or implied, and therefore in principle calls for damages *ex contractu*, not *ex delicto*. *Hall v. Philadelphia Co.*, 74 W. Va. 172, 81 S. E. 727; *Casey v. Walker*, 122 Va. 465, 95 S. E. 434.

In *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083, the court said: "Assumpsit is not the proper form of action for the recovery of damages for a mere wrong. It only lies to recover from the defendant that which is in his hands and belongs to the plaintiff."

B. SPECIAL AND GENERAL ASSUMPSIT.

1. Doctrine Stated.

The general rule is that an action of assumpsit in which the declaration contains only the general counts can not be maintained on a special contract. *Virginia Talc., etc., Co. v. Hurkamp*, 124 Va. 721, 98 S. E. 681; *Standard Fashion Co. v. Lopinsky*, 84 W. Va. 523, 525, 101 S. E. 152; *Mankin v. Jones*, 68 W. Va. 422, 69 S. E. 981; *Thomas v. Mott*, 78 W. Va. 113, 88 S. E. 651, 652.

"Where an express simple contract remains open and unexecuted, and plaintiff proceeds as for a breach, he must declare specially. *Indebitatus assumpsit* will not lie." *Thomas v. Mott*, 78 W. Va. 113, 88 S. E. 651, 652.

"The foundation of that rule seems to rest upon the theory that there is no necessity for an implication of a promise to render compensation where there is an express contract between the parties not fully performed. Parties are bound by their agreements,

and therefore there is no excuse for implying a promise, as is the case where the common counts are used and the contract has been fully performed. If it remains open or executory, or something is still to be done under it besides the payment of the consideration, plaintiff must declare specially." *Thomas v. Mott*, 78 W. Va. 113, 88 S. E. 651, 652.

In an action in assumpsit for damages upon an executory contract recovery can not be had on the common counts, though they accompany a special count, unless the claim of the plaintiff includes matters properly recoverable under such common counts. *Whitaker-Glessner Co. v. Suburban Brick Co.*, 86 W. Va. 621, 104 S. E. 62.

But when the claim is merely pecuniary and is founded on a consideration past or executed, it is sufficient to declare upon the general, or as they are often styled, the common counts. *Virginia Talc, etc., Co. v. Hurkamp*, 124 Va. 721, 98 S. E. 681.

2. Doctrine Illustrated.

To recover in assumpsit for the breach of an executory agreement for the sale of corporate stock, plaintiff must declare specially on the contract. The general counts alone will not suffice, except where payment of the consideration is the only act remaining unperformed thereunder. *Thomas v. Mott*, 78 W. Va. 113, 88 S. E. 651.

To recover in assumpsit for the breach of an executory agreement creating an agency, plaintiff must declare specially on the contract. The general counts alone will not suffice, though they may be used in connection with the special count where occasion demands. *Standard Fashion Co. v. Lopinsky*, 84 W. Va. 523, 101 S. E. 152.

Where a contract, though in writing, has been fully executed, and nothing remains to be done by defendants under it except payment to plaintiffs of the price stipulated for the work and

labor done by them under the contract, in an action of assumpsit to recover the same, a special count on the contract is unnecessary; recovery may be had on the common counts in assumpsit, and the bill of particulars filed therewith. *Lord v. Henderson*, 65 W. Va. 321, 64 S. E. 134. See post, "Work and Labor," II, C, 7.

Indebitatus assumpsit will lie to recover the value of work done under a special contract, if it be fully executed on the part of the plaintiff, and nothing remains to be done under it but the payment of a sum of money by the defendant. The existence of this state of facts raises an implied promise to pay the money. Although an attorney, therefor, may have been employed for a stipulated compensation, if he has fully rendered the services agreed upon, he may maintain indebitatus assumpsit for his fee, where nothing remains to be done but payment by the client. *Carpenter v. Smithey*, 118 Va. 533, 88 S. E. 321; *Newman v. Levi*, 74 W. Va. 223, 81 S. E. 1036.

In the instant case plaintiff was held entitled to recover on a declaration containing only the common counts, although the proof disclosed a special contract, but one which was not breached by either party thereto during the period covered thereby and one fully executed by the plaintiff, so as to entitle him to demand payment of the compensation fixed by the contract for the work done by him under it, the contract calling for the payment of money by the defendant as such compensation. *Virginia Talc, etc., Co. v. Hurkamp*, 124 Va. 721, 98 S. E. 681.

Where a broker, employed by a written contract to sell land for the owner thereof, has been the efficient cause in effecting a sale of the land, though at a less price than he was authorized to sell under his contract with the owner, his compensation may be re-

covered under the common counts in assumpsit, and the contract be used in evidence along with other evidence as a guide to the jury in determining what is a reasonable compensation. *Paschall v. Gilliss*, 113 Va. 643, 75 S. E. 220.

Royalties accruing under a lease stipulating to pay a fixed amount whether the royalties amount to that much or not are recoverable in assumpsit under an indebitatus count for use and occupation, or under a special count on the contract. *Lawson v. Williamson Coal, etc., Co.*, 61 W. Va. 669, 670, 57 S. E. 258. See post, "Use and Occupation," II, C, 6.

In an action of assumpsit to recover for money agreed to be paid by the terms of an oil lease as commutation for failure to bore a well, there must either be a special count or a common count in indebitatus assumpsit suitable to the case specifying the ground of action. *Sandusky v. Oil Co.*, 63 W. Va. 260, 59 S. E. 1082.

C. THE COMMON COUNTS.

1½. Goods Bargained and Sold.

To sustain an action for the purchase price of goods completely sold so as to pass the title, but not delivered, a common indebitatus count for goods bargained and sold is appropriate. *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235.

An action for goods bargained and sold will not lie if the title to the property has not passed to the vendee. *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235; *Oliver Typewriter Co. v. Huffman*, 65 W. Va. 51, 57, 63 S. E. 1086.

2. Goods Sold and Delivered.

An action for goods sold and delivered will not lie, if the title to the property has not passed to the vendee. *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235; *Oliver Typewriter Co. v. Huffman*, 65 W. Va. 51, 57, 63 S. E. 1086.

3. Money Had and Received.

a. In General.

"Wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received." *Thacker v. Hubbard*, 122 Va. 379, 395, 94 S. E. 929.

Assumpsit lies in all cases where one person has received money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it and *ex aequo et bono* it belongs to the plaintiff; in which cases there is, of necessity, the existence of a valid and sufficient consideration of detriment to the plaintiff, otherwise the equity of the latter would not arise—and in which cases, also, there is an absence of facts expressly proved which *ex aequo et bono* negative the existence of any promise. And this is so irrespective of whether the money was received from the plaintiff or a third person. *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820; *Rinehart v. Pirkey*, 126 Va. 346, 101 S. E. 353; *Hix v. Scott*, 80 W. Va. 727, 730, 94 S. E. 399.

This action has of late years been greatly extended, because founded on principles of justice; and it now embraces all cases in which the plaintiff has equity and conscience on his side and the defendant is bound by ties of natural justice and equity to refund the money. In such a case, no express promise need be proved, because from such relation between the parties the law will imply a debt and give this action founded on the equity of the plaintiff's case, as it were upon a contract, "*quasi ex contractu*," as the Roman law expresses it, and upon this debt founds the requisite undertaking to pay. *Rinehart v. Pirkey*, 126 Va. 346, 101 S. E. 353.

"In such case, it is said, the law creates the privity and implies the promise necessary to support the ac-

tion." *Thacker v. Hubbard*, 122 Va. 379, 395, 94 S. E. 929.

Recovery of Things Treated as Money.—"In § 118, of the same work (2 Greenleaf on Evidence) the writer says: 'In regard to things treated as money, it has been held that this count may be supported by evidence of the defendant's receipt of bank-notes; or promissory notes; or credit in account, in the books of a third person; or a mortgage, assigned to the defendant as collateral security, and afterwards foreclosed and bought in by him; or a note payable in specific articles; or any chattel.'" *Hix v. Scott*, 80 W. Va. 727, 730, 94 S. E. 399.

b. Illustrative Cases.

In cases of total failure of consideration, the money paid may be recovered on a count for money had and received. *Gaffney v. Stowers*, 73 W. Va. 420, 424, 80 S. E. 501.

When money has been obtained by a son from his father, in consideration of promises unfulfilled, and which in equity and good conscience he should refund, or as a loan, the same may be recovered upon the common counts in assumpsit with bill of particulars filed, as for money had and received by defendant for the use of the plaintiff, or for money lent to him by plaintiff, as the fact may be disclosed by the evidence. *Hix v. Scott*, 80 W. Va. 727, 94 S. E. 399. See post, "Money Lent," II, C, 4.

Money paid on a void contract for the purchase of land may be recovered in assumpsit. *Mankin v. Jones*, 68 W. Va. 422, 69 S. E. 981.

"On the failure of the vendor to convey, the vendee can sue in assumpsit and recover the money which he has paid, even though the contract be not enforceable in equity." *Mankin v. Jones*, 68 W. Va. 422, 426, 69 S. E. 981.

Rent Paid by Tenant Who Has Been Evicted by Third Person.—Rent paid

by a tenant may be recovered on a count for money had and received, after he has been evicted at the suit of a third person and compelled to pay mesne profits for the period in respect of which he has paid the rent. *Gaffney v. Stowers*, 73 W. Va. 420, 424, 80 S. E. 501.

Money Tortiously Received.—Assumpsit is an appropriate remedy to recover money tortiously received. *County Court v. Duty*, 77 W. Va. 17, 87 S. E. 256.

Money Received through Mistake or Fraud.—Where the defendant has received money from a third person by law or authority through some mistake or fraud, which but for the mistake or fraud would have vested the right to the money in the plaintiff, the plaintiff may recover. That is to say, the plaintiff may recover whenever, but for the mistake or fraud, he would have had unquestioned right to the money. Such cases rest upon the plaintiff's original right to the fund, which right has been lost to the plaintiff or impaired by mistake or fraud. Where the defendant received the money by a right which is independent in its origin from the original right of the plaintiff and in no way goes upon or displaces the latter, the recovery is properly denied. In such case the express facts negative any possibility of a promise of defendant to pay plaintiff anything, and equally negative any privity between their claims of right to the fund. Furthermore, no consideration exists to support the action. *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820.

Payment under Mistake of Fact.—A person paying money under a mistake of fact to one not entitled to receive or retain it may recover it in assumpsit. *Shinn v. Shinn*, 78 W. Va. 44, 88 S. E. 610.

Special Count to Recover Money Paid under Mistake of Law or Fact.

—A special count in a declaration in assumpsit, claiming right of recovery of money as having been paid to the defendant under a mistake of law or fact and setting forth all of the facts and circumstances relied upon as constituting a ground of recovery, is, in legal effect, a mere common count for money had and received, and a demurrer thereto is properly overruled. *Gardner v. Nichols*, 80 W. Va. 738, 93 S. E. 817.

Action by City against County to Recover Taxes Paid through Mistake to County.—By an act of assembly certain territory, formerly in the county of Norfolk, was annexed to the city of Norfolk. In this territory was located certain property of a railroad and terminal company. After the annexation this property was by mistake erroneously supposed to be situate and taxable in the county of Norfolk, whereas in fact it was situate and taxable in the city of Norfolk. By reason of this mistake the property was erroneously assessed for taxes for certain years after such annexation in the county of Norfolk, instead of in the city of Norfolk, as it should have been; and the taxes were paid by said companies to the county of Norfolk. Held, that since under the statute such error in assessment could not be corrected after thirty days from such assessment, the city might sue the county in assumpsit to recover the taxes paid the county under the mistaken assessment; payment by the companies to the county being a valid payment under the statute law of the State and the receipt of the county of Norfolk being a complete acquittance of the railroad companies of all further liability. *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820.

Where a collecting bank is negligent in transmitting a check for collection, and in forwarding it to the drawee bank, whereby such drawee, though in

disregard of a special agreement, is enabled to debit the drawer of the check and credit the collecting bank, and control of the check is lost by the collecting bank and it is never returned to the customer, the latter may in an action of assumpsit, upon the common counts as for money had and received, recover the full amount of the check. *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012. See post, BANKS AND BANKING.

Moneys Paid in Compromise of Prosecution for Acts During Civil War.—West Va. Code 1913, ch. 136, § 5b, II (§ 5024).

No Property or Money in Hands of Defendant.—Wherever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. In such case, it is said, the law creates the privity and implies the promise necessary to support the action. But in the instant case there was no property or money in the hands of the grantee, as the property had been sold to pay the mortgage debt, and the action was brought to recover the deficiency; therefore, the foregoing rule has no application to the instant case. *Thacker v. Hubard*, 122 Va. 379, 94 S. E. 929.

4. Money Lent.

When money has been obtained by a son from his father, in consideration of promises unfulfilled, and which in equity and good conscience he should refund, or as a loan, the same may be recovered upon the common counts in assumpsit with bill of particulars filed, as for money had and received by defendant for the use of the plaintiff, or for money lent to him by plaintiff, as the fact may be disclosed by the evidence. *Hix v. Scott*, 80 W. Va. 727, 94 S. E. 399. See ante, "Illustrative Cases," II, C, 3, b.

Money advanced by plaintiff to defendant, to whom he is then engaged

to be married, and in expectation of marriage, whether understood and intended as a loan or a gift, is recoverable in assumpsit upon the common counts, if the defendant thereafter breaks the engagement without plaintiff's fault. *Burke v. Nutter*, 79 W. Va. 743, 91 S. E. 812.

5. Money Paid.

a. In General.

"Mr. Burks, at p. 129 of his work on Pleading and Practice, says: 'In general, when the plaintiff shows that he, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money which the defendant ought to have paid, the count for money paid will be supported.'" *Richardson Constr. Co. v. Whiting Lumber Co.*, 116 Va. 490, 492, 82 S. E. 87.

An action in assumpsit lies where one at another's request, or as that other's surety, pays or lays out money for him. It is then an action for money paid, laid out and expended. *Teter v. Teter*, 65 W. Va. 167, 63 S. E. 967.

b. Illustrative Cases.

Money paid by one person on the debt of another, at his request, or by his procurement, may be recovered from him, in assumpsit on the common count for money paid, laid out and expended for his use and benefit and at his request, and the method or form of the transaction is immaterial, if it amounts to payment in law or is so treated by the creditor. *Bartlett v. Bank*, 77 W. Va. 329, 87 S. E. 444.

Purchase in Open Market by Vendee Where Vendor Refuses to Deliver.—When a vendor fails or refuses to deliver personal property, the vendee for his own protection has the right, under the circumstances, to buy the goods in the open market, and charge the difference in price to the vendor's account. In such case the law implies a promise on the part of the vendor to

repay the money which the vendee has been compelled to pay for him, and for it indebitatus assumpsit will lie. *Richardson Constr. Co. v. Whiting Lumber Co.*, 116 Va. 490, 82 S. E. 87.

c. Necessity of Request.

Mr. Burks, at p. 129 of his work on Pleading and Practice, says: "When money has been paid for the use of the defendant, the request necessary to sustain a recovery may be either express or implied; and the request, as well as the promise, will be implied when the consideration consists in the plaintiff's having been compelled to do that to which the defendant was legally compellable, or where the defendant has adopted and enjoyed the benefit of the consideration." *Richardson Constr. Co. v. Whiting Lumber Co.*, 116 Va. 490, 492, 82 S. E. 87.

6. Use and Occupation.

Royalties accruing under a lease stipulating to pay a fixed amount whether the royalties amount to that much or not are recoverable in assumpsit under an indebitatus count for use and occupation. *Lawson v. Williamson Coal, etc., Co.*, 61 W. Va. 669, 57 S. E. 258. See ante, "Special and General Assumpsit," II, B.

8. Evidence.

See post, "Evidence," XII.

D. SPECIALTIES.

2. Under the Statutes.

a. In Virginia.

In Any Case Where an Action of Covenant Will Lie an Action of Assumpsit May Be Brought.—Va. Code 1919, § 6088.

b. In West Virginia.

When Assumpsit Lies. — Barnes Code, pp. 1037, 1038, ch. 99, §§ 10, 16a.

G. BILLS, NOTES AND CHECKS.

1. In Virginia.

Assumpsit May Be Maintained upon Any Negotiable Instrument.—Va. Code 1919, § 5760.

2. In West Virginia.

When Assumpsit Lies. — *Barnes* W. Va. Code pp. 1037, ch. 99, §§ 10, 11.

J. AGREEMENT TO MAKE MONTHLY PAYMENTS IN LIEU OF ALIMONY.

Where a husband has agreed in writing to make certain monthly payments to his wife in lieu of alimony, pending a suit by her for a divorce, an action of assumpsit will lie upon the agreement to recover the monthly instalments not paid. This is not an action to recover alimony. *Newman v. McComb*, 112 Va. 408, 71 S. E. 624.

K. FALSE WARRANTY.

A party injured by a false warranty may maintain an action either in assumpsit or case to recover the resultant damages. *Schaffner v. National Supply Co.*, 80 W. Va. 111, 92 S. E. 580. See post, TRESPASS; WARRANTY.

L. IMPLIED PROMISE TO PAY FOR PROPERTY PURCHASED OR APPROPRIATED.

Where property of one has been purchased by another, or appropriated by him under circumstances from which the law will imply a promise on his part to pay for the same, and the evidence thereof is clear and convincing, and he offers no evidence to the contrary, the owner is entitled to recover the price or value of the property in assumpsit, and the judgment of the trial court on the verdict of the jury denying him this right will on writ of error be reversed and a new trial awarded him. *Boyles v. Reaser*, 80 W. Va. 303, 92 S. E. 459.

A school board contracted for the construction of a school building. The contractor entered into a contract with the plaintiff to furnish a certain part of the building material for a certain sum. Before the material was delivered the contractor became bankrupt and refused to receive it. Plaintiff then notified the carrier's

agent to hold the shipments and not to deliver to any one except upon a written order. Notwithstanding this notice, the carrier delivered the material to an agent of the trustee in bankruptcy of the contractor, who contemplated the completion of the contract with the school board. But the trustee abandoned this idea and so notified the parties in interest, relinquishing his claim for the materials; whereupon the school board proceeded itself to complete the building, using the material in question, with knowledge of all the facts. There was evidence indicating an express promise to pay for the material by the school board. Held, that the law will imply a promise by the board to pay for the building materials used, and the plaintiff is entitled to recover in assumpsit regardless of his exercise of the right of stoppage in transitu. *School Board v. Saxon Lime, etc., Co.*, 121 Va. 594, 93 S. E. 579.

M. BREACH OF CONTRACT TO MAKE A WILL.

Assumpsit is a proper remedy for a breach of contract to make a will. *Jefferson v. Simpson*, 83 W. Va. 274, 98 S. E. 212.

N. ITEM OMITTED FROM ACCOUNT.

An item omitted, by mistake, accident or fraud, from a settled account between individuals, growing out of an ordinary business transaction, such as a sale of cattle, may be recovered in an action of assumpsit. *Harman v. Maddy Bros.*, 57 W. Va. 66, 49 S. E. 1009.

O. BREACH OF CARRIER'S DUTY UNDER A CONTRACT.

Where by a contract made between a county court and a railroad company, for the mutual advantage of the parties thereto in preventing the spread of a contagious disease, the carrier agrees, in consideration that the county court shall provide and

maintain a pest house for the care and treatment of persons infected with such disease, to furnish and properly equip a car therefor and transport such persons to the pest house, one of the class of persons therein designated in whose interest it is made may maintain in his own name an action against such carrier, either in assumpsit upon contract or in tort, for damages resulting from a breach of its duty to him under the contract, or arising out of the relation of carrier and passenger after he has been accepted as a passenger. *Jenkins v. Chesapeake, etc., R. Co.*, 61 W. Va. 597, 57 S. E. 48. See post, CARRIERS.

P. LUMBER SOLD AND TAKEN FROM LAND.

Where there is a contract between the parties, though the title to the land be in dispute, assumpsit will lie upon the contract, fully executed, for the value of timber sold, and cut and taken from land. *Curtis v. Deepwater R. Co.*, 68 W. Va. 762, 70 S. E. 776, distinguishing *Parks v. Morris, etc., Co.*, 63 W. Va. 51, 59 S. E. 753.

III. MATTERS OF DEFENSE.

A½. THIRD PERSON OBLIGATED TO PERFORM CONTRACT.

Action for Work Done or Use of Implements.—It is no defense to an action for compensation for work done, or the use of implements in the performance thereof, at the instance, and upon the request, of the defendant, that a third party was known by the plaintiff to have been obligated to the defendant, by contract, to perform it, or to have been liable in damages to him for not having performed it or for breach of a contract occasioning the work, and to have performed slight services in the procurement of the contract on which the action is based. *Monongahela, etc., Dredging Co. v. Smith*, 78 W. Va. 67, 88 S. E. 1085.

IV. PLEADING.

A. THE DECLARATION.

1. In General.

Counts in assumpsit which aver defendant's undertaking and a legal consideration therefor, the breach of defendant in failing to keep that undertaking, and the injury to plaintiff therefrom, are generally sufficient. *Union Stopper Co. v. McGara*, 66 W. Va. 403, 66 S. E. 698.

A declaration against a common carrier for failure to deliver goods which sets forth the consideration, the promise, and the breach, and that notice in writing was given by the plaintiff to the defendant as prescribed by the bill of lading, is good as a declaration in assumpsit upon an express contract. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161.

In *Munn v. Wellsburg Banking, etc., Co.*, 66 W. Va. 204, 205, 66 S. E. 230, it is said: "The point is not made that the declaration is not good in form. It seems to be in the form prescribed by approved precedents for declarations in assumpsit for discharging a servant. *Gregory's Forms Anno. No. 54*, and cases cited."

A quantum meruit count is now obsolete, and is no longer necessary in an action in assumpsit containing the common counts for work and labor done. *Parkersburg, etc., Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

4. Promise.

As to sufficiency against demurrer of averment of promise, see post, "Demurrer," IV, A, 12.

In an action of assumpsit the gist of the action being the promise of payment, the express promise should be laid in the declaration. *Wheeling Mold, etc., Co. v. Wheeling Steel, etc., Co.*, 62 W. Va. 288, 57 S. E. 826. See also *Pennsylvania R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567.

Averment of the promise in a dec-

laration in assumpsit by implication or intendment only is defective and would be insufficient on demurrer. *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098. See post, "Demurrer," IV, A, 12.

The mere recital of the writing sued on though a true copy, is not sufficient; and there is no distinction in pleading in this regard between an express and an implied promise. *Wheeling Mold, etc., Co. v. Wheeling Steel, etc., Co.*, 62 W. Va. 288, 57 S. E. 826.

An implied promise must be as distinctly alleged in a declaration as an express one. *Bannister v. Victoria Coal, etc., Co.*, 63 W. Va. 502, 61 S. E. 338.

In an action of assumpsit, founded on defendant's promise, failure to aver such promise in the declaration renders the declaration fatally defective, and a demurrer thereto for such defect should be sustained. *Danser v. Mallonee*, 77 W. Va. 26, 86 S. E. 895.

When Use of Word "Promise" Not Essential.—Generally, a count in assumpsit which shows that what is equivalent to a promise has taken place is good without the use of the word "promise." *Union Stopper Co. v. McGara*, 66 W. Va. 403, 66 S. E. 698.

Promise Sufficiently Alleged.—A declaration in assumpsit which alleges that the plaintiff agreed to do certain things under the contract, and that the defendant in consideration thereof agreed to pay the plaintiff therefor the price stipulated in the contract, sufficiently alleged the promise of the defendant. *Bannister v. Victoria Coal, etc., Co.*, 63 W. Va. 502, 61 S. E. 338.

Sufficient Averment of Promise in Action on Note.—The clause "whereby he promised and agreed, for a valuable consideration * * * to pay," etc., in a declaration in assumpsit on a promissory note, is a sufficient averment of a promise, and is not merely descriptive of the note. It is affirmative and nar-

rative as well as descriptive, and yet not violative of the rule against duplicity. *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235.

A declaration in assumpsit based on a promise and undertaking safely to carry and deliver goods, needs no averment of a promise to pay money. *Bashar v. Pittsburg, etc., R. Co.*, 73 W. Va. 39, 79 S. E. 1009.

5. Consideration.

Averment of Consideration in Action upon Note or Writing Containing Obligation to Pay Money.—Va. Code 1919, § 5759.

In an action of assumpsit on a special contract to recover damages the consideration must substantially be averred in the declaration. *Thurmond v. Guyan Valley Coal Co.*, 85 W. Va. 501, 102 S. E. 221.

Where the plaintiff is entitled to declare either in tort or upon contract, and elects to waive the tort and sue in assumpsit, he must conform to the rules applicable to that form of action, and in such case, except actions founded upon bills of exchange, negotiable notes, and other legal liabilities which import a consideration, the declaration must, in the absence of statute, allege both a promise and the consideration upon which it is founded. The averment of a consideration is absolutely essential. Now, however, in Virginia it is provided by statute that no averment of a consideration need be made in a declaration in assumpsit on a promise to pay money. *Pennsylvania R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567.

Averment of Consideration Insufficient.—The averment in a declaration against a common carrier, that the defendant, in consideration of the delivery to it of certain goods, issued its bill of lading, by which it "undertook, promised, and agreed" to carry the goods to their destination is not such an averment of consideration as

is necessary in assumpsit, and renders the count one in tort and not in assumpsit. The averment of consideration must be direct and explicit, and not by way of inducement merely. *Pennsylvania R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567.

Count Sufficiently Averring a Substantial Failure of Consideration. — A count in a declaration in assumpsit to recover payments made on the purchase price of a tract of land that avers a state of facts which, if true, shows that the plaintiff never received anything under the contract of sale, and that the defendant can not convey what he contracted to convey, sufficiently avers a substantial, if not a total failure of consideration, and is a good count. *Riverside Residence Co. v. Husted*, 109 Va. 688, 64 S. E. 958.

The declaration, in this case is sufficient under section 2852 of the Code. (Code 1919, § 5759). *Newman v. McComb*, 112 Va. 408, 71 S. E. 624.

6. Performance of Conditions Precedent.

An averment in general terms of performance of all conditions precedent is sufficient in a declaration on a contract for damages in the form of profits or gains prevented, by refusal of the defendant to permit the plaintiff to fully perform his contract. *Comstock v. Droney Lumber Co.*, 69 W. Va. 100, 71 S. E. 255.

8. Breach.

In a special count in assumpsit on a contract to do a number of things, several breaches thereof may be assigned. *McCray v. Craig & Sons*, 70 W. Va. 735, 75 S. E. 79.

9. Affidavit with Declaration.

See post, "Affidavit," IV, D.

9½. Account with Declaration.

When Account to Be Filed with Declaration.—Va. Code 1919, § 6090; Barnes Code, p. 1111, ch. 125, § 11.

Under the plain provision of § 3248

of the Code (Code 1919, § 6090), the plaintiff in every action of assumpsit is required to file with his declaration an account stating distinctly the several items of his claim, unless it is plainly described in the declaration. and the refusal of the trial court, upon request in a proper case, to require such account to be filed constitutes reversible error. *Clinchfield Coal Corp. v. Brooks*, 118 Va. 72, 86 S. E. 829.

Sufficiency of Account. — Evidence is admissible under an account filed with a declaration in assumpsit showing the names of the parties to the action, and the subject matter of which is the same as that of a count in the declaration, and which is otherwise sufficient, notwithstanding omission to endorse on it the style of the action. *Anderson v. Lewis*, 64 W. Va. 297, 61 S. E. 160.

The plaintiff in an action of assumpsit does not waive the common counts of his declaration by failing to file the account required by § 11, ch. 125, Code, at the time the declaration is filed. He may file the account afterwards and rely upon the common counts. *Federation Window Glass Co. v. Cameron Glass Co.*, 58 W. Va. 477, 52 S. E. 518.

10. Amendments.

Amending a declaration in assumpsit embracing the common counts only, by adding a special count applicable to a particular item in the bill of particulars, which is also provable under some one of the common counts, is not a departure from the original cause of action, if the amount of damages claimed in both the original and the amended declarations is the same. *Mankin v. Jones*, 68 W. Va. 422, 69 S. E. 981.

11. Surplusage.

If a count alleges sufficient matter of fact to warrant a recovery, all immaterial allegations may be disre-

garded. Surplusage never vitiates a declaration. *Union Stopper Co. v. McGara*, 66 W. Va. 403, 66 S. E. 698.

A declaration in assumpsit which avers a promise, a consideration therefor, and a breach thereof, entitling the plaintiff to damages, is sufficient on demurrer, though it contains matters of surplusage. *Hall v. Philadelphia Co.*, 74 W. Va. 172, 81 S. E. 727.

A count in assumpsit, upon a special contract, which contains averments of all matters that are essential to fix upon defendant the real liability arising from his breach thereof is sufficient upon demurrer, notwithstanding the count contains matters based upon an erroneous interpretation of defendant's liability under the contract which must be excluded as immaterial to a true stating of the case and as mere surplusage. *Union Stopper Co. v. Wood*, 66 W. Va. 461, 66 S. E. 702.

12. Demurrer.

Question That Can Not Be Raised by Demurrer.—Whether a written agreement can be introduced to sustain a recovery under the common counts in assumpsit must be determined when the evidence is offered. The question can not be raised by a demurrer to said counts. *Oliver Refin. Co. v. Portsmouth, etc., Refin. Corp.*, 109 Va. 513, 64 S. E. 56.

A demurrer will not lie to a common-law count in assumpsit. *Norfolk v. Norfolk County*, 120 Va. 356, 91 S. E. 820.

A demurrer to the common counts in assumpsit, in the usual form, should be overruled. *Oliver Refin. Co. v. Portsmouth, etc., Refin. Corp.*, 109 Va. 513, 64 S. E. 56.

Facts Not Rendering Common Counts Demurrable.—Common counts in assumpsit, otherwise good on demurrer, are not rendered bad and subject to demurrer, because it may appear from a special count of the declaration that the contract, pleaded and relied on therein, is executory

and not provable under the common counts. *Robinson v. Board*, 70 W. Va. 66, 73 S. E. 337.

Nor will such common counts be rendered demurrable, because by reference to the bill of particulars filed with the declaration, it appears that the same is for services contracted for, but not yet rendered, under an executory contract, pleaded in the special count. A bill of particulars is no part of the declaration. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696; *Robinson v. Board*, 70 W. Va. 66, 73 S. E. 337. See post, **BILL OF PARTICULARS**.

Declarations Held Good on Demurrer.—A declaration in assumpsit on a promise in writing to pay money, which distinctly alleges fulfillment of the only condition on which such payment was made to depend, is good on demurrer. *National Valley Bank v. Houston*, 66 W. Va. 336, 66 S. E. 465.

A contract was entered into between a county court and a railroad company, for the mutual advantage of the parties thereto in preventing the spread of a contagious disease, the carrier agreeing, in consideration that the county court should provide and maintain a pest house for the caring and treatment of persons infected with such disease, to furnish and properly equip a car therefor and transmit such persons to the pest house. Held, that a declaration in assumpsit, by one entitled to the benefit of such contract, which properly impleads the railroad company thereon and for a breach of its duty to him thereunder, is good upon demurrer. *Jenkins v. Chesapeake, etc., R. Co.*, 61 W. Va. 597, 57 S. E. 48.

A special count in a declaration in assumpsit, counting upon an original and a second or modified contract, and which after averring both contracts charges a promise on the part of the defendant to pay the amount

accrued to plaintiff under the contracts pleaded, is not rendered bad on demurrer because of its omission to charge a promise to pay "the sum of _____ dollars" alleged in a previous paragraph to be due under the first or original contract pleaded. *Parkersburg, etc., Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

Nor is such count bad on demurrer for failure to aver a promise of defendant to pay respectively the two several sums demanded, one accruing to plaintiff under the contracts in writing pleaded, and the other under other contracts pleaded, but not in writing, such promises being comprehended under the general averment, of a promise to pay a sum larger than the aggregate of both items, intended and sufficient to cover both sums sued for. *Parkersburg, etc., Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

Nor is such count bad on demurrer, because it avers a promise to pay interest on the sum sued for from a date anterior to the making of the second of said contracts, interest being incident merely to the right to recover the principal sum sued for. *Parkersburg, etc., Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

Good Pleading in Count Not Rendered Demurrable by Bad. — If a special count contains matter sufficient to entitle plaintiff to a recovery, the fact that it also contains other matter not constituting good ground of action will not render the count bad on demurrer. The good is not vitiated by the bad. This point is applicable to the item of \$75.00, alleged expenses incurred by plaintiff in attending school preparatory to the execution of his contract for service. *Duty v. Chesapeake, etc., R. Co.*, 70 W. Va. 14, 73 S. E. 331, decided this term, and cases cited. *Robinson v. Board*, 70 W. Va. 66, 73 S. E. 337.

Averment of Promise by Implica-

tion or Intendment Insufficient on Demurrer.—Averment of the promise in a declaration in assumpsit by implication or intendment only is defective and would be insufficient on demurrer. *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098.

Special Counts in Declaration Held Bad on Demurrer.—Special counts in a declaration in assumpsit, charging a debtor and a guarantor of the debt jointly, are bad on demurrer. *Shore v. Lawrence*, 68 W. Va. 220, 69 S. E. 791.

Demurrer to Special Count Well Taken.—A demurrer to a special count in a declaration in assumpsit held well taken, where the count showed no violation of any contractual rights of plaintiff. *Bond v. Priest*, 77 W. Va. 671, 88 S. E. 114.

B. THE PLEA.

1. The General Issue.

Matter which amounts to the general issue in assumpsit must be so pleaded and cannot be set up by motion. *Dudley v. Carter, etc., Co.*, 125 Va. 701, 100 S. E. 466.

When Affidavit is Filed Plea Need Not Be in Writing.—If a defendant files an affidavit along with a plea of nonassumpsit to an action of assumpsit upon a contract for the payment of money where the plaintiff has filed with his declaration an affidavit as to the amount and justice of his claim, the plea, by statute, need not be in writing. *Moreland v. Moreland*, 108 Va. 93, 60 S. E. 730. See post, "Affidavit," IV, D.

General Issue on a Sealed Instrument Shall Be Non Est Factum.—Va. Code 1919, § 6088.

2. Matter Provable under General Issue and Special Pleas.

Matters Provable under General Issue in General.—"An eminent author long since dead whose work survives as a monument to his legal learning said: * * * 'that under the gen-

eral issue any matter which showed that the plaintiff never had a cause of action might be given in evidence; and also that under the plea most matters even in discharge of the action which showed that at the time of commencement of the suit the plaintiff had no subsisting cause of action might be taken advantage of.' 1 Chitty, Pl. (11 Am. Ed.) 478. See also *Manchester Iron Mfg. Co. v. Sweeting*, 10 Wend. (N. Y.) 162." *Sutherland v. Guthrie*, 82 W. Va. 419, 421, 96 S. E. 61.

"The modern tendency of the courts is towards a relaxation of the rigid rules upon the admissibility of evidence in actions of assumpsit and to allow any proof which tends to show the absence of plaintiff's interest in the contract sued on at the time of the pleading, and therefore that defendant was under no liability to him for cause of action averred in the declaration. 2 Greenleaf, Evidence, (15th Ed.) sec. 135." *Sutherland v. Guthrie*, 82 W. Va. 419, 421, 96 S. E. 61.

The prevailing principle controlling the admissibility of evidence in defense of such an action is that anything which tends to show that plaintiff does not have a subsisting cause of action may be received under the general issue. 13 Enc. Evi. 764, *Whitley v. Booker, etc., Co.*, 113 Va. 434, 74 S. E. 160; 16 Enc. Dig. 149. *Sutherland v. Guthrie*, 82 W. Va. 419, 421, 96 S. E. 61.

The general issue of non-assumpsit on an unsealed contract is one of the broadest general issues known to our system of pleading, and it is said that anything may be shown under it except tender, bankruptcy, and the act of limitation, and that these defenses are excepted because they do not contest liability, but only that no action can be maintained therefor. *Dudley v. Carter, etc., Co.*, 125 Va. 701, 100 S. E. 466.

"In 4 Min. Inst. (3d ed.), 774, it is

said: 'But whatever may be the explanation, the fact is undeniable that for more than a century past there have been admitted, under the plea of non-assumpsit in all actions of assumpsit, whether founded on an implied or express promise, any matter of defense whatever (with a few exceptions, the same as in the case of nil debit, ante, p. 770) which tends to deny the defendant's liability to the plaintiff's demand.' The excepted matters are 'such defenses as are allowed by statute to be made by the plea of special set-offs. * * * The statute of limitations, bankruptcy, and tender are believed, with this qualification, to be the only defenses which may not be proved under this plea, and they are excepted because they do not contest that the debt is owing, but insist only that no action can be maintained for it.' " *Whitley v. Booker, etc., Co.*, 113 Va. 434, 437, 74 S. E. 160.

"Under the plea of non-assumpsit defendant may invoke the statute of frauds. Hogg's Pl. & Forms, § 220; *Rowton v. Rowton*, 1 H. & M. 92; *Fleming v. Holt*, 12 W. Va. 143; *Bartlett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; S. C., 35 W. Va. 103, 12 S. E. 1106." *Howell v. Harvey*, 65 W. Va. 310, 312, 64 S. E. 249.

Under General Issue Breach of Conditions of Insurance Policy May Be Shown.—In an action of assumpsit on a fire insurance policy, the defendant may, under the plea of non-assumpsit, show a breach of conditions of the policy avoiding it if the interest of the assured was other than "unconditional and sole ownership," or if "any change in interest, title or possession" took place without notice to the insurer. *Rochester German Ins. Co. v. Monumental Savings Ass'n*, 107 Va. 701, 60 S. E. 93.

The defense of a failure of consideration may be made, in an action of assumpsit upon a promissory note, either under the plea of non-assump-

sit or a special plea under § 5, chapter 126, West Virginia Code. *McClanahan v. Caul*, 63 W. Va. 418, 60 S. E. 382.

4. Plea of Not Guilty.

In an action of assumpsit, a plea of "not guilty," while irregular, presents a substantial issue, and such mispleading and misjoinder of issue thereon will, after verdict, be cured by statute in West Virginia. *Bannister v. Victoria Coal, etc., Co.*, 63 W. Va. 502, 61 S. E. 338.

5. Special Pleas Amounting to General Issue.

As the facts averred in a special plea, denominated by the pleader a plea in abatement of the action, assumpsit, tend to show an assignment by the plaintiff of the claim sued on prior to the commencement of the action and are provable under the general issue in bar of the right to prosecute the action, the trial court did not err in sustaining the motion to strike the plea from the record. *Sutherland v. Guthrie*, 82 W. Va. 419, 96 S. E. 61.

But in an action of assumpsit by the payee against the maker of a note, the latter may file a special plea setting up facts showing that the note was made for the payee's accommodation and was without consideration, even though such matters are provable under the general issue which he has also pleaded. *First Nat. Bank v. Freeman*, 83 W. Va. 477, 98 S. E. 558.

7. Affidavit to Plea in Bar.

See post, "Affidavit," IV, D.

11. Inconsistent Pleas.

In an action of assumpsit brought by the seller of goods against the buyer for failure to accept and pay for the goods ordered, defendant pleaded non-assumpsit, and a special plea of recoupment under section 3299, Code of 1904 (Code 1919, sec. 6145), to recover damages of plaintiff for failure to deliver the goods to the defendant.

It was insisted on behalf of plaintiff that when the defendant filed its special plea it forever waived its right to defend on the ground that it had rescinded the contract because of the failure of the plaintiff to begin deliveries at the time agreed upon. Held: That this position was not tenable. The continued existence of the contract was put in issue by the plea of non-assumpsit, and while there could be no recoupment if the contract did not exist, and to this extent the two pleas are inconsistent, this is not a valid objection, for the defendant may plead as many several matters of law or fact as he deems necessary. Section 3264, Code of 1904 (Code 1919, sec. 6107). Nothing is more common in practice than contradictory pleas. In the case at bar, if the defendant did not seek any recovery over and above the plaintiff's claim, there was no necessity for the special plea as the defense set up by it might have been shown under the general issue of non-assumpsit. *Norfolk Hosiery, etc., Mills v. Aetna Hosiery Co.*, 124 Va. 221, 98 S. E. 43. See post, PLEADING; SET-OFF, RECOUPMENT AND COUNTERCLAIM.

C. VARIANCE.

2. Between Allegations and Proof.

The time laid in a declaration in assumpsit containing only the common counts, is immaterial and may be departed from in the proof. *Bartlett v. Bank*, 77 W. Va. 329, 87 S. E. 444.

Variance as to County in which Contract was Made.—A declaration in assumpsit states that the contract was made in Raleigh county, whereas the proof shows that it was made in Fayette county. This variance will not dismiss the case, the place not being material. *Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 248.

Items of Account Provable under Common Counts.—Items of an account, for board and use of teams and

vehicles, furnished at the request and for the use and benefit of defendant, are provable under the common counts for goods and chattels furnished and work and services performed by plaintiff at such request. *Flannigan v. Monongahela Tie, etc., Co.*, 77 W. Va. 158, 87 S. E. 165.

In an action of assumpsit a declaration, which counts as upon a special contract for carriage between the plaintiff and defendant for hire and reward, is not supported by proof of a contract between the county court and the defendant company, nor by the implied contract between the carrier and passenger; the variance being fatal. *Jenkins v. Chesapeake, etc., R. Co.*, 61 W. Va. 597, 57 S. E. 48.

D. AFFIDAVIT.

1. In Virginia.

a. Statutory Provision.

When, in Action of Assumpsit, No Plea in Bar to Be Received, or Inquiry of Damages Made, unless Defendant File with Plea Affidavit Denying Plaintiff's Claim, but Judgment Given Therefor.—Va. Code 1919, § 6133, cited in *Diebold, etc., Co. v. Taterson*, 115 Va. 766, 769, 80 S. E. 585.

b. Purpose of Statute.

Section 3286 of the Code (Code 1919, § 6133), allowing the plaintiff in assumpsit, or his agent, to make affidavit as to the correctness of his claim, and debarring the defendant from any plea unless sworn to, was enacted to prevent the filing of sham pleas merely for delay. *Carpenter v. Gray*, 113 Va. 518, 75 S. E. 300; *Mumford Banking Co. v. Farmers, etc., Bank*, 116 Va. 449, 82 S. E. 112; *Gehl v. Baker*, 121 Va. 23, 92 S. E. 852.

c. Sufficiency of Compliance with Statute.

(1) In General.

A substantial compliance with the provisions of § 3286 of the Code (Code 1919, § 6133), is all that is re-

quired. *Carpenter v. Gray*, 113 Va. 518, 75 S. E. 300.

(2) Who May Make the Affidavits.

Affidavit to Account Sued On.—"In the case of *Merriman Co. v. Thomas & Co.*, 103 Va. 24, 48 S. E. 490, in construing section 3286 of the Code (Code 1919, § 6133) which provides that if in an action of assumpsit the account sued on is verified by an affidavit made by 'the plaintiff or his agent,' no plea in bar shall be received unless accompanied by a like counter affidavit, this court held that the word 'book-keeper' did not import agency, and that the affidavit of the plaintiff's book-keeper, without more, was not a compliance with the statute. The court says: 'The statute makes an innovation upon the established mode of procedure in such cases, and the plaintiff, in order to take advantage of it, must proceed in accordance with its provisions. The affidavit can only be made by the plaintiff, or his agent.' " *Clement v. Adams Bros.—Paynes Co.*, 113 Va. 547, 550, 75 S. E. 294.

Affidavit to Plea.—The affidavit of the president of a corporation, in the absence of any averment therein of his agency, or any other evidence on the subject, is not a sufficient compliance with section 3286 of the Code (Code 1919, § 6133) which requires the affidavit of the defendant or his agent to the plea. The fact that a person is president of a corporation does not per se import agency to make an affidavit for it. *Jones & Co. v. Hancock & Sons*, 117 Va. 511, 85 S. E. 460.

(3) Sufficiency of Affidavits.

The strict rule applied in construing affidavits in attachment cases in equity, where the jurisdiction of the court is involved, is not to be applied to the affidavit allowed by section 3286 of the Code (Code 1919, § 6133). *Carpenter v. Gray*, 113 Va. 518, 75 S. E. 300.

Plaintiff's Affidavit Held Sufficient.

—The affidavit does not, in express terms, state that the affiant is the plain-

tiff in the action, but it uses language which plainly shows that he is the plaintiff, and that is sufficient. See *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. 660. The plaintiff was J. E. Gray, the affiant was J. E. Gray, and the affidavit states that J. E. Gray made oath "that the foregoing account against W. R. Carpenter is just, true, and correct, and due to the best of affiant's belief, and that, to the best of affiant's belief, the amount of his claim against the said W. R. Carpenter is \$2,800, and that the said amount is justly due, with interest from the 1st day of March, 1910." The language quoted leaves no room for doubt that the affiant was the plaintiff; that the amount claimed was \$2,800; that it was justly due, and that it bore interest from March 1, 1910. The fact that the account filed with the declaration claimed interest from January 1, 1910, does not affect the validity of the affidavit, since the date fixed by the latter was in favor of the defendant, and will control in entering up judgment if no defense be made. *Carpenter v. Gray*, 113 Va. 518, 75 S. E. 300.

Defendant's Affidavit Must Be in Writing.—If a defendant file an affidavit along with a plea of non-assumpsit to an action of assumpsit upon a contract for the payment of money where the plaintiff has filed with the declaration an affidavit as to the amount and justice of his claim, the affidavit must necessarily be in writing. *Moreland v. Moreland*, 108 Va. 93, 60 S. E. 730.

Defendant's Affidavit Held Sufficient.—An affidavit accompanying a plea of nonassumpsit "that the matters stated in the annexed plea are true" is a substantial compliance with the provisions of § 3286 of the Code (Code 1919, § 6133), requiring the defendant under certain circumstances to file an affidavit that the plaintiff is not entitled to recover anything from the defendant on the claim sued on, etc.,

and that is all that is necessary. The plea puts in issue the entire claim of the plaintiff, and the affidavit states that the plea is true. *Jackson v. Dotson*, 110 Va. 46, 65 S. E. 484.

d. Effect of Defendant's Failure to File Affidavit.

"That plaintiff in error was entitled to an office judgment for the amount of his claim sued on at the second rules held in the clerk's office following the filing of his declaration accompanied by the affidavit, etc., required by section 3286 of the Code (Code 1919, § 6133), to become final on the fifteenth day of the next term of the court or at the expiration thereof, if that occurred before the fifteenth day of the term, unless the defendant filed a plea in bar of the action accompanied by affidavit as required by the same statute, is the settled law in this State. *Price v. Marks*, 103 Va. 18, 48 S. E. 499, and authorities there cited." *Gring v. Lake Drummond Canal, etc., Co.*, 110 Va. 754, 756, 67 S. E. 360.

e. Waiver or Estoppel.

A plaintiff, in an action of assumpsit, may waive, or be estopped from asserting, his right to have judgment entered in his favor for the amount claimed by him in the affidavit filed with his declaration under § 3286 of the Code (Code 1919, § 6133), although the defendant has failed to comply with the provisions of that section which entitle him to make defense to the claim asserted. *Carpenter v. Gray*, 113 Va. 518, 75 S. E. 300; *Jackson v. Dotson*, 110 Va. 46, 65 S. E. 484.

The requirement of the statute was manifestly imposed for the benefit of the plaintiff and may be waived by him expressly or by implication, or he may be by his conduct estopped to take advantage of it. *Carpenter v. Gray*, 113 Va. 518, 75 S. E. 300; and cases cited. *Mumford Banking Co. v. Farmers, etc., Bank*, 116 Va. 449, 454, 82 S. E.

112; *Gehl v. Baker*, 121 Va. 23, 92 S. E. 852.

Consenting to, or accepting without objection, a continuance of the case, are familiar methods of waiving the provisions of the statute. *Gehl v. Baker*, 121 Va. 23, 92 S. E. 852.

The provisions of the statute will be deemed to have been waived where the plaintiff not only makes no objection where the plea is tendered without a sufficient affidavit, but, though present by counsel, assents to, or accepts without objection, a continuance of the case until the next term of the court, "with leave to the defendant to file within fifteen days his grounds of defense." *Jackson v. Dotson*, 110 Va. 46, 65 S. E. 484.

If, upon the request of the plaintiff, the defendant consents to the postponement of a case until a later day of the term, and the court adjourns before that day arrives, the office judgment which would otherwise have become final on that adjournment of the court does not become final, and the defendant may enter his sworn plea to the merits at the next term of the court. *Mumford Banking Co. v. Farmers, etc., Bank*, 116 Va. 449, 82 S. E. 112.

In *Mumford Banking Co. v. Farmers, etc., Bank*, 116 Va. 449, 82 S. E. 112, the court said: "In *Pollard v. American Stone Co.*, 111 Va. 147, 68 S. E. 266, it was held that if the plaintiff agrees to postpone the trial of the case to the next term of the court, or to a later day of the term at which the office judgment would become final, he will be held to have waived the plea and affidavit required by the statute, and the agreement need not be entered of record. The reasoning of that case applies with peculiar force to the facts and circumstances appearing in the record now before us, for though the plaintiff should not be considered as having expressly or impliedly consented that the case be continued to the September term of the court, it is not only consented, but for the conven-

ience of its president and counsel requested that the case be not taken up on the first and only day that the court was held at its July term, and the result of the trial had at a later day shows that the defendant had a meritorious defense and was not seeking a postponement for the purpose of delay or with the object of taking advantage of the plaintiff to any extent. It would indeed be a harsh application of the statute in question to permit the plaintiff here to take advantage of defendant's failure to file its plea and affidavit on the only day the court was open to it to do so, when the plaintiff itself not only consented but requested that the case go over from that day."

Plaintiff brought his action of assumpsit against the defendant to recover damages for failure to deliver according to contract certain coal which he had purchased. The case was regularly matured at the rules, and, at the next succeeding term, the defendant appeared and pleaded non-assumpsit, and issue was joined thereon and the case was continued. The plea was not sworn to, but as this was not an action on a contract for the payment of money, but a contract to do a collateral thing, if it was necessary that the plea should have been sworn to, the plaintiff waived the provision of the statute which was enacted for his benefit, as he had the right to do. Code of 1904, section 3286 (Code 1919, § 6133). *Dudley v. Carter, etc., Co.*, 125 Va. 701, 100 S. E. 466.

Consenting to or obtaining a continuance of the case, after the circuit court had set aside plaintiff's office judgment and permitted the defendant to plead, can not be regarded as a waiver of plaintiff's right to have judgment under § 3286 of the Code (Code 1919, § 6133). *Carpenter v. Gray*, 113 Va. 518, 526, 75 S. E. 300.

2. In West Virginia.

Affidavits by Plaintiff and Defend-

ant; Judgment.—Barnes W. Va. Code, p. 1117, ch. 125, § 46.

Where the plaintiff has filed with his declaration the affidavit provided for by § 46, chapter 125, West Virginia Code, no plea shall be filed unless the defendant file with it the affidavit required by that section. But where, in such case, a plea, not accompanied by such affidavit, is filed without objection, and the case proceeds to trial, the provision of the statute requiring such affidavit will be treated as having been waived. *Williamson & Co. v. Nigh*, 58 W. Va. 629, 53 S. E. 124.

Though a plaintiff in an action of assumpsit has filed with his declaration, an affidavit of the amount due him, the defendant may file a plea in abatement to the jurisdiction of the court without filing the counter affidavit required of a defendant by Code, chapter 125, § 46. *Netter-Oppeneheimer & Co. v. Elfant*, 63 W. Va. 99, 59 S. E. 892.

The form for verification of pleadings, prescribed by § 42, Ch. 125, Code 1906, is insufficient as an affidavit by defendant under § 46 of the same chapter, unless when read with the pleading thus verified a denial of liability in whole or in part substantially appears therefrom. *Woods v. Teter*, 72 W. Va. 668, 79 S. E. 658.

R. Bros. sued M. & H. in assumpsit as partners and filed with their declaration and account the affidavit required of them by § 46, ch. 125, of the Code. M. and H. separately and severally entered their pleas of non assumpsit and tendered their separate affidavits denying their individual liability upon the demands stated in the declaration, but filed no affidavits denying partnership. Held, such affidavits not being responsive to the allegations of the declaration or to the affidavit filed by plaintiffs, defendant's pleas should be rejected. Ruffner

Bros. v. Montgomery & Co., 61 W. Va. 62, 56 S. E. 388.

In an action of assumpsit when a defendant files a counter affidavit under West Virginia Code, chapter 125, § 46, that there is only part of the demand due the plaintiff, the plaintiff is not bound then to take judgment for that part, and try as to the balance of the demand. He may try the case as to all his demand. *Towles & Co. v. Carpenter, etc., Co.*, 62 W. Va. 151, 57 S. E. 365.

V. WAIVER OF TORT.

It is generally true that, where a tort is committed which involves an injury to personal property, the plaintiff may waive the tort and sue upon an implied contract to pay for the property which has been wrongfully taken, damaged or converted to the defendant's use, and this rule has been applied to state agencies. *Nelson County v. Coleman*, 126 Va. 275, 101 S. E. 413.

Essential Requisite to Waiver of Tort and Maintenance of Assumpsit.—"Tort may not be waived, and an action maintained as upon an implied contract to pay the damages sustained, unless the defendant's estate has been benefited thereby, as by the appropriation of plaintiff's property, or the proceeds of the sale thereof, and * * * for mere damages sustaining for wrong and injuries done to the person or property resulting in no pecuniary benefit to the estate of the defendant. assumpsit will not lie. *Burk's Pleading & Practice*, section 85, page 121: *Wilson v. Shrader*, 73 W. Va. 105, 79 S. E. 1083, 1086; *Walker v. Norfolk, etc., R. Co.*, 67 W. Va. 273, 277, 67 S. E. 722; *Webster v. Drinkwater (Me.)*. 17 Am. Dec. 238, and note." *Parkersburg, etc., Sand Co. v. Smith*, 76 W. Va. 246, 254, 85 S. E. 516.

Where money is tortiously received the tort may be waived and assump-

sit maintained. *County Court v. Duty*, 77 W. Va. 17, 87 S. E. 256.

It was claimed that a special count in a declaration in an action of assumpsit set up a tort which was improperly joined as a cause of action with the common counts in assumpsit. The special count did allege a fraudulent and tortious transaction, but one in which the defendants were charged with having received money belonging in good conscience to the plaintiff, and for the refunding of which the law implies a promise. The action was specifically designated in the declaration as assumpsit. Held: That that form of action, if the plaintiff desired to waive the tort, was appropriate for the recovery of the money. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

Appropriation of Another's Property.—If a railroad company, without the knowledge or consent of the owner, takes the property of a contractor, left stored temporarily on its right of way, and appropriates the same to its own use in a manner indicating a claim of right in opposition to that of the owner, the latter may waive the tort and recover the value of the property taken in an action of assumpsit. *Walker v. Norfolk, etc., R. Co.*, 67 W. Va. 273, 67 S. E. 722.

Property Severed from Land and Sold or Converted.—Where a trespass has been committed upon real estate, and property severed therefrom and sold by the defendant or converted to his own use, the owner may waive the trespass and sue for the value of the property, and the law will imply a promise to pay for it. *Wilson v. Shrader*, 73 W. Va. 105, 113, 79 S. E. 1083.

When a trespasser cuts and sells, or converts to his use, trees growing on land, the owner of the land may waive the tort, and instead of bringing action for the tort, sue in assumpsit and recover on the common count for money had and received, or on a quan-

tum valebat for their value; but he cannot maintain assumpsit when the title to the land is in contest between the parties. *Parks v. Morris, etc., Co.*, 63 W. Va. 51, 59 S. E. 753.

False Warranty.—Either an action on the case sounding in tort or assumpsit will lie for a false warranty. *Standard Paint Co. v. Vietor & Co.*, 120 Va. 595, 91 S. E. 752.

VII. LIMITATION OF ACTIONS.

A. IN VIRGINIA.

Limitation of Action for Recovery of Money Paid.—Va. Code 1919, § 5555.

Unlawful for Member of School Board or Any Officer of the Public Free Schools, etc., to Be Concerned in Any Contract for Labor or Work, or Supplies — Limitation of Action for Money Paid under Such a Contract.—Va. Code 1919, § 683.

B. IN WEST VIRGINIA.

Statute of Limitation Not Applicable to Actions for Moneys Paid in Compromise of Prosecution for Acts During Civil War.—W. Va. Code 1913, ch. 136, § 5b, II, (§ 5024).

Period Excluded from Operation of Statute of Limitations.—Barnes Code, p. 1157, ch. 136, § 4.

IX. DAMAGES.

B. THE AD DAMNUM CLAUSE.

3. Verdict in Excess of Ad Damnum.

Interest.—Under § 14, chap. 131, Code, in an action of assumpsit on contract the jury can not, for damages, allow an amount beyond the amount of damages laid in the declaration; but it may add to that sum interest, though the aggregate exceed the amount in the declaration. And where the excess of the verdict over the amount laid in the declaration can be lawfully attributed to interest, the verdict is good. *Salem Terminal*

Tract. Co. v. McGraw, 66 W. Va. 321, 66 S. E. 463.

D. MEASURE OF DAMAGES.

Ordinarily in actions of assumpsit the plaintiff is limited in the ascertainment of damages to those arising directly from the breach of the contract; the wilfulness or wantonness of the breach and other circumstances incidentally connected therewith having nothing to do with the case. *Hall v. Philadelphia Co.*, 74 W. Va. 172, 81 S. E. 727.

"The distinction between damages in assumpsit and in tort is not always observed. It is plainly stated in a leading work: 'The inherent difference between a breach of an agreement between parties, and that sort of a breach of duty which we call a tort, is as old as the law itself. It is believed, too, that as a general rule the measure of damages in one case is necessarily different from the measure of damages in the other. To put the plaintiff in the same position as if the contract has not been broken is the object in cases of contract; whether the contract is broken by accident or by fraud can make no difference. As long as the action is brought to obtain compensation for the loss of the contract, the circumstances attending the breach can not affect the result. But if the cause of action is a tort, the plaintiff must obtain full compensation for an act or series of acts, the full effect of which can not even be understood unless we know every circumstance of aggravation and mitigation. The action for breach of promise of marriage is an undoubted exception to the truth of this general observation; but this action is an anomaly in every respect, and unknown to other systems of law. It may be said that redress should be given for bringing about a breach of contract through duress, or fraud, or other oppression,

and so we conceive it would; but in such an action, the damages for the loss of the contract would be one thing, and the damages for the wrong another.' 2 Sedgwick on Damages. (9th ed.), sec. 602." *Hall v. Philadelphia Co.*, 74 W. Va. 172, 175, 81 S. E. 727.

X. VERDICT.

C. CURE BY VERDICT.

Averment of the promise in a declaration in assumpsit by implication or intendment only is defective and would be insufficient on demurrer, but, in the absence of a demurrer, is cured by a verdict under the operation of the statute of jeofails. *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098.

XI. JUDGMENT.

Against Whom Judgment May Be Rendered in Action on Negotiable Instrument.—Va. Code 1919, § 5760; Barnes Code, p. 1037, ch. 99, § 11. See post, **BILLS, NOTES AND CHECKS.**

XII. EVIDENCE.

1/2A. BURDEN OF PROOF.

In an action for money had and received, the burden of proving all of the facts from which the alleged legal liability will arise rests upon the plaintiff who asserts such liability. *Ritchhart v. Pirkey*, 126 Va. 346, 101 S. E. 353.

E. HOW OBJECTIONS TO RAISED.

Whether a written agreement can be introduced to sustain a recovery under the common counts in assumpsit must be determined when the evidence is offered. The question can not be raised by a demurrer to said counts. *Oliver Refin. Co. v. Portsmouth, etc., Refin. Corp.*, 109 Va. 513, 64 S. E. 56.

ASSUMPTION.—As to assumption of liens, see post, LIENS; VENDOR AND PURCHASER. As to assumption of mortgage debt, see MORTGAGES AND DEEDS OF TRUST.

In *Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 733, 65 S. E. 200, it is said: "Of course, it could not be said that one had assumed the risk of a danger which he did not comprehend or understand, because assumption of a risk is a voluntary act requiring a positive operation of the mind. It is based upon knowledge, actual or constructive, of possible dangers. Without such knowledge there could be no assumption. One can not be said to assume the risk of a thing which he never thought could happen. This is axiomatic." See post, FELLOW SERVANTS; MASTER AND SERVANT.

ASYLUMS.—See ante, HOSPITALS AND ASYLUMS.

AT.—At Any Time Pending Suit.—See *Maxwell v. Maxwell*, 67 W. Va. 119, 125, 67 S. E. 379.

At His Home.—The words "in his own home," "in his home," "at his home" and "permanent residence of the person and his family" have substantially the same meaning namely, anywhere within the curtilage. *Bare v. Commonwealth*, 122 Va. 783, 94 S. E. 168.

At Least.—See *State v. Moore*, 67 W. Va. 559, 560, 68 S. E. 177.

At Once.—As to contract of sale requiring engine to be shipped at once, see *Lawson v. Hobbs*, 120 Va. 690, 91 S. E. 750, see also, post, SALES.

At Option of Lessee.—See post, RENEW.

At Term at Which Trial Is Had.—"At the term at which the trial is had according to *Jordan v. Jordan*, 48 W. Va. 600, 37 S. E. 556, and the other decisions, means at the term at which final judgment was rendered." *Barker v. Stephenson*, 67 W. Va. 490, 493, 68 S. E. 113. See post, EXCEPTIONS, BILL OF.

At Time of Passage of Act.—As to meaning of phrase at time of passage of act, in statute, see *State v. Pinson*, 76 W. Va. 572, 85 S. E. 786. See also, post, STATUTES.

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CROSS REFERENCES.

See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70, and references there given. In addition, see ante, APPEARANCES; post, EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES; EXEMPTIONS FROM EXECUTION AND ATTACHMENT; FORTHCOMING AND DELIVERY BONDS; FRAUDULENT CONVEYANCES; HOMESTEAD EXEMPTIONS; SUMMONS AND PROCESS. As to attachment of money in bank on service by publication, see 3 Va. Law Reg., N. S. 68. As to attachment of witnesses, see post, FISH AND FISHERIES; WITNESSES.

I. NATURE, OBJECT AND CONSTRUCTION.**A. NATURE.**

Attachment laws being in derogation of the common law, and harsh in their application, substantial compliance with their requirements must appear. *Taylor v. Sutherlin-Meade, etc., Co.*, 107 Va. 787, 60 S. E. 132; *Damron v. Citizens Nat. Bank*, 112 Va. 544, 546, 72 S. E. 153.

"While different in terms, in effect ours and the Virginia attachment proceedings are substantially similar; and, excepting so far as purely proceeding in rem, they are merely collateral as an aid to some other proceedings, as a warrant or summons before a justice, a suit in equity, or an action at law." *Mabie v. Moore*, 75 W. Va. 761, 763, 84 S. E. 788.

"A proceeding by way of attachment partakes somewhat in its nature both of a proceeding in rem and one in personam. It is not, strictly speaking, a proceeding in rem, although it partakes more of the nature of such a proceeding where no service of process has been had than it does of a pro-

ceeding in personam. There is this difference, however. In a pure proceeding in rem, the judgment is conclusive against the world as to the right in the property or thing seized, or the status sought to be determined, while in a proceeding by attachment, where there is no service of process the attachment is only conclusive upon the parties to it and their privies. If a stranger claims to own the property he would not be bound by the adjudication in the attachment proceeding while in a pure proceeding in rem every one is bound by the adjudication. It will thus be seen that the effect of such a judgment is not bound as a judgment in a proceeding purely in rem." *Gerber Co. v. Thompson*, 84 W. Va. 721, 725, 100 S. E. 733.

B. OBJECT.

See ante, "Nature," I, A.

C. CONSTRUCTION.

"Attachment is purely a statutory remedy, summary and drastic in its nature, and, therefore, the courts apply to the statute the rule of strict construction; all its requirements must

be strictly complied with." *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 757, 82 S. E. 1094; *Mabie v. Moore*, 75 W. Va. 761, 762, 84 S. E. 788, citing *Barksdale v. Hendree*, 2 Pat. 2 H. 43; *Delaplain & Co. v. Armstrong*, 21 W. Va. 211; *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 877; *United States Baking Co. v. Bachman*, 38 W. Va. 84, 18 S. E. 382.

"A careful review of the record shows a substantial compliance with the attachment statutes; and 'a more technical construction * * * would lead to inconvenience in practice, and often to a miscarriage of justice, without any resultant benefits.' *Richardson v. Hoskins Lumber Co.*, 111 Va. 755, 757, 69 S. E. 935; *Hilliard v. Union Trust Co.*, 123 Va. 724, 728, 97 S. E. 335.

II. WHEN PROPER.

½A. IN GENERAL.

See post, "In General," II, A, ½; "Necessity," XIII, B, 1.

Several Attachments on Original Petition.—Va. Code 1919, § 6388.

Costs of Additional Attachments.—Va. Code 1919, § 6388.

Issue and Execution on Sunday.—Va. Code 1919, § 6392; Barnes Code ch. 106, § 8.

"The right to sue out the attachment is given not only at the time of the institution of the action but at any time thereafter. No limit is fixed upon the time except that it must be pending the action, and it was under this statute that, after a personal action had been begun, an attachment was subsequently sued out in *O'Brien v. Stephens*, 52 Va. (11 Gratt.) 610." *Kaylor v. Davy Pocahontas Coal Co.*, 118 Va. 369, 372, 87 S. E. 551.

Successive Attachments. — The right to sue out an attachment is given by § 2959 of the Code (§ 6388 Va. Code, 1919), not only at the time of the institution of the action, but at any time thereafter pending the action. The

plaintiff is not restricted to a single attachment, but may from time to time, as need may require, sue out other and additional attachments, founded either on the original affidavit or on a new affidavit made for the purpose. *Kaylor v. Davy Pocahontas Coal Co.*, 118 Va. 369, 87 S. E. 551.

"It is intimated, if not decided, in *Miller v. White*, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791, that the basis of the attachment may be changed and a new attachment sued out founded upon a new affidavit." *Kaylor v. Davy Pocahontas Coal Co.*, 118 Va. 369, 373, 87 S. E. 551.

After verdict, but before judgment, in an action at law and while a motion to set aside the verdict is still undecided, the action is still a pending action, and an attachment as ancillary thereto may be sued out under the provisions of § 2950 of the Code (Va. Code 1919, § 6031). *Kaylor v. Davy Pocahontas Coal Co.*, 118 Va. 369, 87 S. E. 551.

A. GROUNDS.

½. In General.

See ante, "In General," II, ½A. See also Va. Code 1919 §§ 6378, 6379; Barnes Code, ch. 106, § 1.

Recovery of Penalty for Violation of License or Revenue Laws.—Va. Code, 1919, § 2395.

"In the case here, the averment of the grounds for the attachment in question conform to the requirements of §§ 2960, 2961 of the Code of 1887 (§§ 6378, 6379 Va. Code 1919), and it should not have been dismissed as void upon its face." *Myers v. McCormick*, 109 Va. 160, 164, 63 S. E. 427.

2. Foreign Corporations and Nonresident Debtors.

a. In General.

"At an early date in Virginia, the only process available for collection of a debt or claim against a foreign debtor having property within the state was by

attachment in equity." *Mabie v. Moore*, 75 W. Va. 761, 763, 84 S. E. 788.

b. Foreign Corporations.

See also, post, FOREIGN CORPORATIONS.

Property of Foreign Corporations.—Va. Const., § 163; Barnes Code ch. 106, § 1.

Attachment will lie against a foreign corporation for the sole reason that it is such a corporation. *Dudley v. Chicago, etc., R. Co.*, 58 W. Va. 604, 52 S. E. 718.

Effect of Having Local Agent.—A corporation chartered and organized under the laws of another state, and holding no charter from this state, is a foreign corporation, although it has an agent, appointed under the requirements of the statute of this state, upon whom process may be served; and the fact that it is such foreign corporation is all that is required by § 2959 of the Code of 1887 (§§ 6378, 6379 Va. Code 1919) to justify the issuing of an attachment against its property. *Cook & Son Min. Co. v. Thompson*, 110 Va. 369, 66 S. E. 79.

Property of Nonresident President.—An attachment, for a debt of a foreign corporation which has failed to comply with the provisions of Virginia Code, § 1104 (§ 3847 Va. Code 1919), will not lie against the property of the nonresident president of such corporation, who was never a citizen or resident of the state, nor present in the state carrying on a prohibited business. *Richmond Standard Steel, etc., Co. v. Dinny*, 105 Va. 439, 53 S. E. 961.

c. Nonresident Debtors.

(1) In General.

See ante, "In General," II, A, ½.

Property of Nonresidents.—Va. Const., § 163, Barnes Code, ch. 106, § 1.

Damages Caused by Fertilizer Falsely Labeled.—Va. Code 1919, § 1128.

"In Shinn on Attachments, § 103, it is said: 'Where one is in fact a nonresident, his property will be liable in a foreign attachment, notwithstanding the fact that the defendant may be in the state at the time it is sued out. Nor will the allegation of nonresidence be defeated by the fact that the defendant is personally served. The effect of such personal service will, of course, be to give the court jurisdiction to enter a general judgment and issue an execution, not only against the property attached but generally against the defendant and all of his property.'" *Bank v. Byrum*, 110 Va. 708, 710, 67 S. E. 349.

(2) Who Are Nonresident Debtors.

Committee of Lunatic.—It is the established general rule that when there is a committee of a lunatic every suit respecting his person or estate must be brought by or against the committee, and in determining the right to sue out an attachment on the ground of the non-residence of the defendant, the residence of the committee and not that of the lunatic governs. *Sheltman v. Taylor*, 116 Va. 762, 823 S. E. 698.

Federal Soldier.—A person born and domiciled in another state, who comes to Fortress Monroe (which is within the territorial limits of this state, but under the exclusive jurisdiction of the United States), for the purpose of enlisting in the army, and enlists and remains an enlisted soldier of the United States, does not thereby acquire a residence in this state so as to defeat the right of a creditor to attach his property in this state on the ground that he is a nonresident. The mere fact that the state has the right to serve process, civil and criminal, in the territory ceded to the United States does not affect the personal status of one resident in such territory. The power to serve process on the defendant is not the test of the right to issue an attachment against him as a nonresident. *Bank v. Byrum*, 110 Va. 708, 67 S. E. 349.

3. Debtor Removing or About to Remove.

See ante, "In General," II, A, ½.

5. Fraudulent Conversion, Assignment or Disposition of Property.

See ante, "In General," II, A, ½.

"Fraudulently Contracting a Debt,"

etc.—An officer of a private corporation entrusted with its funds and property who improperly converts the same to his own use is guilty of fraudulently contracting a debt or incurring a liability to such corporation which will be the basis of an attachment under the provisions of § 1 of ch. 106 of the Code (Barnes Code, ch. 106, § 1). *Piedmont Grocery Co. v. Hawkins*, 83 W. Va. 180, 98 S. E. 152.

Every assignment by a debtor of his property must of necessity work some delay as to other creditors in the collection of their claim; but this is not such delay as is meant by the statute which gives the right of attachment when the debtor is about to convey, assign, conceal, or dispose of his property with intent to hinder, delay and defraud his creditors. *Breeden v. Peale*, 106 Va. 39, 55 S. E. 2.

B. TO WHAT ACTIONS REMEDY EXTENDS.

1. In General.

See post, "In Equity," II, B, 4, c.

Pending Suits or Actions.—Va. Code 1919, § 6410; Barnes Code, ch. 106, § 1.

In Equity.—Va. Code 1919, § 6410; Barnes Code, ch. 106, § 1.

Motion for Judgment by Notice.—

Section 2959 of the Virginia Code of 1887 (§§ 6378, 6379 Va. Code 1919), which provides for the issuing of an attachment at the time or after the institution of any action at law for the recovery of any specific personal property, or a debt, or damages for the breach of a contract, applies to a motion for a judgment by notice. *Breeden v. Peale*, 106 Va. 39, 55 S. E. 2.

Liability of Same Class as Debt.—

"Associated, as it is, in the statute [See

W. Va. Code 1906, c. 106, W. Va. Code, 1913, § 4435] with the word 'debt,' the legal or equitable 'claim' enforceable in equity [by attachment] is a liability of the same general class as debt, and not one sounding in damages merely." *Mabie v. Moore*, 75 W. Va. 761, 84 S. E. 788.

"The revised code of 1849 authorized attachments in actions at law where the debt or claim was recoverable by such action, and in equity only if recoverable in equity. *Chesapeake, etc., R. Co. v. Paine & Co.*, 70 Va. (29 Gratt.) 502." *Mabie v. Moore*, 75 W. Va. 761, 763, 84 S. E. 788.

"But it is not to be presumed equitable jurisdiction was so far enlarged as to embrace causes of action at law. We perceive no such intention, either expressly or inferentially arising out of the statute. It meant only that where equity had theretofore exercised jurisdiction on either legal or equitable claims or demands, it could invoke the aid of an attachment to compel compliance with its decree or order." *Mabie v. Moore*, 75 W. Va. 761, 764, 84 S. E. 788.

2. Demands Arising Ex Contractu.

"The statute (§ 2961 of the Code [§ 6379 Va. Code 1919]) uses the word 'claim,' which is as broad a term as could well have been used, and there is no interpretation properly to be made of the statute which would deny the right to issue an attachment for a claim for damages for breach of contract. The liability for damages for breach of contract is a debt contracted, not a tort. *Burton v. Mill*, 78 Va. 468, 481." *Myers v. McCormick*, 109 Va. 160, 163, 63 S. E. 427.

Section 1 of ch. 106 (Barnes Code, ch. 106, § 1), properly construed confers upon courts of equity jurisdiction to entertain suits to recover on causes of action ex contractu only where an attachment, supported by proper grounds therefor, is sued out as a basis of such

jurisdiction. *Piedmont Grocery Co. v. Hawkins*, 83 W. Va. 180, 181, 98 S. E. 152, citing *Swarthmore Lumber Co. v. Parks*, 72 W. Va. 625, 79 S. E. 723; *Mabie v. Moore*, 75 W. Va. 761, 84 S. E. 788.

3. Demands Arising Ex Delicto.

"The decree specifically assigns, as foundation therefor, the holding in *Swarthmore Lumber Co. v. Parks*, 72 W. Va. 625, 79 S. E. 723, that 'chapter 106, Code (Barnes Code, ch. 106), authorizing attachments in equity, confers upon courts of equity no jurisdiction as to causes of action ex delicto.'" * * *. *Mabie v. Moore*, 75 W. Va. 761, 762, 84 S. E. 788.

4. Right to Relief Regardless of Maturity of Debt.

a. In General.

Rent.—Va. Code 1919, § 6416; Barnes Code, ch. 106, § 3.

c. In Equity.

See ante, "In General," II, A, 2, a. "Being in derogation of the common law, statute authorizing proceedings by attachment must be strictly construed. *Barksdale v. Hendree*, 2 Pat. & H. 43; *Delaplain & Co. v. Armstrong*, 21 W. Va. 211; *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977; *United States Baking Co. v. Bachman*, 38 W. Va. 84, 18 S. E. 382. Wherein, then, is such equitable jurisdiction (of proceedings by attachment in case of a demand arising ex delicto) so conferred? If at all, it is by § 1, ch. 106. No other provision enables a court of equity to maintain a suit where before its enactment equity had not jurisdiction. Plainly, it does not enlarge jurisdiction in equity except as to a debt or claim not due." *Mabie v. Moore*, 75 W. Va. 761, 762, 84 S. E. 788.

C. ATTACHMENT FOR RENT.

See post, "Jurisdiction," V, A; "Grounds of Action," XVI, A.

½. In General.

Rent Not Payable in Money.—Va.

Code 1919, § 5529; Barnes Code, ch. 106, § 3, ch. 50, § 195.

Tenant Removing, etc., His Effects.

—Va. Code 1919, § 6416, Quoted in *Bernard v. McClanahan*, 115 Va. 456, 79 S. E. 1059; Barnes Code, ch. 106, § 3.

Liability of Goods of Sub-Tenant.—

"The statute § 2791, supra [§ 5523 Va. Code 1919]) plainly makes the goods of the under tenant liable for the rent, just as though they were the goods of the tenant himself; and by § 2962 (§ 6416 Va. Code 1919) it is provided that if the goods are liable to be distrained, they may be attached." *Bernard v. McClanahan*, 115 Va. 453, 459, 79 S. E. 1059.

The liability of an under-tenant of leased premises, as in this case, does not arise out of contractual relations between him and the lessor, but by virtue of statute, whereby he, upon entering the leased premises as an under-tenant subjects his property carried thereon to liability for the rent contracted to be paid by the lessee of the premises, and this liability of his property continues while on the leased premises and for thirty days after the same is removed therefrom; provided, however, that such goods of the under-tenant can not be subjected to the satisfaction of more than one year's rent due or to become due from the lessee to the lessor, as provided by statute. Code, § 2791, 2792 (§§ 5523, 5524 Va. Code 1919)." *Bernard v. McClanahan*, 115 Va. 453, 457, 79 S. E. 1059.

Failure to Mature Action at Law.—

The fact that the action at law referred to in the clerk's certificate to an attachment was never matured for hearing does not render an attachment for rent void, for the attachment is good as a remedy for the collection of rent to become due under a contract, whether there is an action at law to recover it or not, since the right to sue out an attachment for rent is not dependent upon a pending action at law to recover the

same. *Bernard v. McClanahan*, 115 Va. 453, 79 S. E. 1059.

1. For What Rent Attachment Will Issue.

See ante, "In General," II, C, ½.

4. Removal of Goods in Course of Trade.

See ante, "In General," II, C, ½.

5. Intention to Remove Goods.

See ante, "In General," II, C, ½.

III. PROPERTY SUBJECT.

A. IN GENERAL.

See ante, "Foreign Corporations," II, A, 2, b; "In General," II, A, 2, c, (1); Va. Code 1919, §§ 6386, 6389; Barnes Code, ch. 106, § 5.

B. REAL PROPERTY.

See ante, "In General," III, A.

Property under Void Deed.—As against rights of existing creditors of grantor, in deed which is *prima facie* void, no title vests thereby in grantee; and such creditors may proceed, upon proper ground, by process of attachment, against the land conveyed, levying on it as grantor's property, and a purchaser at judicial sale under such attachment proceedings may obtain a perfect legal title to land so attached and sold. *Metz v. Patton*, 63 W. Va. 439, 60 S. E. 399.

C. PERSONAL PROPERTY.

See ante, "In General," III, A.

2. Choses in Action.

Shares of Stock.—By the common law, shares of stock in a corporation, being in the nature of choses in action, intangible property incapable of manual seizure, are not subject to execution or attachment. They are made subject by § 9 of chapter 106, West Virginia Code of 1899 (Barnes Code, ch. 106, § 9), being within the terms "personal property, choses in action and other securities." *Lipscomb v. Condon*, 56 W. Va. 416, 49 S. E. 392; *Stix & Co. v. York*, 84 W. Va. 446, 448, 100 S. E. 221.

Notes Indorsed for Collection.—

Where the property claimed and levied on consists of negotiable notes endorsed on by the payees in blank and delivered to an agent, solely for collection or discount, the attachment creditor, by levy on the instruments as the property of the agent, although without notice or knowledge of his want of title, does not acquire the rights or position of a bona fide purchaser for value nor any lien on the choses in action. *Howell v. McCarty*, 77 W. Va. 695, 88 S. E. 181.

6. Chattels Pawned.

See post, "Where Vendor or Other Equitable Owner Has Parted with Legal Title," III, C, 7.

7. Where Vendor or Other Equitable Owner Has Parted with Legal Title.

Warehouse Receipt for Issue.—Va. Code 1919, § 1314; Barnes Code, ch. 62F, § 25.

Attachable Right of Shipper.—Where a bank takes, by endorsement, a bill of lading and pays the draft of the shipper for the value of the goods, the bank becomes the owner of the goods covered by the bill of lading until the draft is paid, and this is true, although the transfer be not to give the permanent ownership, but to furnish security for the advance of money or discount of commercial paper. After such transfer no attachable interest in the goods remains in the shipper. *Buckeye Nat. Bank v. Huff*, 114 Va. 1, 75 S. E. 769.

Proceeds of Crops—Identification.—

Where crops are produced on the lands of another under an agreement that the land owner is to have a certain share, and the producer, whether a tenant or cropper, is to have the residue and the whole crop is shipped to market in the name of the land owner who is to pay over to the producer his share thereof, and the crops are marked in the name of the producer and are capable of identification, showing the share to which the producer is entitled, the land owner is a mere trustee, with power to sell the

producer's share and to turn over the proceeds to him, and such proceeds are not subject to attachment by creditors of the land owner. *Jones v. Crumpler*, 119 Va. 143, 89 S. E. 232.

13. Goods of Sub-Tenant.

See ante, "In General," II, C, ½.

14. Specific Chattels.

Va. Code 1919, §§ 6386, 6389.

E. PROPERTY EXEMPT FROM ATTACHMENT.

See post, EXEMPTIONS FROM EXECUTION AND ATTACHMENT; HOMESTEAD EXEMPTION.

Pensions.—Va. Code 1919, § 2658; Va. Acts 1918, Chap. 85.

Insurance.—Va. Code 1919, §§ 4219; 4292.

Claim of Exemptions.—Va. Code 1919, § 6398.

Same — Examination of Debts Admitted to Be Due.—Va. Code 1919, § 6398.

IV. COMMENCEMENT OF ACTION, ETC.

Va. Code 1919, § 6383; Barnes Code, ch. 106, § 1.

Oath to Petition.—Va. Code 1919, § 6383; Barnes Code, ch. 106, § 1.

Petition.—Va. Code 1919, § 6383; Barnes Code, ch. 106, § 1.

Dismissal of Petition.—Va. Code 1919, § 6404.

Defendants.—Va. Code 1919, § 6383.

V. JURISDICTION AND VENUE.

A. JURISDICTION.

Va. Code 1919, §§ 5947, 6360; Barnes Code, ch. 106, § 3.

Rent for Twenty Dollars or More.—Va. Code 1917, § 6417.

Rent for Less Than Twenty Dollars.—Va. Code 1919, § 6418.

Priority of Jurisdiction.—By attachment sued out pursuant to chapter 106, of the Code (Barnes Code ch. 106), of this state, and levied on the lands or personal property of defendant, a lien

is thereby acquired and the court first to take jurisdiction thereby acquires the exclusive jurisdiction and dominion of the property, with right to pronounce and enforce its judgments and decrees respecting the same, and this is so whether the property attached be land or personal property taken into actual custody by the officer. *McGrew v. Maxwell*, 80 W. Va. 718, 94 S. E. 395.

Concurrent Jurisdiction — Injunction.—Nor can another court of concurrent jurisdiction so interfere by injunction or otherwise upon the principle of avoiding a multiplicity of suits; want of equity jurisdiction of the subject matter of the controversy; merger of the cause in the judgment or decree of some other court in a foreign jurisdiction. All such supposed rights involve questions proper to be presented to the court first to acquire jurisdiction and dominion over the property involved, as provided either by statute or by some other equitable proceeding of intervention in that court. *McGrew v. Maxwell*, 80 W. Va. 718, 94 S. E. 395.

"Under our law, * * * there is practically no distinction between this sort of mesne process (attachment) and final process of execution. By the one as well as by the other the court acquires the custody and dominion over real as well as personal property, with the right to protect that custody and possession against the encroachment of any other court of co-ordinate or concurrent jurisdiction." *McGrew v. Maxwell*, 80 W. Va. 718, 723, 94 S. E. 395.

A justice of the peace has jurisdiction under the provisions of §§ 2960, 2961 of the Code of 1887 (§§ 6378, 6379 Va. Code 1919), to issue an attachment, on a claim of damages for breach of contract, against a defendant who intends to remove his effects out of the state. *Myers v. McCormick*, 109 Va. 160, 63 S. E. 427.

Equity.—We do not think that under our statute there can be any doubt

about the jurisdiction in equity by attachment upon claims arising out of contract; the practice has too long prevailed in this state to now question it. *McGrew v. Maxwell*, 80 W. Va. 718, 725, 94 S. E. 395.

An independent suit for alimony is not controlled by the statute applicable to divorce suits as to residence of the parties. Equity has jurisdiction for the purposes of attachment and to set aside fraudulent conveyances, although neither party is a resident of this state, and the marriage and cohabitation was in another state and the breach of the marital duty is alleged to have occurred in another state. *Jolliffe v. Jolliffe*, 10 Va. Law Reg. 1098.

B. VENUE.

Va. Code 1919, § 6381; Barnes Code, ch. 106, § 1.

VI. AFFIDAVIT.

See generally, ante, AFFIDAVITS. See also, Va. Code 1919, § 6383, under which attachment proceedings are commenced by petition, not by affidavit as under the Code of 1887 § 2959.

A. NECESSITY.

Va. Code 1919, § 6383; Barnes Code, ch. 106, § 1. Before the present revision of the Virginia Code a formal affidavit was required as the commencement of attachment proceedings, and all the Virginia decisions in this division of the title refer to such formal affidavit, which is no longer required in Virginia.

Recovery of Penalty for Violation of License or Revenue Laws.—Va. Code 1919, § 2395.

B. TIME OF MAKING.

Barnes Code, ch. 106, § 1.

In General.—The affidavit for an attachment can be made at any time before another obtains a right. *Northern Neck State Bank v. Gilbert Packing Co.*, 114 Va. 658, 77 S. E. 451; *Cirode v. Buchanan*, 22 Gratt. (63 Va.) 205. *Watter Front Coal Co. v. Smithfield, etc.*, 114 Va. 482, 485, 76 S. E. 937.

C. WHO MAY MAKE.

Barnes Code, ch. 106, § 1; Va. Code 1919, § 6384.

An attachment awarded to a corporation as plaintiff, based upon the affidavit of its secretary and treasurer, as such and without more, cannot be maintained. The court cannot say, as a matter of law and in the absence of averment, that the term "secretary and treasurer" necessarily imports the relation of agency between such officer and his corporation within the intentment of the attachment laws of this state, which require the affidavit to be made by the "plaintiff, his agent or attorney." If he is in fact such agent, it should be so averred in the affidavit. Attachment laws being in derogation of the common law, and harsh in their application, substantial compliance with their requirements must be made to appear, on the face of the proceedings. *Taylor v. Sutherlin-Meade, etc., Co.*, 107 Va. 787, 60 S. E. 132.

Same—Affidavit of "Secretary and Treasurer.—*Damron v. Citizens Nat. Bank*, 112 Va. 544, 545, 72 S. E. 153, following *Taylor v. Sutherlin-Meade, etc., Co.*, 107 Va. 787, 60 S. E. 132.

D. WHO MAY TAKE.

See generally, ante, AFFIDAVITS.

"The taking of an affidavit is purely ministerial. *Shinn on Attachment*, Vol. 1, § 130, says: 'It may be stated, as a general rule, that the affidavit for attachment may be made before any officer authorized by the laws of the state to administer oaths.' " *First Nat. Bank v. Cootes*, 74 W. Va. 112, 113, 81 S. E. 844.

Bank Cashier in Capacity of Notary Public.—Being the cashier of a bank does not disqualify a notary public from taking an affidavit to be used in an attachment suit brought to collect a debt due his bank. *First Nat. Bank v. Cootes*, 74 W. Va. 112, 81 S. E. 844.

E. FORMAL REQUISITES.

Clerical Error in Form.—Where it appears upon the face of the record that

the affidavit for an attachment was unquestionably filed in the proper court by the proper officer, it will not be vitiated by a mere clerical error of the clerk who wrote it, in not substituting the words "Law and Chancery" for "Corporation" in the printed form used by him. *Bernard v. McClanahan*, 115 Va. 453, 79 S. E. 1059.

G. AVERMENTS.

1. In General.

Barnes Code, ch. 106, § 1. See also, Va. Code 1919, §§ 6379, 6383. In Virginia attachment proceedings are now commenced by petition, see Va. Code 1919, § 6383.

Affiant as "Plaintiff, His Agent or Attorney." — "Correct practice (under Va. Code 1887, § 2960) requires the affidavit to aver that the affiant is 'the plaintiff, his agent or attorney,' according to the fact, and compliance with the rule imposes no undue hardship upon the attaching creditor." *Damron v. Citizens Nat. Bank*, 112 Va. 544, 546, 72 S. E. 153.

"The attachment stands upon the affidavit, not the bill or declaration, and that must state facts which, if true, constitute a cause of action." *Millar v. Whittington*, 77 W. Va. 142, 143, 87 S. E. 164.

Must Be Positive.—In an affidavit for an attachment, the material facts relied on to support the grounds of attachment must be of positive import bearing out those grounds, and be of sufficient certainty and particularity to enable the party proceeded against properly to defend. *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

When the suit is upon a negotiable note against the endorser thereof, it is necessary for the plaintiff in his affidavit for an attachment in stating the nature of his claim to allege presentation for payment at the time and place appointed and within proper hours, demand of payment, and due notice to endorser,

and when payable at a bank, according to the requirements of the Uniform Negotiable Instruments Law, it should allege presentation for payment at the bank where payable during business hours, and before the close of the bank in the event contemplated by the statute. It is not sufficient to allege that the note was duly protested. *Deming Nat. Bank v. Baker*, 83 W. Va. 429, 98 S. E. 438.

Founded on Information.—"The affidavit for the attachment is defective in its statements of material facts. That statement is as follows: 'Affiant further says that it has recently come to his knowledge and he believes his information to be true, that the said L. C. Claytor, one of the defendants herein, and the responsible partner in said business, has proposed to one of his friends to convey to him and without consideration all real estate owned by him, situated in Fayette county, West Virginia, consisting of valuable lands and appurtenances, and that he believes the information which he has to be true.' Primarily all this is bad in not even purporting to state material facts positively, but only on information. *Hudkins v. Haskins*, 22 W. Va. 645; *Sublett v. Wood*, 76 Va. 318; *Clowser v. Hall*, 80 Va. 864." *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 121, 83 S. E. 726.

Refusal of Demand for More Definite Bill of Particulars.—In an action of attachment the refusal of a demand for more than a definite bill of particulars (than that contained in the affidavit) will not be ground for reversal where the bill of particulars objected to was itemized, and the record of the case as a whole discloses plainly that the defendant was in no wise prejudiced by being subjected to trial on the same. *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

3. Knowledge or Belief.

An affidavit for attachment as pro-

vided by section 1, ch. 106, Code (Barnes Code, ch. 106, § 1), is not invalid for omitting to allege that plaintiff believes he is entitled to recover from the defendant; it is sufficient to allege in the language of the statute the amount of the claim which he believes he is justly entitled to recover in the action. *Deming Nat. Bank v. Baker*, 83 W. Va. 429, 98 S. E. 438.

4. Nature of Claim.

In General.—As construed by our decisions, § 1, ch. 106 of the Code requires that plaintiff in stating the nature of his claim should state it with as much particularity, though not in detail, as is required in the declaration or bill, so that it may thereby be made to appear that he has a valid cause of action against the defendant. *Deming Nat. Bank v. Baker*, 83 W. Va. 429, 98 S. E. 438; *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 757, 82 S. E. 1094.

Illustrations.—An attachment affidavit held to authorize issuance of writ, though it stated that action was for money due on contract, where it specified the items of the account sued on. *Flannigan v. Monongahela Tie, etc., Co.*, 77 W. Va. 158, 87 S. E. 165.

An affidavit for an attachment, pursuant to § 193, Ch. 50, Code 1906, (Barnes Code ch. 50, § 193), which states the nature of plaintiff's claim to be "for day labor on Round Bottom Job in said county and state, \$54.07, and cutting timber by thousand on Round Bottom Job in said county and state, \$88.92, that the said claim is just, and this affiant believes that plaintiff ought to recover thereon" the aggregate of the two items "with interest on the same from the 5th day of September, 1910," is void for indefiniteness in description of plaintiff's claim, and should be quashed. *Eplin v. Blessing*, 73 W. Va. 283, 80 S. E. 458.

"It does not state for whom plaintiff performed labor and cut timber,

nor what labor he performed as distinguished from the cutting of timber. For aught appearing in the description, he may have performed both for a trespasser on defendant's lands located on Round Bottom, if the latter owned land thus designated. Besides, there appears no averment that the services were performed at the instance or request or pursuant to any employment by or on behalf of defendant." *Eplin v. Blessing*, 73 W. Va. 283, 80 S. E. 458.

An affidavit for an attachment, pursuant to § 193, chapter 50, Code 1906, (Barnes Code, ch. 50, § 193), which states the nature of plaintiff's claim to be: "That the claim of the said plaintiff against the defendant is for check not paid, protest fees and To. Mdse. that the said claim is just, and this affiant believes that plaintiff ought to recover thereon Sixty 20-100 Dollars, with interest on the same from the * * * day of * * * 189 * * *," is void for indefiniteness in description of plaintiff's claim, and should be quashed on motion, as not being a compliance with the requirements of the statute. *Bank v. Loeb*, 71 W. Va. 494, 76 S. E. 883.

An attachment affidavit, in an action on a contract for the sale and delivery of goods to plaintiff, not stating the terms of the contract nor the character of the goods sold, and showing no other cause of action than, "that the time for the performance of the obligations," under the contract had passed, does not sufficiently state the nature of plaintiff's claim. *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 82 S. E. 1094.

"The affidavit in this case does not state the character or kind of goods, wares and merchandise which plaintiff states it bought of defendants; nor where they were to be delivered; nor that the time of delivery was of the essence of the contract; neither does it state in what respect the contract was

broken whether by failure to deliver the goods at a specified time and place, or by delivering goods inferior to those purchased." *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 757, 82 S. E. 1094.

An affidavit for an attachment, saying the plaintiff is about to institute a suit in equity against the defendants "for the recovery of a claim and debt arising out of contract, upon and by the terms of which there is justly due the plaintiff," (naming him), from the defendants, (naming them), "as affiant verily believes, at least the sum of Eight Hundred and Nine Dollars," is fatally defective for failure to state sufficiently the nature of the plaintiff's claim. *Millar v. Whittington*, 77 W. Va. 142, 87 S. E. 164.

5. Indebtedness.

a. Justice of Demand.

"In *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. 660, this court said: 'Affidavits as to the ground of attachment are always to be strictly construed, and any omission of the requirements of the statute is fatal to the attachment, but if the language of the affidavit necessarily implies the fact, it is sufficient. Hence, an affidavit "that the claim is just," and "that the defendant is converting," etc., is sufficient compliance with a statute which requires an affidavit "that the claim is believed to be just," and "that to the best of affiant's belief defendant is converting," etc.,' " *Water Front Coal Co. v. Smithfield, etc., Co.*, 114 Va. 482, 486, 76 S. E. 937.

"The adverbial phrase 'at least' does not qualify, in our judgment, the amount claimed, but serves merely to emphasize the mode of stating the amount, which, as we have seen, is set forth in the affidavit with the utmost exactness—to the uttermost farthing." *Water Front Coal Co. v. Smithfield, etc., Co.*, 114 Va. 482, 486, 76 S. E. 937.

c. Maturity of Debt.

In an attachment before a justice, when the ground of attachment justifies the issuance of the writ before maturity of the debt, it is not absolutely essential to set out that the debt is due or when it will become due, if the debt is otherwise sufficiently described. *Dawkins v. Ellis*, 69 W. Va. 216, 71 S. E. 182.

7. Sufficiency in General.

c. Stating Specific Facts.

Fraud in Contracting Debt or Incurring Liability.—Where the ground for an attachment is that the defendants fraudulently contracted the debt or incurred the liability for which the suit is about to be or is brought, the affiant should state the material facts relied upon to show the existence of such ground, and if facts are stated in a vague and uncertain manner, and not sufficient to show that the debt was fraudulently contracted, or the liability fraudulently incurred, the attachment should be quashed. *Elkins Nat. Bank v. Simmons*, 57 W. Va. 1, 49 S. E. 893.

Where an affidavit for an attachment, after stating the material facts relied upon, and after stating the liability of the defendants, states: "Affiant says that the said J. H. and Chas. Simmons fraudulently incurred the liability aforesaid, for which suit is about to be brought," this is a sufficient statement of the ground for the attachment under subsection 8, § 1, chapter 106, West Virginia Code, 1899. *Elkins Nat. Bank v. Simmons*, 57 W. Va. 1, 49 S. E. 893.

Neither a mere general charge of untruth of a representation made with knowledge thereof for procurement of a loan of money, and relied upon by the lender if unaccompanied by an averment of facts, necessarily importing fraudulent intent as matter of law, nor a general charge of intention on the part of the borrower not to repay the loan, supported only by an

avermment of the filing of a plea of non-liability for the debt in an action brought to recover it, amounts to a sufficient statement of facts in an attachment affidavit setting up, as ground for the attachment, fraudulent contraction of the debt. *Teter v. George*, 86 W. Va. 454, 103 S. E. 275.

"All of the essential elements of a ground of attachment must appear from facts disclosed by the affidavit, not mere conclusions or claims, and, if there is failure in this respect as to any one of them, the affidavit is insufficient. The facts 'must exclude every reasonable conclusion that the act was proper and innocent. If they leave it doubtful whether the act alleged was fraudulent or innocent, the affidavit will be insufficient.' *Sandheger v. Hosey*, 26 W. Va. 221, 224. See also, *Delaplain & Co. v. Armstrong*, 21 W. Va. 211; *Goodman v. Henry*, 42 W. Va. 526, 26 S. E. 528." *Teter v. George*, 86 W. Va. 454, 456, 103 S. E. 275.

d. Grounds Stated Disjunctively.

Under Virginia Code 1887. — When separate and distinct grounds of attachment are stated and all are relied on, they must be stated conjunctively. They can not be stated in the alternative. An affidavit which states that either one or the other of three separate and distinct grounds of attachment exist does not state the existence of any one of them, and hence is not a sufficient basis for an attachment. *Northern Neck State Bank v. Gilbert Packing Co.*, 114 Va. 658, 77 S. E. 451.

West Virginia Decisions.—An affidavit for an attachment, pursuant to § 193, Ch. 50, Code 1906 (Barnes Code, ch. 50, § 193), which states that the defendant (naming him) "has assigned, disposed of or removed his property, or a material part thereof, or is about to do so, with like intent to defraud" his creditors, is void for uncertainty and indefiniteness in its averments of fraud; and the affidavit, and attachment issued thereon, should, on de-

fendant's motion, be quashed. To avail for the purpose of a valid attachment, the affidavit should state the ground conjunctively, not disjunctively, apparently modifying the rule stated in the opinion of *Sandheger v. Hosey*, 26 W. Va. 221; *Eplin v. Blessing*, 73 W. Va. 283, 80 S. E. 458.

Same—Two Phases of Same Fact—

Where an attachment is sued out and reliance is had upon two or more distinct grounds for support thereof they should be joined in the conjunctive, but where only one ground of attachment is relied upon and two or more phases of the same fact which constitutes such ground are stated, the joining of such different phases in the disjunctive will not invalidate the attachment affidavit. *Piedmont Grocery Co. v. Hawkins*, 83 W. Va. 180, 98 S. E. 152; *Hatfield v. Blount*, 86 W. Va. 411, 103 S. E. 203.

An attachment sued out upon the eighth ground given by § 1 of ch. 106 of the Code (Barnes Code, ch. 106, § 1), that the defendant fraudulently contracted the debt or incurred the liability for which the action or suit is about to be, or is brought, will not be quashed because the attachment affidavit states that the debt was fraudulently contracted or the liability incurred. This is but the declaration of two phases of the same fact which constitutes the basis of the attachment. *Piedmont Grocery Co. v. Hawkins*, 83 W. Va. 180, 98 S. E. 152.

An attachment sued out upon the fifth ground given by § 1 of ch. 106, of the Code (Barnes Code, ch. 106, § 1), that the defendant is converting, or is about to convert his property, or a material part thereof, into money or securities, with intent to defraud his creditors, will not be quashed because the attachment affidavit states that the defendant is converting, or is about to convert, his property, or a material part thereof into money or other securities. This is but the declaration of two phases of the same fact which

constitute the basis of the attachment. *Hatfield v. Blount*, 86 W. Va. 411, 103 S. E. 203.

2. Variance.

Inconsistency between the claim stated in an affidavit for an attachment and the demand set up in the declaration constitutes a variance fatal to the attachment. *Simmons v. Simmons*, 56 W. Va. 65, 48 S. E. 833.

A slight, unsubstantial variance of an affidavit for an attachment from the declaration in the action, respecting the nature of the demand sued on is not available as ground for quashing the attachment. *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882, distinguishing *Simmons v. Simmons*, 56 W. Va. 65, 48 S. E. 833.

Mere difference between the declaration and affidavit in respect to the quantum of descriptive matter pertaining to the cause of action, both being in perfect agreement as far as such matter is set forth, does not constitute inconsistency or a variance, such as will vitiate the attachment. *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882.

H. SUPPLEMENTAL AFFIDAVIT.

Under Virginia Code of 1887. — An affidavit for an attachment may be corrected in the trial court at any time before the rights of others have accrued. *Water Front Coal Co. v. Smithfield, etc., Co.*, 114 Va. 482, 76 S. E. 937.

But if, when the affidavit is made, it is fatally defective, it can not be amended. It is void, and the plaintiff must begin de novo with an affidavit that complies sufficiently with the statute to sustain the attachment. *Northern Neck State Bank v. Gilbert Packing Co.*, 114 Va. 658, 77 S. E. 451.

West Virginia Decisions. — Where the defect in the affidavit is substantial, not merely clerical and formal, it is not amendable and a motion to quash should be sustained. *Millar v. Whittington*, 77 W. Va. 142, 143, 87 S. E. 164, citing *Sommers v. Allen*, 44

W. Va. 120, 28 S. E. 787; *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977; *United States Baking Co. v. Bachman*, 38 W. Va. 84, 18 S. E. 382.

An affidavit for an attachment upon any of the grounds prescribed by § 1 of ch. 106 of the Code (Barnes Code ch. 106, § 1), except the first, which fails to make any statement of the material facts relied upon to show the existence of the grounds for the attachment is void, and can not subsequently be amended by the filing of another affidavit purporting to state such material facts. *Hatfield v. Blount*, 86 W. Va. 411, 103 S. E. 203.

I. EFFECT OF DEFECTIVE AFFIDAVIT.

Under Virginia Code of 1887. — When the affidavit for an attachment is inoperative and void, the court may, under the authority of section 2981 of the Code (§ 6403 Va. Code 1919), abate the attachment issued thereon at any time before a final judgment has been entered disposing of the property attached, and the court is not precluded from abating the attachment because at a former stage of the proceedings a motion to abate was overruled, if upon further consideration it is satisfied that the writ was issued upon an insufficient affidavit. *Northern Neck State Bank v. Gilbert Packing Co.*, 114 Va. 658, 77 S. E. 451.

Courts acquire jurisdiction of attachments in equity alone by force of the affidavit; and, upon appeal, in a case founded upon an insufficient affidavit, the appellate court can only abate the attachment and dismiss the proceeding, in the absence of an application to the trial court to amend the affidavit. In the absence of statute, it can not remand the case to the trial court for the purpose of amending the affidavit. *Taylor v. Sutherlin-Meade, etc., Co.*, 107 Va. 787, 60 S. E. 132.

Under West Virginia Decisions—Waiver of Defects. — "It may be that the giving of a bond to perform the

judgment operates as a waiver of defects in the proceedings, such for instance as a want of proper affidavits. 1 Shinn on Attachments, § 30. However, we are not called upon to decide that question. The question we have is, does the giving of a forthcoming bond amount to a waiver of such defect? We hardly think so, for the reason that the property is still subject to the attachment, the possession only being retained; the property remains in the hands of the owner as the bailee of the officer and it is still subject to the order of the court. 1 Shinn on Attachments, § 288." *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 759, 82 S. E. 1094.

VII. BOND.

A. NECESSITY.

Va. Code 1919, §§ 6384, 6385; Barnes Code, ch. 50, § 199; ch. 106, §§ 10, 11, 22.

Recovery of Penalty for Violation of License or Revenue Laws.—Va. Code 1919, § 2395.

B. FORMAL AND OTHER REQUISITES.

Va. Code 1919, §§ 6384, 6385; Barnes Code, ch. 106, § 11, 12.

For Additional Surety.—The affidavits filed in support of a motion for additional security on an attachment bond held not to show inadequacy of the security given. *Flannigan v. Monongahela Tie, etc., Co.*, 77 W. Va. 158, 87 S. E. 165.

C. BY WHOM GIVEN.

Va. Code 1919, §§ 6154, 6155, 6414; Barnes Code, ch. 106, § 29.

D. EFFECT OF GIVING BOND.

See ante, "Necessity," VII, A; post, "Delivery on Forthcoming or Delivery Bond," XII, C. See also Va. Code 1919, §§ 6154, 6155.

Waiver of Irregularities. — By the giving of a forthcoming bond, as provided in § 10, ch. 106 (Barnes Code, ch. 106, § 10), serial § 4464, Code 1913, defendant does not waive irregulari-

ties and defects in the attachment proceedings. *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 82 S. E. 1094.
E. ACTION ON.

1/2. Right of Action.

Recovery of a smaller sum than is claimed, in one of two actions on attachment bonds, in which the items of the bills of particulars filed are identical, does not preclude right of recovery in the other. *Parkersburg Corrugated Paper Co. v. United States Fidelity, etc., Co.*, 81 W. Va. 749, 95 S. E. 783.

VIII. WRIT OR WARRANT.

A. TO WHAT OFFICER DIRECTED.

Va. Code 1919, §§ 3120, 6387; Barnes Code, ch. 106, § 2.

IX. LEVY.

A. IN GENERAL.

By Whom and upon What Property.—Va. Code 1919, §§ 6389, 6390; Barnes Code, ch. 106, §§ 4-7.

How Made.—Va. Code 1919, § 6390; Barnes Code, ch. 106, § 5.

On Property Held under Process.—Va. Code 1919, § 6408.

Rent—Entry by Force. — Va. Code 1919, § 5526; Barnes Code, ch. 93, § 13.

B. UPON REAL PROPERTY.

See ante, "In General," IX, A.

C. UPON PERSONAL PROPERTY.

See ante, "In General," IX, A.

Rent—Goods in Possession. — Va. Code 1919, § 5526.

X. RETURN.

A. TIME AND PLACE FOR MAKING.

Va. Code 1919, §§ 6386, 6387; Barnes Code, ch. 124, § 2.

B. REQUISITES.

See post, "Description of Land," X, C; Va. Code 1919, § 6391; Barnes Code, ch. 106, § 7.

Showing Time of Levy, Description of Land, etc.—The return of a sheriff

on an order of attachment, levied on real estate, showing the time of the levy and the quantity and location of the land and referring to the deed to the defendant therefor, as recorded at a certain page of a certain book in the office of the clerk, of the county court, for a more particular description thereof, is sufficient. *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882.

C. DESCRIPTION OF LAND.

See ante, "Requisites," X, B.

A return on an attachment that it was levied on a tract of land of the defendant company containing about three hundred and sixty acres, located in the county of M., in the magisterial district of P., of said county, "being the same land conveyed to said company by L. C. Garnett, Esq., special commissioner of Mathews county circuit court, by deed recorded in deed book No. 15, pp. 58-59," identifies the land with sufficient certainty, both for the purposes of sale and conveyance, without the aid of extrinsic evidence, and is a substantial, if not a literal, compliance with § 2967 of the Code of 1887 (§§ 6389, 6390 Va. Code 1919). *Richardson v. Hoskins Lumber Co.*, 111 Va. 755, 69 S. E. 935.

E. RETURN AS EVIDENCE.

The officer's return upon an attachment is competent and legal evidence to show proper service thereof and that the property attached is such as may be legally seized under the writ, and conclusive evidence that everything has been done necessary to constitute a valid levy. *Pocahontas Wholesale Grocery Co. v. Gillespie*, 63 W. Va. 578, 60 S. E. 597.

XI. LIEN.

As distinguished from garnishment lien, see post, "Lien and Priorities," XVII, G.

A. WHEN LIEN COMMENCES.

Va. Code 1919, §§ 6393, 6469; Barnes Code, ch. 106, § 9.

Under the express terms of Virginia

Code 1904, § 2971 (§ 6393 Va. Code 1919), an attachment is a lien on personal property from the time of levying the attachment, or serving a copy thereof as provided by § 2967 of the Code (§§ 6389, 6390, Va. Code 1919), although it may be necessary subsequently to enter a judgment or decree for its enforcement. The lien of the attachment is perfected by the levy thereof, and the subsequent judgment or decree is simply the enforcement of a valid pre-existing lien. The lien created by the levy is not "inchoate" or "imperfect." *Jackson v. Valley Tie, etc., Co.*, 108 Va. 714, 62 S. E. 964.

The levy of an attachment creates an inchoate lien upon the property attached, and, when final judgment is rendered for the plaintiff, it relates back to the levy, but it can not by relation render a transaction unlawful which was not unlawful at the time it took place. *Trimble v. Covington Grocery Co.*, 112 Va. 826, 72 S. E. 724.

B. EXTENT OF LIEN.

1. In General.

Va. Code 1919, §§ 6393, 6394; Barnes Code, ch. 106, § 9.

On Property Held under Process.—Va. Code 1919, § 6408.

Warehouse Receipt Given and Transferred.—Va. Code 1919, § 1331.

No Right Superior to That of Debtor. — By attachment, a creditor acquires in the proceeds of property claimed by his debtor no right or interest superior to that possessed by the latter therein at the time of the levy or service of the writ. *Howell v. McCarty*, 77 W. Va. 695, 88 S. E. 181; *Seward & Co. v. Miller*, 106 Va. 309, 55 S. E. 681.

4. Upon Real Property.

See ante, "In General," XI, B, 1.

C. PRIORITIES.

1. In General.

See ante, "In General," XI, B, 1.

Va. Code, 1919, §§ 6393, 6454; Barnes Code, ch. 106, § 24.

Prior Lien Respected.—An attachment creditor can acquire through his attachment no higher or greater right to the property attached than the defendant when the attachment was levied, unless he can show fraud or collusion by which his rights are impaired. If property, when attached, is subject to a lien placed thereon by the defendant in good faith, that lien must be respected, and the attachment postponed to it. *Seward & Co. v. Miller*, 106 Va. 309, 55 S. E. 681.

4. Between Attachments.

See post, "Lien and Priorities," XVII, G.

10. Between Attachment and Deed for Land.

Lis Pendens as Notice of Attachment.—A *lis pendens* in attachment proceedings filed in the clerk's office of the proper county, as provided by § 3566 of the Code of 1887 (§ 6469, Va. Code 1919), operates to give constructive notice of the lien of the attachment to a subsequent grantee of the defendant, and such grantee stands upon no better footing as to the attaching creditor than his grantor. *Breeden v. Peale*, 106 Va. 39, 55 S. E. 2.

XII. DISPOSITION OF ATTACHED PROPERTY.

½A. CUSTODY OF ATTACHED PROPERTY.

See post, "Delivery on Forthcoming or Delivery Bond," XII, C; Va. Code 1919, § 6397; Barnes Code, ch. 50, § 199, ch. 106, § 13.

B. SALE.

Perishable Property.—Va. Code 1919, § 6397; Barnes Code, ch. 106, § 13.

Real Estate.—Va. Code 1919, § 6405; Barnes Code, ch. 106, § 20.

Bond.—Va. Code 1919, § 6406; Barnes Code, ch., 106, § 22.

Disposition of Proceeds.—Va. Code 1919, § 6405; Barnes Code, ch. 106, § 21.

Surplus Proceeds.—Va. Code 1919, § 6158; Barnes Code, ch. 106, § 20.

Protection of Purchaser.—Va. Code 1919, § 6411; Barnes Code, ch. 106, § 25.

Order for Sale.—An order in an attachment case which recites that it appears to the satisfaction of the court that the defendant is indebted to the plaintiff in a stated sum, and directs a sale of the attached effects, or so much thereof as may be necessary, to pay the sum so stated is not a personal judgment against the defendant, but reaches only the goods attached. *Bernard v. McClanahan*, 115 Va. 453, 79 S. E. 1059.

Redemption.—In decreeing a sale of real estate to satisfy the lien of an attachment thereon, the debtor should be given a reasonable time within which to redeem by paying the amount decreed against him. *Benedetto v. Di Bacco*, 83 W. Va. 620, 99 S. E. 170.

Where, however, a decree is entered without giving such time to redeem, and the debtor in the court below did not ask that he be allowed such time, and it fairly appears that if it had been asked it would have been allowed him, the decree will be corrected in this court without costs to the appellant. *Benedetto v. Di Bacco*, 83 W. Va. 620, 99 S. E. 170.

If, on rehearing in an attachment proceeding, under § 25 of chap. 106 of the Code (Barnes Code ch. 106, § 25), no error in the judgment or proceedings is established, the defendant is not entitled to pay the judgment and have the sale of the property, made and confirmed before his appearance in the action, set aside, although the plaintiff therein was the purchaser. An offer to pay the debt at such stage of the proceedings is substantially an offer to redeem the property from sale, and not a defense to the action. *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882. See post, JUDICIAL SALES AND RENTINGS.

C. DELIVERY ON FORTHCOMING OR DELIVERY BOND.

See post, "Delivery on Forthcoming or Delivery Bond," XV, A, 4.

Va. Code 1919, § 6394; Barnes Code, ch. 106, § 10.

Right of Defendant to Give Bond.—“After the plaintiff has given the attachment bond and the attachment is levied on the defendant's property, three courses are open to him. He can give a forthcoming bond under § 2972, or a bond with condition to perform the judgment of the court under the same section, or a bond under § 2974 (§ 6396 Va. Code 1919), in a penalty double the value of ‘the whole estate of the defendant with condition, if judgment or decree be rendered for the plaintiff in said suit, to pay said value, or so much thereof as may be necessary to satisfy the same.’” *Kaylor v. Davy Pocahontas Coal Co.*, 118 Va. 369, 373, 87 S. E. 551.

Returning and Filing Bond. — Va. Code 1919, § 6395; Barnes Code, ch. 106, § 11.

Exceptions to Bond. — Va. Code 1919, § 6395; Barnes Code, ch. 106; § 11.

Appeal Bond. — Va. Code 1919, § 6413; Barnes Code, ch. 106, § 28.

D. INTEREST AND PROCEEDS.

Va. Code 1919, § 6396; Barnes Code, ch. 106, § 12.

XIII. PROCEEDINGS TO SUPPORT OR ENFORCE ATTACHMENT.

A. IN GENERAL.

See post, “In General,” XI, C, 1.

Jurisdiction, etc.—Va. Code 1919, §§ 6380, 6417; Barnes Code, ch. 106, §§ 1, 3.

Forthcoming of Specific Property—Vacation.—Va. Code 1919, § 6389.

Before Justice of the Peace. — Va. Code 1919, §§ 6415, 6416, 6418, Barnes Code, §§ 193-194.

B. PROCESS AND SERVICE.

$\frac{1}{2}$. In General.

Attachment from Civil Justice.—Va. Code 1919, §§ 6389, 3120; Barnes Code, ch. 106, §§ 4, 5, 7, 17, 24.

1. Necessity.

Va. Code 1919, §§ 6389, 6401; Barnes Code, ch. 106, §§ 5, 6.

Personal Service.—A judgment in an attachment suit where no personal service is had upon the defendant therein has no other effect than to reach the property which the nonresident defendant may have in the state, and after such property is exhausted such judgment is of no force or effect. *Gerber Co. v. Thompson*, 84 W. Va. 721, 100 S. E. 733.

2. Sufficiency.

See ante, “Necessity,” XIII, B, 1.

“Defendant being a foreign corporation, a copy of the order of attachment must have been served upon some officer or agent of defendant doing business for it in this state. In other words, it must be such service as would authorize rendition of a personal judgment if the writ served were a summons.” *Hayman v. Monongahela Consolidated Coal, etc., Co.*, 81 W. Va. 144, 148, 94 S. E. 36.

3. Fees.

Service.—Va. Acts 1918, p. 300.

Claims Not Exceeding Certain Sums.—Va. Code 1919, § 6415; Barnes Code, ch. —.

C. ORDER OF PUBLICATION.

Va. Code 1919, § 6401; Barnes Code, ch. 106, § 17.

When an attachment, other than under §§ 2961 and 2962 of the Code (§§ 6379, 6416, Va. Code 1919), has been regularly issued, levied and returned executed, if the defendant has not been served with a copy of the attachment, or with process in the suit wherein the attachment issued, an order of publication should be issued against him, as required by § 2979 (§ 6401, Va. Code 1919) of the Code, but it is not necessary that said order of publication should be issued immediately upon such return, and if the action is not abated, and process is subsequently served on the defendant in the action, this is a compliance with § 2979 of the

Code, and the attachment, if otherwise valid, should not be quashed. *Water Front Coal Co. v. Smithfield, etc., Co.*, 114 Va. 482, 76 S. E. 937.

D. APPEARANCE AND DEFENSES.

Va. Code 1919, § 6402; Barnes Code, ch. 106, § 18.

Voluntary Appearance.—It was held that the filing of a bond for the release of the property attached did not constitute a voluntary appearance to the action. *Crockett v. Reynolds*, 76 W. Va. 763, 766, 86 S. E. 881, citing *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 82 S. E. 1094.

Defenses.—Va. Code 1919, § 6403; Barnes Code, ch. 106, § 19.

E. SUFFICIENCY OF PLEADING, ETC.

Va. Code 1919, § 6382; Barnes Code, ch. 106, §§ 1, 19.

E½. AMENDMENTS.

Va. Code 1919, §§ 6388, 6409.

F. JUDGMENT.

1. In General.

For Plaintiff. — Va. Code 1919, § 6405; Barnes Code, ch. 106, § 25.

For Defendant.—Va. Code 1919, § 6403; Barnes Code, ch. 106, § 19.

Dismissed for Non-Appearance — Cause Retained. — Va. Code 1919, § 6404.

Attachment at Law and Subsequent Suit in Chancery.—Where an attachment at law has been sued out and levied, and a suit in chancery subsequently brought to subject assets of the debtor, it is improper to bring the attachment into the chancery suit and there take a decree for the debt, while the attachment stands merely upon the inchoate lien created by the levy of the attachment. The proper mode of procedure is to take judgment in the attachment case, and then to report the perfected lien in the chancery suit. *Trimble v. Covington Grocery Co.*, 112 Va. 826, 72 S. E. 724.

4. Judgment on Rehearing.

Restitution.—Va. Code 1919, § 6412; Barnes Code, ch. 106, § 26.

G. RIGHT TO REHEARING, RE-OPENING CASE, ETC.

Va. Code 1919, §§ 6411, 6412; Barnes Code, ch. 106, §§ 25, 26.

Security for Costs.—Va. Code 1919, §§ 6411, 6412; Barnes Code, ch. 106, §§ 25, 26.

A party, including a non-resident corporation, against whom an attachment has issued, on order of publication, and against whose property, levied on thereunder, judgment has been rendered, who has made no appearance to the action, has an absolute right by virtue of § 25, ch. 106, Code (Barnes Code, ch. 106, § 25), within the time therein designated, on giving security for the costs that have accrued and may thereafter accrue, to have the case reopened, and to be permitted to make defense thereto, unless he has been served with a copy of the attachment or with process in the suit more than sixty days before the date of the judgment. *Hayman v. Monongahela Consolidated Coal, etc., Co.*, 81 W. Va. 144, 94 S. E. 36.

XIV. CLAIMS BY THIRD PERSONS.

A. RIGHT TO QUESTION VALIDITY OF ATTACHMENT.

See post, "Right of Subsequently Attacking Creditors," XIV, B; Va. Code 1919, § 6407; Barnes Code, ch. 106, § 28.

Condition Precedent.—An intervener in such a suit is not entitled to have an adjudication as to the validity of the attachment, until his right has been either admitted or established. *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 94 S. E. 42.

"He must file a petition stating the facts necessary to the establishment of the right he claims and sustain the averments thereof by documentary or oral evidence or both, as the nature of

his case may require, and such issues of fact, arising on his petition, as are proper for jury determination must be disposed of by a jury trial, unless the right of such trial is waived." *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 50, 94 S. E. 42.

"Every Person Interested." — The procedure in the attachment suit and in the intervention is statutory. Neither party has any right beyond that given by the statute. Only a person interested within the meaning of the statute can intervene. He must claim the attached property or an interest in it or a lien thereon. Code, ch. 106, § 23; *Smith v. Parkersburg Co-Op. Ass'n*, 48 W. Va. 232, 37 S. E. 645; *Miller v. White*, 46 W. Va. 67, 33 S. E. 332. A mere creditor at large of the debtor is not such a person. *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753; *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 50, 94 S. E. 42.

Question for Court or Jury.—If the title, interest or lien set up by the intervenor depends upon documentary evidence, the question of its validity is one for determination by the court; but, in so far as it depends upon conflicting oral testimony, the statute, § 23, ch. 106 (Barnes Code, ch. 106, § 23), requires it to be determined by a jury, unless the right of jury trial so given is waived. *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 94 S. E. 42.

B. RIGHT OF SUBSEQUENTLY ATTACHING CREDITORS.

A subsequent attaching creditor has right, by §§ 151 and 152, chapter 50, Code 1906 (Barnes Code, ch. 50, §§ 151, 152), to contest the validity of a prior attachment against the same property. Such right is not limited thereby to an owner claimant or one with title of right of possession. *Bank v. Loeb*, 71 W. Va. 494, 76 S. E. 883.

The validity of such prior attachment, based on such void affidavit, may be attacked and the affidavit and attachment quashed on motion of a

subsequent attaching creditor with a valid attachment on the same property in a proceeding under said §§ 151 and 152, chapter 50, Code 1906 (Barnes Code, ch. 50, §§ 151, 152). *Bank v. Loeb*, 71 W. Va. 494, 76 S. E. 883.

Without such valid (subsequent) attachment, however, a subsequent attaching creditor can not be heard upon such petition to impeach the validity of a prior attachment, though void on its face. *Bank v. Loeb*, 71 W. Va. 494, 76 S. E. 883.

C. PROCEEDINGS TO DETERMINE CLAIMS TO PROPERTY.

Va. Code 1919, § 6407; Barnes Code, ch. 106, § 23.

Costs of Interpleader. — Va. Code 1919, § 6407; Barnes Code, ch. 106, § 23.

The procedure in an attachment in equity and in an intervention therein is purely statutory and all parties interested are entitled to demand and have adherence thereto. Assertion of a judgment lien therein by an intervenor does not convert it into a suit to enforce judgment liens. *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 94 S. E. 42.

To protect their interests in the attached property, lienors must come into the suit by petition, as provided by § 23, ch. 106, Code (Barnes Code, ch. 106, § 23). *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 94 S. E. 42.

A petition alleging the relation of suretyship between such an intervenor and the defendant, in a judgment against both, his payment of the judgment under compulsion, and return of an execution showing no property of the principal found, and asserting right to the benefit of the lien of the judgment by subrogation, is sufficient on its face. *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 94 S. E. 42.

Same—Jury Trial—Answer.—In case of intervention in attachment proceedings, the jury trial takes place upon

the intervener's petition and without other pleadings for either party. An answer to the petition by the attaching creditor is neither necessary nor proper. *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 94 S. E. 42.

Same—Evidence.—In a controversy between a creditor of the drawer of a draft, who has attached the fund in the hands of the collecting bank, and the endorsee thereof, concerning title to the fund, oral evidence is admissible to prove title without the production of the draft. *Dixon-Pocahontas Fuel Co. v. Myers Grain Co.*, 71 W. Va. 715, 77 S. E. 362.

Same — Suretyship—Question for Jury.—If the alleged relation of principal and surety between the intervener and the defendant is not shown by documentary evidence, it is a question of fact for jury determination. *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 94 S. E. 42.

Same—Adjudication. — If in such a proceeding, the intervener attacks the attachment for insufficiency of the affidavit or otherwise, but has not established his claim and the defendant has appeared and admitted the debt claimed by the attaching creditor, and made no objection to the attachment, the intervener has no right to have an adjudication as to the validity of the attachment, the court cannot quash it on his motion, nor is the plaintiff entitled to a decree on the answer. *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 94 S. E. 42.

XV. DISSOLUTION.

A. WHAT WILL EFFECT DISSOLUTION.

½. In General.

See post, "Procedure for," XV, B.

Failure to Give Bond. — Va. Code 1919, § 6385; Barnes Code, ch. 106, § 6.

Dismissal or Cause Retained.—Va. Code 1919, § 6404; Barnes Code, ch. 106, § 19.

Formal Defects.—Va. Code 1919, § 6409.

Failure of Jurisdiction in Equity.—

When plaintiff's claim is purely legal and jurisdiction in equity depends solely on the validity of the attachment, if that is not good, the jurisdiction fails, and the bill should be dismissed. *Deming Nat. Bank v. Baker*, 83 W. Va. 429, 98 S. E. 438.

Disposition of Cause without Action on Attachment. — Where an attachment is sued out as ancillary to an action at law, a final judgment in the action without making any disposition of the ancillary proceeding by attachment necessarily operates as a release of the attached effects. *Kaylor v. Davy Pocahontas Coal Co.*, 118 Va. 369, 87 S. E. 551.

4. Delivery on Forthcoming or Delivery Bond.

See ante, "Delivery on Forthcoming or Delivery Bond," XII, C. And see generally, post, FORTHCOMING AND DELIVERY BONDS. See also Va. Code 1919, § 6394; Barnes Code, ch. 106, § 10.

The effect of a bond given by the defendant under § 2972 of the Code (§ 6394 Va. Code 1919), with condition to perform the judgment of the court is to "release from any attachment the whole of the estate attached," but it does not debar the plaintiff from suing out other attachments for the same debt and having the same levied on other property of the defendant. *Kaylor v. Davy Pocahontas Coal Co.*, 118 Va. 369, 87 S. E. 551.

A bond given by a defendant and his assignees in an attachment suit, pursuant to § 10, chapter 106, Code 1906 (Barnes Code, ch. 106, § 10), conditioned to perform the judgment or decree of the court dissolves the attachment, as the statute plainly contemplates. The bond then stands in lieu of the property attached. The attachment has expended its force, and thereafter nothing is left on which it can operate. *Roach v. Blessing*, 73 W. Va. 319, 80 S. E. 453.

Having given a bond with alternative conditions to have the attached property forthcoming at such time and place as the court may require, or to perform the judgment of the court, defendant may elect to perform either condition; and his motion, thereafter made, to quash the attachment will be treated as his election to have the property forthcoming. *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 82 S. E. 1094.

"Sec. 10, Ch. 106 (Barnes Code, ch. 106, § 10), serial § 4464, Code 1913, provides for the retention of attached property by the owner, or its return to the person in whose possession it was, on giving bond with condition to have the same forthcoming at such time and place as the court may require. It also provides for the release of the property from the attachment on the giving of bond with condition to perform the judgment or decree of the court. Two bonds are therein provided for having different objects; one is to enable the party in whose possession the property is to retain it without affecting the attachment, and the other is to discharge the attachment. A bond to perform the judgment discharges the lien of the attachment, and becomes a substitute for the rem." *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 758, 82 S. E. 1094.

After Personal Decree Rendered against Foreign Corporation. — When in a suit against a foreign corporation, in which its property has been attached and afterwards released by the giving of a bond, pursuant to statutory provisions, the defendant appears and makes defense and a personal decree is rendered against it for an amount which it has previously tendered on account of the demand set up in the bill, but not paid into court, it is error to dismiss the attachment and decree a release of the bond. *Dudley v. Chicago, etc., R. Co.*, 58 W. Va. 604, 52 S. E. 718.

B. PROCEDURE FOR.

½. In General.

"A court may *ex mero motu* quash an irregular attachment in a case in which there has been no appearance, *McAllister v. Guggenheimer & Co.*, 91 Va. 317, 21 S. E. 475." *Yellow Pine Lumber Co. v. Mays*, 81 W. Va. 46, 54, 94 S. E. 42.

1. Motion to Quash.

a. In General.

See post, "In General," XV, B, 2, a; Va. Code 1919, § 6403; Barnes Code, ch. 106, § 19.

Formal Defects.—Va. Code 1919, § 6409.

Plea in Abatement Treated as Motion to Quash. — A plea in abatement to an attachment which sets up only matter of variance, appearing from the declaration and affidavit without the aid of the plea, accompanied by an oral motion to quash, may be treated as a motion to quash. *Simmons v. Simmons*, 53 W. Va. 65, 48 S. E. 833.

Upon a motion to quash the attachment for variance between claim stated in affidavit and demand set up in the declaration, the declaration may be resorted to for the purpose of establishing it, and a plea in abatement is not necessary. *Simmons v. Simmons*, 56 W. Va. 65, 48 S. E. 833.

Scope of Hearing—Validity of Claim.

—The question of the validity of the debt or demand of the plaintiff, i. e., whether it is or is not established does not arise upon a preliminary motion to quash the attachment, but only when the case is heard upon its merits. Consequently, the question of the liability of a partnership for torts of one of the partners is not within the scope of a motion to quash an attachment, but must be determined when the case comes up for trial on its merits. *Myers & Co. v. Lewis*, 121 Va. 50, 92 S. E. 988.

b. Who May Make Motion to Quash.

Va. Code 1919, § 6403; Barnes Code, ch. 106, § 19.

g. Judgment.

Barnes Code, ch. 106, § 19; Va. Code 1919, § 6403.

Time for Entering.—"The authority given the court under § 2981 (§ 6403 Va. Code 1919) to enter judgment abating the attachment may be exercised at any time before a final judgment has been entered disposing of the property attached, and the court is not precluded from abating the attachment because at a former stage of the proceeding a motion to abate was overruled, if upon further consideration it is satisfied that the writ was issued upon an insufficient affidavit." *Northern Neck State Bank v. Gilbert Packing Co.*, 114 Va. 658, 661, 77 S. E. 451.

Effect of.—An order overruling a motion to quash an attachment is interlocutory and does not preclude a renewal of the motion. *Simmons v. Simmons*, 56 W. Va. 65, 48 S. E. 833.

Under subsection 8 of § 1 of chapter 135 of the West Virginia Code, 1899 (Barnes Code, ch. 135, § 1 [8]), a decree overruling a motion to quash an attachment is an interlocutory but appealable decree, and does not preclude a renewal of the motion at the same or any subsequent term before final decree, and in a suit in which an attachment is sued out and some of the defendants appear and move to quash the attachment, and their motion is overruled, a creditor who files a petition under § 23, chapter 106, of the Code (Barnes Code, ch. 106, § 23), disputing the validity of the plaintiff's attachment and stating a claim to or interest in the property attached, and is made a formal party thereto, has the right to move to quash said attachment, and the statute of limitations as to his right to appeal begins to run at the date of the decree overruling his motion. *Elkins Nat. Bank v. Simmons*, 57 W. Va. 1, 49 S. E. 893.

2. Plea in Abatement.**a. In General.**

Barnes Code, ch. 106, § 19.

Upon a motion to quash an attachment for variance caused by inconsistency between the claim stated in an affidavit for an attachment and the demand set up in the declaration, the declaration may be resorted to for the purpose of establishing it, and a plea in abatement is not necessary. *Simmons v. Simmons*, 56 W. Va. 65, 69, 48 S. E. 833.

4. Effect of Dismissal.

Upon quashing an attachment in equity for a purely legal demand, the suit should be dismissed, when there is no ground of equity jurisdiction other than the attachment. *Millar v. Whittington*, 77 W. Va. 142, 87 S. E. 164.

When Attachment Ancillary.—In an action to recover a debt, with attachment and service of process by publication against a non-resident defendant, his motion, after the court on his special appearance for that purpose has quashed the attachment and order of publication against him, to dismiss the case from the docket, is properly overruled. After such action the plaintiff has the right to retain the case on the docket for new process and a new order of attachment, if so advised. *Danser v. Mallonee*, 77 W. Va. 26, 86 S. E. 895.

"This case is not like a suit in equity on a claim not due, and when jurisdiction in equity depends solely upon the validity of the attachment. In such cases, according to our decisions, the suit falls with the attachment and the bill is properly dismissed. *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981; *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135." *Danser v. Mallonee*, 77 W. Va. 26, 28, 86 S. E. 895.

XVI. ACTION FOR WRONGFUL ATTACHMENT.**A. GROUNDS OF ACTION.**

Rent.—Va. Code 1919, § 5782; Barnes Code, § 103, § 3.

Conversion.—"A plaintiff in execution procuring a levy to be made on a stranger's goods is guilty of conversion, whether he takes possession or not, conversion is any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of their possession." *Hale v. Ames*, 2 T. M. Mon. (Ky.) 143, 15 Am. Dec. 150; *St. George v. O'Connell*, 110 Mass. 475; 28 Am. & Eng. Enc. L. (2d. ed.) 691, et seq." *Buckeye Nat. Bank v. Huff*, 114 Va. 1, 10, 75 S. E. 769.

"The question in this class of cases is not whether the plaintiff was divested of all or part of his property, but whether the wrongful seizure thereof amounted to a conversion of the property. Where such is the case, the owner of the property has several remedies, among which are an action for damages resulting from the wrongful seizure, and the action of trover, in each of which actions the measure of recovery would be practically the same, viz., the value of the property converted, with interest, etc." *Buckeye Nat. Bank v. Huff*, 114 Va. 1, 10, 75 S. E. 769.

"One is liable in an action of trespass for causing an attachment against a debtor to be levied on a consignment of goods in the custody of a common carrier, the title to which was in a third person, to whom the bill of lading covering the shipment had previously been duly assigned by the shipper." *Farmers, etc., Bank v. Allen-Holmes & Co.*, 122 Ga. 67, 49 S. E. 816." *Buckeye Nat. Bank v. Huff*, 114 Va. 1, 10, 75 S. E. 769.

B. FORM OF ACTION.

See ante, "Grounds of Action," XVI, A.

C. PERSONS LIABLE.

Joint Wrongdoers.—In the case of several wrongful and successive seizures of the same property, under attachments, covering in part the same period of time, the wrongful acts are

concurrent, not joint, and the injured party may recover from any one of the wrongdoers the entire damages accruing within the period of his seizure and unlawful possession of the property; but he can have only one satisfaction for the same injury and, after having recovered a judgment against one of the parties, he must allow, in a second one against another, credit for the amount of the former recovery, in the estimation of his damages. *Parkersburg Corrugated Paper Co. v. United States Fidelity, etc., Co.*, 31 W. Va. 749, 95 S. E. 783.

E. DAMAGES.

Inability of a manufacturing company or firm, on whose plant an attachment has been wrongfully levied, to operate the plant and carry on its business, with profit, does not preclude right in it to recover damages by way of compensation for deprivation of the value of the use of such property, during the period of the wrongful seizure and possession. *Parkersburg Corrugated Paper Co. v. United States Fidelity, etc., Co.*, 31 W. Va. 749, 95 S. E. 783.

Same—Deterioration.—In such case, there may be a recovery also for deterioration of the plant and injury to materials and finished products, occasioned by the wrongful seizure. *Parkersburg Corrugated Paper Co. v. United States Fidelity, etc., Co.*, 31 W. Va. 749, 95 S. E. 783.

Same—Wages and Salaries.—If, in the opinion of the jury, founded upon sufficient evidence, the company had reasonable ground for belief that it would be able to resume operations, profitable or unprofitable, and intention to do so, there may be a recovery, in such case, for the wages or salaries of retained agents and employees whose services were deemed to be essential to efficient conduct of the business. *Parkersburg Corrugated Paper Co. v. United States Fidelity, etc., Co.*, 31 W. Va. 749, 95 S. E. 783.

Same—Instruction.—Though compensation for deprivation of profits, if recoverable in such case, would include compensation for deprivation of the use of the plant, and the latter could not be recovered in addition to profits, it is not erroneous to give separate instructions, in a case in which the evidence may not justify a verdict for profits, authorizing consideration of both profits and use of the property, in the ascertainment of the damages, and omitting reference to the relation between the two items, since they correctly state the law as far as they go and lack nothing but completeness. The mere possibility of a misleading inference deducible from their terms and provisions does not vitiate them. *Parkersburg Corrugated Paper Co. v. United States Fidelity, etc., Co.*, 81 W. Va. 749, 95 S. E. 783.

XVII. GARNISHMENT.

A. NATURE.

"Garnishment is, in effect, a suit by the defendant, in the name of the plaintiff, against the garnishee, and he generally occupies toward the garnishee the same position that his debtor occupied; his rights are no higher. It is, for most purposes, a compulsory assignment of the debt, or so much as is necessary to pay plaintiff's demand, by defendant to plaintiff, and does not alter or affect the character of the debt; it requires a judgment or decree against the garnishee to do so." *Crane v. Standard Lumber, etc., Co.*, 77 W. Va. 617, 620, 87 S. E. 1018.

Garnishment is in the nature of a proceeding in rem. Its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of the claim against the defendant, property of the defendant in the hands of the garnishee, or a debt due from the garnishee to the defendant. It is not a direct action between the persons, but a species of seizure of the property or debt of the one by the other. It involves a res. *Atkins v. Evans*, 76 W. Va. 17, 84 S. E. 901.

Application of Remedy.—This special procedure by suggestion is available only in the two instances mentioned in the statute. It affords no remedy for the enforcement of purely equitable liabilities. *Freitas v. Griffith*, 112 Va. 343, 345, 71 S. E. 531.

B. SERVICE ON GARNISHEE.

1. In General.

Va. Code 1919, § 6509; Barnes Code, ch. 50, § 17, ch. 52, § 19.

Return. — Va. Code 1919 § 6055; Barnes Code, ch. 124, § 2.

Essential to Jurisdiction. — In garnishment, it is primarily essential to the court's jurisdiction in relation to the debtor property sought to be affected, that the garnishee be actually served with the writ of attachment whereon he is designated as such. Acceptance of service or voluntary appearance by the garnishee will not suffice. *Atkins v. Evans*, 76 W. Va. 17, 84 S. E. 901.

To acquire jurisdiction, upon a suggestion, to direct payment of money or appropriation of the property in the hands or under the control of one other than the judgment debtor, in satisfaction of the lien of an execution, the process must be served on the person having such money or property in his custody, or, if it be a foreign or non-resident domestic corporation, upon the auditor. Acceptance of service by either will not suffice. *First Nat. Bank v. Smith*, 80 W. Va. 678, 93 S. E. 755.

Effect of Service.—The service of an attachment upon a garnishee creates a lien upon the debt which the garnishee owes to defendant in attachment, but nothing more. Such service, however, does not create the relation of debtor and creditor between such garnishee and the attaching creditor, within the meaning of §§ 2460, 2460a of the Code of 1887 (§§ 5186, 5187 Va. Code, 1919) and does not confer upon such attaching creditor the right to avoid a sale in gross of merchandise by said garnishee for want of conformity to § 2460a (§ 5187 Va. Code 1919). *Trim-*

ble *v. Covington Grocery Co.*, 112 Va. 826, 72 S. E. 724. See post, "Lien and Priorities," XVII, G.

4. Service on Corporation.

See ante, "In General," XVII, B, 1.

C. APPEARANCE AND ANSWER OF GARNISHEE.

Failure to Appear.—Va. Code 1919, § 6399; Barnes Code, ch. 106, § 15.

Failure to Disclose Debts.—Va. Code 1919, §§ 6400, 6511; Barnes Code, § 106, § 5.

Examination of Garnishee. — Va. Code 1919, § 6398; Barnes Code, ch. 50, ch. 206, ch. 106, § 14.

Debtor's Filing of Exemption List as an Appearance.—The mere tender to a justice, in garnishment on a judgment, before the return day of the notice thereof to the garnishee, of a paper purporting to be a list of property by the debtor claimed exempt from levy under execution, does not constitute an appearance by him to such proceeding, or preclude the right given him by § 124, ch. 50, Code (Barnes Code, ch. 50, § 124), to have a rehearing thereof, he not being served with the notice required by § 120 of that chapter or otherwise participating therein. *Crockett v. Reynolds*, 76 W. Va. 763, 86 S. E. 881.

Sufficiency of Answer. — If, when made, a garnishee's answer correctly states the liability sought to be imposed, it is sufficient, although subsequent changes in the liability may afford good grounds to require him to answer over. *Lacy v. Greenlee*, 75 W. Va. 517, 84 S. E. 921.

D. ORDER FOR PAYMENT OR DELIVERY INTO COURT.

Va. Code 1919, § 6398; Barnes Code, ch. 50, § 207.

D½. DELIVERY OF PROPERTY OR FORTHCOMING OR DELIVERY BOND.

Va. Code 1919, § 6398; Barnes Code, ch. 106, § 14.

E. PROPERTY SUBJECT TO GARNISHMENT.

½. In General.

Barnes Code, ch. 106, § 5; Va. Code 1919, § 6398.

Wages and Salaries of State Employees.—Va. Code 1919, § 6559.

Wages and Salaries of Employees of City, etc.—Va. Code 1919, §§ 6560, 6561.

Collection of Taxes.—Va. Code 1919, §§ 2444, 2447.

In General.—On a summons on suggestion the court can make no order against the garnishee, unless he owes a debt to the defendant in execution, or has in his hands personal estate of such defendant, for which debt or estate the defendant could maintain an action at law. *Freitas v. Griffith*, 112 Va. 343, 345, 71 S. E. 531.

"In the case of a fund in the custody of a court, because of its jealousy of its jurisdiction, it will not allow another court to say what disposition should be made of that fund, or any part of it, and this principle of public policy militates against garnisheeing such fund, but when the court has exercised its jurisdiction by directing to whom the fund shall be paid, the rule of public policy is not violated by permitting such funds to be garnisheered by a creditor of the party to whom the court has directed their payment." *Leiter v. American-LaFrance Fire Engine Co.*, 86 W. Va. 599, 603, 104 S. E. 56.

Personal property fraudulently transferred to a wife by her husband can not be reached by a summons in garnishment on the wife upon an execution against her husband. The garnishment statute does not contemplate or operate upon estate in the possession of the garnishee to which he has title. *Freitas v. Griffith*, 112 Va. 343, 71 S. E. 531.

Unaccepted Option on Land. — Through an option contract, when recorded pursuant to § 4 of chapter 74 of the Code, might protect the optionee

or his assignee in any rights acquired under the contract, they were not complete purchasers of the land, and the land remained subject to attachment at the suit of a creditor of the optioner. *West Virginia Pulp, etc., Co. v. Cooper*, 87 W. Va. 781, 106 S. E. 55.

1. Debts.

See ante, "In General," XVII, E, ½.

A debt due from a third person to a partnership can not be subjected to garnishment, in an action at law, by an individual creditor of a partner, while the firm accounts and liabilities remain unsettled and unpaid. *Lacy v. Greenlee*, 75 W. Va. 517, 84 S. E. 921.

Place of Garnishment of Debt.—A debt may be attached by garnishment at the place of residence of the debtor, although it be expressly made payable elsewhere. *Baltimore, etc., R. Co. v. Allen*, 58 W. Va. 388, 52 S. E. 465.

For the purpose of garnishment, a debt is annexed to the person of the debtor and subject to garnishment wherever he is found, unless expressly made payable elsewhere. *Baltimore, etc., R. Co. v. Allen*, 58 W. Va. 388, 52 S. E. 465.

Payment of Wages in Advance.

If, after service of notice on the employer of a judgment debtor under § 3601 of Code 1904 (§ 6501 Va. Code 1919), such debtor and garnishee enter into a new agreement of employment by the terms of which the employer is to pay the daily wage agreed upon to the employee each day in advance, such wages, paid by the employer after notice of the *fieri facias* and before its return day, are not such debts due the judgment debtor by the garnishee as are subject to the lien of the *fi. fa.* *South Boston Sav. Bank v. Johnson*, 16 Va. Law Reg. 911.

2. Money on Deposit.

A special deposit in a bank is subject to garnishment. *Lutz v. Williams*, 79 W. Va. 609, 91 S. E. 460.

8. Property Exempt from Garnishment.

Warehouse Receipt Issued for.—Va. Code 1919, § 1314.

Pensions.—Va. Code 1919, § 2658, Va. Acts 1918, ch. 85.

Insurance.—Va. Code 1919, §§ 4219, 4292.

Wages. — Va. Code 1919, §§ 6555, 6556.

Homestead Exemptions.—Va. Acts 1918, p. 487.

Restraining Sale.—Va. Code 1919, § 6565.

F. AGAINST WHOM GARNISHMENT MAY ISSUE.

1. In General.

Special commissioners who have in their hands an amount arising out of a chancery cause, belonging to a judgment debtor, and which amount by decree in such cause has been directed to be paid over to the said owner, are liable to garnishment therefor. *Boylan v. Hines*, 62 W. Va. 486, 59 S. E. 503.

2. Public Officers.

"The reason," however, for declining to allow the funds in the hands of public officers or public corporations to be garnisheed is that it would subject these public officers and public corporations to annoyance from being brought into court in suits in which the public is in no wise interested, and further that it would have a tendency to deprive those who contract with the public of the means of performing their obligations. It is considered to be against public policy to allow public officers to be made parties to suits in which the public has no interest, and unduly annoy them and interfere with them in the performance of their public duties, and also to permit one who contracts with the public to be deprived of the consideration for his contract even at the suit of one of his creditors, upon the theory that to do so would tend to prevent the proper performance of the public functions by those charged therewith." *Leiter v. American-La France Fire Engine Co.*, 86 W. Va. 599, 603, 104 S. E. 56.

Treasurer of Municipal Corporation.—In a suit by a third party against a

creditor of a municipal corporation, the treasurer of such municipal corporation, in whose hands are the public funds, can not be made a garnishee upon the ground that the municipal corporation has directed the payment of a certain sum to such creditor. *Leiter v. American-La France Fire Engine Co.*, 86 W. Va. 599, 104 S. E. 56.

5. Corporations.

Barnes Code, ch. 52, § 19.

Railroad corporations, chartered by other states, but owning and operating railroads in this state, have the status of residents of this state, and such corporations may be proceeded against as garnishees, without reference to the jurisdiction in which debts due from them were contracted or are payable. *Baltimore, etc., R. Co. v. Allen*, 58 W. Va. 388, 52 S. E. 465.

Public Corporations. — Statutes relating to attachment and garnishment, and making corporations, as other persons, amenable to legal process, and defining the word "person" to include corporations, are generally construed not to include public corporations. *Welch Lumber Co. v. Carter Bros.*, 78 W. Va. 11, 88 S. E. 1034.

"But the authorities are by no means uniform on this question. Among the cases cited to the contrary are *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 33 S. E. 516, and *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596. Many of the cases referred to in the text books are reviewed, but the question not decided, in our case of *Brown v. Gates*, 15 W. Va. 131. The Virginia decisions are not binding upon us, and were evidently influenced by a recent statute of that state, respecting public officers, and regarded as having changed the rule of public policy in that state." *Welch Lumber Co. v. Carter Bros.*, 78 W. Va. 11, 12, 88 S. E. 1034.

Municipal corporations are not liable to garnishee process, and this exemption from such process is not personal, but is upon grounds of public policy.

Leiter v. American-La France Fire Engine Co., 86 W. Va. 599, 104 S. E. 56.

Same—Waiver of Non-Liability. — Exemption of municipal or other public corporations from process of garnishment is not a personal privilege which may be waived by them, by appearance and answer, but one based on principles of public policy and which can not be waived. *Welch Lumber Co. v. Carter Bros.*, 78 W. Va. 11, 88 S. E. 1034; *Leiter v. American-La France Fire Engine Co.*, 86 W. Va. 599, 104 S. E. 56.

G. LIEN AND PRIORITIES.

See generally, ante, "Lien," XI.

Service of notice of attachment gives plaintiff a lien upon the debt owing by the garnishee to defendant. *Crane v. Standard Lumber, etc., Co.*, 77 W. Va. 617, 87 S. E. 1018; *Trimble v. Covington Grocery Co.*, 112 Va. 826, 72 S. E. 724.

Service of notice of attachment upon a garnishee gives plaintiff a lien upon the debt owing by the garnishee to defendant, but not any greater right against him than the defendant had; the character of the garnishee's obligation is not changed unless there is a personal judgment or decree against him. *Crane v. Standard Lumber, etc., Co.*, 77 W. Va. 617, 87 S. E. 1018.

A lien upon a debt garnished does not make the debt a lien upon the property of the garnishee, unless and until there is a personal decree or judgment taken against him. *Crane v. Standard Lumber, etc., Co.*, 77 W. Va. 617, 620, 87 S. E. 1018.

Lien of Garnishment and Attachment Distinguished. — An attaching creditor does not acquire a lien on the property of the garnishee, from the time it was served with notice; as the service of notice or process upon a garnishee does not have the same effect upon him that the levy of an attachment has upon the tangible property of the debtor, and create a priority in favor of the attaching creditor, not only against the other creditors of the

principal debtor, but against the creditors of the garnishee as well. It gives the attaching creditor a lien on the debt, owing by the garnishee, from the time he was served with a copy of the attachment, in like manner as a lien is created on the tangible property of the principal debtor, from the time the attachment is levied. *Crane v. Standard Lumber, etc., Co.*, 77 W. Va. 617, 619, 87 S. E. 1018.

Priority between Attachments.—Proceedings on junior attachments against a garnishee should be stayed until proceedings on senior attachments against the same garnishee are determined, unless the amount garnisheed is sufficient to satisfy both sets of attachments. *Prichard & Co. v. Critchlow*, 56 W. Va. 547, 49 S. E. 453.

Conflict of Laws.—Several attachments are sued out in Greene county, Pa., and served on a garnishee, a subsequent attachment is sued out in Marion County, W. Va., by a different plaintiff, against the same defendant, and served on the same garnishee, the question is presented in each of such attachment suits as to which attachments are entitled to priority under the statute of Pennsylvania. As a matter of comity and to avoid confusion and conflict of decisions to the detriment of the garnishee, the proceedings under the jurisdiction of the courts of West Virginia should be stayed until the matter of priority is settled by the courts of Pennsylvania having jurisdiction thereof. *Prichard & Co. v. Critchlow*, 56 W. Va. 547, 49 S. E. 453.

Duty of Garnishee to Retain Fund.—Where a creditor has by garnishment acquired a lien on a fund or debt payable to another, the garnishee can not lawfully pay it to the plaintiff in a subsequent action, but must retain it in his hands subject to the process served upon him. *Whan v. Hope Natural Gas Co.*, 81 W. Va. 338, 94 S. E. 365.

Same—Garnishee Concluded by Judgment.—If the stakeholder is a party to the suit between the debtor and one

claiming an equity in a certain portion of a fund deposited by the debtor with a third person and has been directed by a decree of the court to turn over to the claimant the portion of the fund found to be his, he can not refuse to do so on the ground that, after the suit was brought, he was garnished by creditors and debtors. *Hogg v. McGuffin*, 72 W. Va. 86, 77 S. E. 552. See post, JUDGMENTS AND DECREES.

H. DISCHARGE OF GARNISHEE.

Va. Code 1919, § 6512; Barnes Code, ch. 50, § 198.

I. ACTIONS AGAINST GARNISHEE.

2½. Pleading.

In a proceeding by suggestion, no formal pleadings are required. The broad issue is whether the garnishee owes the judgment debtor anything or has in his possession any property belonging to him. *Lutz v. Williams*, 79 W. Va. 609, 91 S. E. 460.

4. Defenses.

a. In General.

Set-Off.—The rights of the plaintiff against a garnishee are the same and can rise no higher than the rights of the principal debtor against him, and the garnishee may set-off against such plaintiff any debt or liability he would be entitled to set off against his creditor. *Bowling v. Bluefield-Graham Fair Association*, 84 W. Va. 41, 99 S. E. 184.

As an exception to the general rule that the rights of the plaintiff and garnishee are fixed as of the date of the service of process, if the liability of a lessee to the principal defendant sought to be charged with the plaintiff's debt arises out of a particular lease contract, the lessee is entitled to offset against the plaintiff's claim any debt or liability, legal or equitable against his lessor which has or may accrue to him under the lease, if matured and asserted before judgment against him as such garnishee. *Bowl-*

ing *v. Bluefield-Graham Fair Association*, 84 W. Va. 41, 99 S. E. 184.

5. Judgment.

Judgment—Execution—Costs. — Va. Code 1919, §§ 6510, 6513; Barnes Code, ch. 106, § 14.

Decree Not One for Money.—A decree in favor of plaintiff in an attachment suit, against defendant for his debt, finding that it is a lien on the debt garnisheed, but not decreeing that plaintiff recover it, or that the garnishee pay it to him, is not a decree for money against the garnishee. *Crane v. Standard Lumber, etc., Co.*, 77 W. Va. 617, 87 S. E. 1018.

Judgment of Justice without Jurisdiction.—Where a justice is without jurisdiction, his judgment in the principal action, as well as that upon the attachment and garnishment, is void. And the payment of the money, due

from the garnishee to the defendant on the order of the justice, is no protection to the garnishee. *Roberts v. Hickory Camp Coal, etc., Co.*, 58 W. Va. 276, 52 S. E. 182.

6. Appeal and Review.

Conclusiveness of Master's Finding.

—Where it is alleged in a bill in chancery that an attachment was served on a garnishee on a designated day, and, on reference to a master, he finds that it was served on that day, and no exception is taken to his report by the garnishee, who was a party defendant, and upon such finding, unexcepted to, the court bases its decree, it will be held to have been so served. *Trimble v. Covington Grocery Co.*, 112 Va. 826, 72 S. E. 724.

7. Costs.

Va. Code 1919, § 6400; Barnes Code, ch. 50, § 209; ch. 106, § 19.

ATTAINDER.—See post, CONSTITUTIONAL LAW.

ATTEMPTS AND SOLICITATION TO COMMIT CRIME.

I. Definition and General Consideration.

V. Punishment.

CROSS REFERENCES.

See the title ATTEMPTS AND SOLICITATION TO COMMIT CRIME, vol. 2, p. 135, and references there given. In addition, see ante, ABORTION; post, AUTREFOIS, ACQUIT AND CONVICT; BRIBERY; CRIMINAL LAW; ELECTIONS; ESCAPE; HOMICIDE; INSURRECTION; OBSTRUCTING JUSTICE; POISONS AND POISONING; RAPE; TREASON.

I. DEFINITION AND GENERAL CONSIDERATION.

The intention to commit a felony, and the doing of some act towards its commission without actually committing it, is an attempt and is, from its very nature, an offense of a lower grade than the consummated felony. *Cates v. Commonwealth*, 111 Va. 837, 69 S. E. 520.

On Indictment for Felony, Accused May Be Convicted of an Attempt; Ef-

fect of General Verdict of Not Guilty.

—Va. Code 1919, § 4922; Barnes Code, p. 1276, ch. 159, § 22.

V. PUNISHMENT.

General Statutory Provision.—Va. Code 1919, § 4767; Barnes Code, p. 1256, ch. 152, § 9. As to punishment for attempt to commit particular crimes, see the particular titles relating to crimes.

Shooting, etc., in Attempting a Felony.—Va. Code 1919, § 4403.

ATTENDANCE OF WITNESSES.—See post, WITNESSES.

ATTESTATION.—See ante, ACKNOWLEDGMENTS; post, WILLS.

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CROSS REFERENCES.

See the title ATTORNEY AND CLIENT, vol. 2, p. 144, and references there given. As to attorneys in fact, see ante, AGENCY. As to when an appellate court will remand a case with directions to the trial court to ascertain the reasonableness of an attorney's fee, see ante, APPEAL AND ERROR. As to notice to counsel of application for transcript of record, see Va. Code 1919, § 6339; ante, APPEAL AND ERROR. As to arguments of counsel before jury, see Va. Code 1919, § 6255; ante, ARGUMENTS OF COUNSEL. As to number of counsel to be allowed to argue a case, see Va. Code 1919, § 6255; ante, ARGUMENTS OF COUNSEL. As to notice to counsel in proceedings on *capias*, see Va. Code 1919, § 6421; ante, ARREST. As to validity of stipulation in note for attorney's fees or collection costs, see post, BILLS, NOTES AND CHECKS. As to service of notice to take depositions on counsel of non-resident party, see Va. Code 1919, § 6229; post, DEPOSITIONS. As to service on counsel of non-resident party in proceeding to obtain answers to interrogatories, see Va. Code 1919, § 6236; post, DISCOVERY. As to duties, etc., of attorneys under prohibition laws, see Va. Acts 1918, p. 578; 1920, p. 570; post, INTOXICATING LIQUORS. As to retaining counsel in another action as disqualifying judge in a case in which same counsel is interested, see post, JUDGES. As to service of notice on counsel to produce books, writings, etc., see Va. Code 1919, § 6237; post, PRODUCTION OF DOCUMENTS. As to duties of attorneys concerning land registration, see Va. Acts 1916, pp. 70, 558; post, RECORDING ACTS.

III. ADMISSION AND QUALIFICATION.

A. NECESSITY AND PROCEDURE FOR OBTAINING LICENSE OR QUALIFYING TO PRACTICE LAW.

1. In General.

See post, "Regulations as to Obtaining License," III, B; "Eligibility," III, C.

Necessity for License, etc.—Va. Code

1919, p. 3144, Va. Acts 1915, p. 232; Barnes Code, ch. 119, § 4.

Same—Separate Revenue License.—

Va. Code 1919, p. 3145, Va. Acts 1915, p. 232.

License—How Granted.—Va. Code 1919, §§ 3409, 3411; Barnes Code, ch. 119, §§ 1, 4.

Same—Validation of License.—Va. Laws 1918, p. 398, Pollards Code 1920, ch. 222, p. 424, Va. Acts, 1918, p. 398.

Same—Attorney from Another State.

—Va. Code 1919, § 3409; Barnes Code, ch. 119, § 2.

Same—To Teacher in Law School.—

Va. Code, 1919, § 3409.

Separate License to Each Member of Firm.—Va. Code 1919, § 2368.

To Qualify in Each Court.—Va. Code 1919, § 3421; Barnes Code, ch. 119, § 3.

3. Effect of Acting as Attorney without Qualification.

Penalties.—Va Code 1919, § 3422; Acts 1921, p. 201, ch. 78, amending Barnes Code, ch. 119, § 4.

When Penalty Incurred. — Va. Acts 1918, p. 221, Pollards Code 1920, ch. 111, p. 394; Barnes Code, ch. 119, § 4.

B. REGULATIONS AS TO OBTAINING LICENSE.

See ante, "In General," III, A, 1; post, "Eligibility," III, C; "Board of Bar Examiners," III, E.

Examination.—Va. Code 1919, §§ 3411-3415; Barnes Code, ch. 119, § 1.

Certificate of Character and Age of Applicant.—Va. Code 1919, §§ 3418, 3419; Barnes Code, ch. 119, § 1.

"The right to practice the law is not one of the citizen's inherent rights, but is a privilege which may be granted him within prescribed regulations, under the exercise of the state's police power, 6 C. J. 571; and the granting of the license is a judicial, and not a mere ministerial act. In re Application, 67 W. Va. 213, 67 S. E. 597, and cases cited at page 218." In re Adkins, 83 W. Va. 673, 675, 98 S. E. 888.

Power of Legislature. — Notwithstanding the jurisdiction of the courts over the subject, it has been generally conceded that the legislature may in the exercise of its police power, prescribe reasonable rules and regulations for admissions to the bar, which will be followed by the courts. But the legislature may not impose unreasonable rules or deprive the courts of their inherent power to prescribe other rules

and conditions of admission to practice." In re Application, 67 W. Va. 213, 218, 67 S. E. 597.

Same—Admission to Practice—Joint Legislative Resolution.—The Legislature cannot, by the passage of a joint resolution requiring the court to grant licenses to certain named individuals to practice law, avoid the requirements of a general statute, and rules of the court made and promulgated pursuant thereto, regulating the granting of such licenses and prescribing the length of study and degree of preparation required of the applicant in order to entitle him thereto. In re Adkins, 83 W. Va. 673, 98 S. E. 888.

C. ELIGIBILITY.

See post, "Who May Not Practice Law," V, ½A; Right of Clerk of Court to Practice," V, A; Va. Code 1919, § 3408, amended by Va. Acts 1920, p. 66; Pollards Code 1920, p. 146; Barnes Code, ch. 119, §§ 1, 2, 5.

Women.—Under § 3408 Va. Code 1919, as amended by Va. Acts 1920, p. 66, Pollard's Code 1920, p. 146, women may practice law.

Not a De Jure Right.—The right to practice law, given by said statute (Barnes Code, ch. 119, § 1), is not a de jure right, and the word "may" employed therein, in the provision that the supreme court "may upon the production of a duly certified copy of the order of the county court * * * grant such applicant a license to practice law in the courts of this state," will be construed to have been used in its popular, or permissive sense, and not as synonymous with the word "shall," and if upon application for such license and objection to the granting thereof it be clearly shown that the applicant has not the requisite good moral character entitling him to admission to practice law in the courts, his application for such license will be denied. In re Application, 67 W. Va. 213, 67 S. E. 597.

Effect or Order of Court as to

Moral Character.—On application to the supreme court for license to practice law, as provided by § 1, chap. 119, Code 1906 (Barnes Code, ch. 119, § 1), and the rules of the supreme court made pursuant thereto, the order of the county court, as to the good moral character of the applicant, will be treated as prima facie evidence only, and the provision of the statute relating thereto will be construed as prescribing what legal effect as evidence should be given thereto when standing alone and uncontradicted. In re Application, 67 W. Va. 213, 67 S. E. 597.

License Refused.—A case where, upon charges against an applicant for license to practice law, and protest and objection to granting him license preferred by a bar association, and upon the evidence adduced in support of said charges, he was adjudged not entitled to such license and license refused. In re Application, 67 W. Va. 213, 67 S. E. 597.

D. OATH.

Va. Code 1919, § 3421; Barnes Code, ch. 119, § 3.

E. BOARD OF BAR EXAMINERS.

See ante, "Regulations as to Obtaining License," III, B.

Appointment.—Va. Code 1919, § 3410. See Barnes Code, ch. 119, § 1.

Membership—Number, Qualifications, etc.—Va. Code 1919, § 3410.

Vacancies.—Va. Code 1919, § 3410, Pollard's Code 1920, p. 422, Va. Acts 1918, p. 398.

Term of Office.—Va. Code 1919, § 3410; Pollard's Code 1920, p. 422; Va. Acts 1918, p. 398.

Duty to Certify List of Licenses Granted to Supreme Court of Appeals.—Va. Code 1919, § 3511; Pollard's Code 1920, p. 422, Va. Acts 1918, p. 398.

Rules and Regulations of.—Va. Code 1919, § 3413; Pollard's Code 1920, p. 423, Va. Acts 1918, p. 398.

President.—Va. Code 1919, § 3413; Pollard's Code 1920, p. 423.

Quorum.—Va. Code 1919, § 3413;

Pollard's Code 1920, p. 423; Va. Acts 1918, p. 398.

Preservation of Papers.—Va. Code 1919, § 3414; Pollard's Code 1920, p. 423; Va. Acts 1918, p. 398.

Compensation.—Va. Code 1919, § 3416; Pollard's Code 1920, p. 423; Va. Acts 1918, p. 398.

Secretary and Treasurer.—Va. Code 1919, §§ 3412, 3416; Pollard's Code 1920, p. 423; Va. Acts 1918, p. 398.

Disposition of Fees.—Va. Code 1919, § 3417; Pollard's Code 1920, p. 423; Va. Acts 1918, p. 398.

IV. TAXATION.

License Fees.—Va. Code 1919, p. 3145; Va. Acts 1914, p. 265; Va. Acts 1915, p. 232; Va. Code 1919, § 3417; Barnes Code, ch. 119, § 1.

Exemption from License Fees.—Va. Code 1919, § 2368.

V. DISABILITIES, PRIVILEGES AND LIABILITIES.

See ante, "Eligibility," III, C, post, "Duties, Disabilities and Liabilities as to Client," VIII.

½A. WHO MAY NOT PRACTICE LAW.

See ante, "Eligibility," III, C, post, "Right of Clerk of Court to Practice," V, A. See also, Barnes Code, ch. 119, §§ 5, 6, 8.

Member of State Corporation Commission.—Va. Const., § 155.

Clerk, Sheriff, Sergeant, or Deputy, etc.—Va. Code 1919, § 3426; Barnes Code, ch. 119, § 38.

Judge.—Va. Const. § 105; Va. Code 1919, § 5975; W. Va. Const. Art. 8, § 16.

Corporations.—Only male citizens may qualify to practice law, and the right cannot be exercised by a corporation. In re Richmond Title, etc., Co., 2 Va. Law Reg. N. S., 772. Under § 3408 Va. Code 1919, as amended by Va. Laws 1920, p. 66, women may practice.

Same—Purpose of Organization—Practice of Law.—An application for a charter for a corporation which speci-

fies its purpose to be, to make abstracts of titles; to aid in clearing and perfecting titles; to act as agent in the execution of any business, obligation, office or duty; to act as trustee to give advice and furnish attorneys in land transactions; and to furnish licensed attorneys to others in a general practice of law, is a corporation proposed to be established for the practice of law. In re Richmond Title, etc., Co., 2 Va. Law Reg., N. S., 772.

A. RIGHT OF CLERK OF COURT TO PRACTICE.

See ante, "Who May Not Practice Law," V, ½A.

Clerk of Supreme Court of Appeals.—Va. Code 1919, § 3380.

B. EXEMPTION FROM ARREST AND OTHER PRIVILEGES.

Right to Continuance When Member of General Assembly Is Counsel in Suit.—Va. Code 1919, § 298.

Use of State Law Libraries.—Va. Code 1919, § 298.

Libraries Acquired by Members of the Bar.—Va. Code 1919, § 373.

Exempt from Jury Service.—Va. Code 1919, § 5985.

VI. EMPLOYMENT OR APPOINTMENT.

See post, MUNICIPAL CORPORATIONS; SCHOOLS.

Public Defender in Cities.—Va. Acts 1920, p. 544.

By County School Board.—Va. Code 1919, § 648.

By Board Medical Examiners.—Va. Code 1919, § 1610.

Service of Process—Application to Purchase Delinquent Land.—Va. Code 1919, § 2495.

By Auditor to Collect Taxes.—Va. Code 1919, § 2533.

Approval of Title to Real Estate for Public Uses.—Va. Code 1919, § 2709.

To Assist Commonwealth's Attorney.—Va. Code 1919, § 2787.

Disbarment Proceeding.—Va. Code 1919, § 3424.

Commissioner of Fisheries.—Va. Code 1919, § 3154.

Auditor in Proceeding by Officer for Salary Withheld for Debt Due State.—Va. Code 1919, § 3478.

Assigned to Represent Poor Person.—Va. Code 1919, § 3517.

Service of Process against Corporation.—Va. Code 1919, § 3854.

By Commissioner of Insurance—Liquidation of Insurance Company.—Va. Code 1919, § 4245.

By Commissioner of Prohibition.—Va. Code 1919, § 4627.

To Assist Justice in Examination of Persons Accused.—Va. Code 1919, § 4842.

Guardian Ad Litem for Infant or Insane Defendant.—Va. Code 1919, §§ 1741, 6098.

Drainage Districts.—W. Va. Code Supp. 1918, § 1727s.

Accused to Be Allowed Counsel.—W. Va. Code, ch. 159, § 1.

Right to Employ Counsel.—A party in interest to a suit has a constitutional right to be heard by counsel, which of necessity involves the right to employ counsel. *Ward v. Winchester*, 11 Va. Law Reg. 501.

Commencement of Relation.—As soon as a client has expressed a desire to employ an attorney and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity the relation of attorney and client has been established. *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

"An attorney may be employed without formalities of any kind. The contract may be made by parol, and is often largely implied from the acts of the parties. Neither is the relation dependent upon the payment of fees. It may exist between two parties, though a third person pays for the attorney's services, or though such services were rendered by the attorney gratuitously." *Keenan v. Scott*, 64 W. Va. 137, 142, 61 S. E. 806.

Acquiescence of persons jointly interested in a fund in litigation, in the employment of an attorney by one of their number for the protection of their common interest, amounts to a representation of agency in the person making such contract, which will justify the attorney in making a subsequent contract of employment with the same person for protection of the same fund in litigation other than that in respect to which he was first employed, the parties having knowledge of the rendition of his service in such subsequent litigation as it is performed, and not disavowing or denying agency of their associate to make such employment. *Cecil v. Clark*, 69 W. Va. 641, 72 S. E. 737.

Withdrawal from Trial.—When the court appoints three practicing attorneys to aid a prisoner in making his defense, it is not error for one of them to withdraw from the trial, where the prisoner makes no objection to such withdrawal. *State v. Briggs*, 58 W. Va. 291, 52 S. E. 218.

VII. RETAINER AND AUTHORITY.

A. PRESUMPTION AND EVIDENCE AS TO RETAINER AND AUTHORITY.

Authority.—An attorney at law who brings a suit, being an officer of court, is presumed to have been authorized to do so by the suitor, until the contrary is made to appear. *County Court v. Duty*, 77 W. Va. 17, 87 S. E. 256.

"The books say that when an accredited attorney appears at the bar of the court as representing clients, there is a presumption of his authority, and after the court has acted the burden is upon the party denying his authority to clearly show the want of authority." *Teter v. Irwin*, 69 W. Va. 200, 205, 71 S. E. 115.

Evidence of Authority.—Authority of an attorney to act for his client in consent by the attorney to a decree

binding his client may be shown by the conduct of the client, his acquiescence therein or other circumstances proving it. *Teter v. Irwin*, 69 W. Va. 200, 71 S. E. 115.

B. ESTOPPEL TO DENY AUTHORITY.

"In some circumstances, a client is estopped to deny the authority of an attorney to represent him. *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. 605." *Marshall v. McDermitt*, 79 W. Va. 245, 251, 90 S. E. 830.

C. SCOPE AND EXTENT OF AUTHORITY.

1. In General.

To Sue for Certain Purposes.—Authority conferred upon an attorney to sue for specific performance of a contract or to quiet the title to real estate, does not include authority to sue only for rescission of the contract on which his client's right or claim is founded. *Neill v. McClung*, 71 W. Va. 458, 76 S. E. 878.

Management of Suit.—Stipulations between opposing counsel, necessary or incidental to the management of the suit, are within the implied authority of the attorney and are binding on his client. *Board v. Clemens*, 85 W. Va. 11, 13, 100 S. E. 680.

Suit Instituted without Authority.—The decree and all proceedings in a suit instituted by an attorney, without authority from the party whom he professes to represent, is void. *Neill v. McClung*, 71 W. Va. 458, 76 S. E. 878.

Continuance.—An attorney at law employed to prosecute or defend a suit has implied authority to agree to a continuance thereof, when such continuance is in the interest of his client, or in the attorney's judgment will expedite a hearing. *Board v. Clemens*, 85 W. Va. 11, 100 S. E. 680.

To Consent to Decree.—The relation of client and attorney at law authorizes the attorney to consent to a decree

binding his client. *Teter v. Irwin*, 69 W. Va. 200, 71 S. E. 115.

Stock Subscription Contract.—A proxy for certain subscribers to the stock of a corporation, who also represented some of them as attorney, at an organization meeting of a corporation, upon the discovery that the subscriptions were obtained by misrepresentation, had no authority to act for the subscribers in making election whether they would affirm or repudiate the subscription contracts. That was not within the scope of his actual or apparent authority as proxy or as attorney. His actual and apparent authority as proxy coincided, indeed, and was confined to such matters as could and did properly come before the organization meeting for action. And as attorney at law his actual and apparent authority likewise coincided, as an attorney at law, as such, has no right to do any act which surrenders a substantial right of his client. *Rhoades v. Banking, etc., Co.*, 125 Va. 320, 99 S. E. 673.

Surrender of Rights.—"An attorney at law, as such, has no right to do any act which surrenders a substantial right of his client." *Rhoades v. Banking, etc., Co.*, 125 Va. 320, 335, 99 S. E. 673.

Fraudulent Confederation.—The general rule that a client is bound by the acts of his attorney, does not hold good when the acts of the attorney were done in pursuance of a fraudulent confederation of the attorney with the party who seeks to maintain such acts of the attorney. *Roller v. McGraw*, 63 W. Va. 462, 60 S. E. 410.

H. and S. sold to R. tracts of land, who sold the same to M. while suit was pending for balance of purchase money claimed to be due thereon from R. to H. and S. R. gave his obligation to M. to pay any recovery in favor of H. and S. R. filed his answer setting up good defense and claiming a decree over against H. and S., for deficit in quantity of land and failure of title in some tracts, for overpayment of purchase

money. D., the attorney of R., without the knowledge or consent of R., entered into an agreement with M. permitting decree to be entered against R. without defense for the amount claimed to be due to H. and S. on the purchase money, which M. was to pay releasing R. from liability. M. afterwards obtained judgment by default against R. for the amount paid on said decree. R. filed his bill to enjoin the collection of said judgment alleging that when his attorney D. entered into the agreement with M. to permit the decree to be entered against R. in favor of H. and S. his said attorney, D., together with others, was a joint purchaser from R. of the lands in question with R., and that the knowledge of such interest of his attorney, as purchaser, and his defense to M.'s action had come to plaintiff's knowledge within a year before filing his bill. Held, the bill is good on demurrer. *Roller v. McGraw*, 63 W. Va. 462, 60 S. E. 410.

5. Ratification by Client.

If an attorney at law act without authority in consenting to a decree, and the client afterwards recognize his authority, or, with knowledge of it, acquiesce in it, and make no objection to it when he knows that other persons are acting upon faith of the attorney's authority, it is a ratification making the decree binding on the client. *Teter v. Irwin*, 69 W. Va. 200, 71 S. E. 115.

The objection that a suit against a county treasurer was instituted by the commonwealth's attorney in the name of the board of supervisors, without authority from them, may be, and in the case in judgment was, waived by the defendant in his answer. Moreover, the action of the commonwealth's attorney in this case was ratified by the board. *Herrell v. Board*, 113 Va. 594, 75 S. E. 87.

E. TERMINATION OF AUTHORITY.

Abandonment.—An attorney, re-

tained generally to conduct a legal proceeding, is presumed, in the absence of anything to indicate a contrary intent, to enter into an entire contract to conduct the proceeding to its termination, and he can not lawfully abandon the service, before such termination, without justifiable cause; but if he have sufficient cause therefor he may do so, and recover what his services already rendered are reasonably worth. *Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060.

"What will justify abandonment is thus stated by Mechem on Agency, § 855: 'No general rule can be laid down by which it can, in all cases, be determined what cause will be sufficient to justify an attorney in abandoning a case in which he has been retained. But if the client refuses to advance money to pay the expenses of the litigation, or if he unreasonably refuses to advance money, during the progress of a long litigation, to his attorney to apply upon his compensation, sufficient cause may be furnished to justify the attorney in withdrawing from the further service of the client. So any conduct upon the part of the client during the progress of the litigation which would tend to degrade or humiliate the attorney, such as attempting to sustain his case by the subornation of witnesses, or any other unjustifiable means, which would furnish sufficient cause. So if the client demanded of the attorney the performance of an illegal or unprofessional act; or if the client were seeking to use the attorney as a tool to carry out the malicious or unlawful designs of the client, the attorney might lawfully abandon the service. So if the client insists upon the employment of counsel with whom the attorney can not cordially cooperate, the attorney will be justified in withdrawing from the case.'" *Matheny v. Farley*, 66 W. Va. 680, 684, 66 S. E. 1060.

This was a case in which the facts proven were held to justify abandonment. 1 Va.—36.

ment by an attorney of the case in which he had been employed, and to support the verdict and judgment in his favor for services already rendered. *Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060.

Discharge.—"A client has the legal right to discharge his attorney, at any time, with or without cause; but not without cause unless he first pays or secures the attorneys' fees and charges, and the court will not enforce a substitution until this has been done. Mechem on Agency, § 856; Weeks on Attorney at Law, § 250; 4 Cyc. 954, 955. These authorities make it clear that without notice, and payment of his fees, an attorney is not required to retire from a case. He has the right to stand his ground, and, maintain his position as counsel of record until his fees and disbursements are paid or secured, and before the court can enter an order of substitution it should see that this condition is fulfilled by a client." *Matheny v. Farley*, 66 W. Va. 680, 683, 66 S. E. 1060.

Death of Client.—"The death of the client, or, in case of a corporation of partnership, its dissolution, operates as an immediate termination of the relation; although the case for which he was employed may be still pending, the attorney has no authority to appear for the heirs or the personal representative unless employed by them." *Teter v. Irwin*, 69 W. Va. 200, 203, 71 S. E. 115.

VIII. DUTIES, DISABILITIES AND LIABILITIES AS TO CLIENT.

A. DUTIES.

As to attorney representing conflicting interest, see 2 Va. Law. Reg., N. S., 301. As to attorney withholding evidence being misconduct, see 2 Va. Law. Reg., N. S., 471.

B. PRIVILEGED COMMUNICATIONS.

1. In General.

An attorney employed by two or more persons to give professional ad-

vice or assistance in a matter in which they are mutually interested can, on litigation subsequently arising between such persons or their representatives, be examined as witnesses at the instance of either, as to communications made when he was acting as attorney for all; although he could not disclose such communications in a controversy between his clients or either of them, and third persons. *Kirchner v. Smith*, 61 W. Va. 434, 58 S. E. 614.

2. What Communications Privileged.

See ante, "In General," VIII, B, 1.

Confidential communications between an attorney and his client, made because of that relationship and concerning the subject matter of the attorney's employment, are privileged from disclosure, even for the purpose of administering justice. *Grant v. Harris*, 116 Va. 642, 82 S. E. 718.

Publication Sought by Client.—"No communication to a lawyer for the express purpose of having it brought to the attention of the public, or communicated to another, is privileged. *Weeks on Attorneys at Law* (2d ed.), § 151; *Bartlett v. Bunn*, 56 Hun. 507, 10 N. Y. Supp. 210; *Commonwealth v. Bacon*, 135 Mass. 521." *Stein v. Morris*, 120 Va. 390, 396, 91 S. E. 177.

Plaintiff communicated a scheme of banking to defendant, and defendant united with plaintiff in an effort to organize a company to carry the scheme into effect, but the effort was a failure. The scheme was not committed to defendant in confidence; on the contrary, the very thing he was asked to do necessarily involved his discussing plaintiff's plan and making it known to the public. It was held that there was no violation by the defendant of professional confidence when the defendant eventually established a scheme somewhat similar. *Stein v. Morris*, 120 Va. 390, 91 S. E. 177.

3. Waiver of Privilege.

The privilege, however, is that of the

client, who may waive it expressly, or it may be implied from his conduct. No particular formality is essential. *Grant v. Harris*, 116 Va. 642, 82 S. E. 718.

A client who goes on the stand in an attempt to secure some advantage by reason of transactions between himself and his counsel, waives the right to object to the attorney's being called by the other side to give his account of the transaction. Such waiver is in no sense contrary to public policy, but is in the interest of truth and justice. In the case in judgment, the client was seeking to have set aside deeds prepared by her counsel and executed in their presence, on the ground of fraud, duress and the lack of capacity on her part to make a deed. *Grant v. Harris*, 116 Va. 642, 82 S. E. 718.

4. Application of Rule Where Attorney Witness for Client.

In an action for malicious prosecution the details of the private and confidential conversations between the now plaintiff and his counsel touching his defense to the criminal prosecution set on foot by the now defendant cannot be given in evidence. They are mere self-serving declarations, not explanatory of any fact issue, nor relevant to the issue, which was whether the now defendant had probable cause for believing the now plaintiff guilty of the crime charged. *Singer Mfg. Co. v. Bryant*, 105 Va. 403, 54 S. E. 320.

C. DEALINGS BETWEEN ATTORNEY AND CLIENT.

1. In General.

While before the relation commences, counsel and client may freely make their contracts, subject to the same rules as those which govern other men, still after the relation commences it is regarded as one of special trust and confidence. All dealings between the attorney and client must be characterized by the utmost fairness and good

faith, and transactions between them are closely scrutinized. *Bruce v. Bibb*, 129 Va. 45, 105 S. E. 570.

As soon as a client has expressed a desire to employ an attorney and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established; and all dealing thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation. *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

"The books hold that an attorney is not precluded from dealing with his client by virtue of his relationship, when they are each in a situation to deal at arm's length, although all such contracts will be subject to the closest scrutiny, and the attorney will not be allowed to take advantage of his relations with his client in reference to the property in litigation to the latter's disadvantage." *Keenan v. Scott*, 64 W. Va. 137, 144, 61 S. E. 806.

While some cases have held that all transactions between attorney and client are voidable at the election of the client, the better rule, and the one established by the preponderance of authority, does not go so far. Although such transaction will be closely and carefully scrutinized, yet those which are obviously fair and just will be upheld, and the client is not entitled to absolute relief from such a contract, unless it be shown that he has suffered some injury through an abuse of confidence on the part of his attorney. *Bruce v. Bibb*, 129 Va. 45, 105 S. E. 570.

Generally transactions between attorney and client are regarded as *prima facie* fraudulent, and where the transaction is of advantage to the attorney, he is required to show, not only that he exercised no undue influence, but that he gave his client all the information and advice which it would have been

his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been if the client had been dealing with a stranger. This rule, however, is not inflexible, and in those cases where, owing to the death of the attorney, it is impossible for his representatives to make full or plenary proof, it is not always rigorously applied. *Bruce v. Bibb*, 129 Va. 45, 105 S. E. 570.

Interest of Attorney Antagonistic to Client.—No closer or more confidential relation can exist in matters of business between parties than that of client and attorney; and while such relation exists an attorney cannot allow his personal interests, in any way, to become antagonistic to those of his client without at once giving the client full information thereof. *Roller v. McGraw*, 63 W. Va. 462, 60 S. E. 410.

Case at Bar.—In the instant case, a suit by the executrix of a deceased client against the executrix of a deceased attorney to have a bond given by the client to the attorney for legal services cancelled, the contract embodied in the bond under the established rules as to transactions between attorney and client was held voidable, not because any actual fraud could be fairly inferred from the evidence, but because, under the scrutiny which a court of equity must give to such contracts, it appeared that it provided for compensation to the attorney in excess of the fair value of the services which were shown to have been rendered. It also appeared that the bond, equal to one-third or one-fourth of the client's entire estate, was relatively too large a proportion of his property to be paid to his attorney for such legal services, in the absence of clear and convincing evidence of the character and value of those services justifying such a fee. *Bruce v. Bibb*, 129 Va. 45, 105 S. E. 570.

Laches.—Suit was instituted by the executrix of a client to have a bond

given by the client to his attorney for legal services canceled nearly five years after the date of the bond. The client lived for three years after the death of the attorney, and during that period accepted legal advice and services from the attorney's son without paying any compensation therefor; and when the bond was shown to him by the attorney's executrix, he demanded and received a credit of \$500 thereon. Held: That complainant was not barred from repudiating the bond by the laches of her testator. While these circumstances made a strong case for defendant, they were not sufficient to overcome the principle that transactions between attorney and client should be given the closest scrutiny. *Bruce v. Bibb*, 129 Va. 45, 105 S. E. 570.

2. Agreements as to Compensation.

An attorney may contract with his client for the rendition of professional services, and in such contract may fix the amount of the compensation to be paid for such services. *Hubbard v. George*, 81 W. Va. 538, 94 S. E. 974.

Effect of Subsequent Agreement as to Compensation.—After the relationship of attorney and client has begun, any subsequent change in their agreement as to compensation, or as to the property out of which such compensation of the attorney is to come, will not effect such existing relationship. *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806; *Hubbard v. George*, 81 W. Va. 538, 94 S. E. 974.

A court of equity will cautiously scrutinize a contract for additional compensation obtained by an attorney from his client after the relation between them is once established, and will frequently interfere, at the election of the client, to prevent the enforcement of such a contract or to restore to him what has been obtained thereunder. *Vance v. Ellison*, 76 W. Va. 592, 85 S. E. 776.

Section 13, chap. 119 (Barnes Code,

ch. 119, § 13), Code, providing that "an attorney shall be entitled for his services as such to such sums as he may contract for with the party for whom the service is rendered," has no application to an agreement, made after the relation of attorney and client has been established, for transfer to the former of part of the property in litigation as compensation for legal services. *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

Same—Excessive Compensation.—

Where, after his employment, an attorney at law procures from his client a deed or contract for land or personal property, the subject of his employment, or for greater interest therein than his original contract called for, whether fraudulently or otherwise, he may be compelled at the election of his client to reconvey the real estate, or surrender for cancellation the contract for the personal property. *Woodcock v. Barrick*, 79 W. Va. 449, 91 S. E. 396.

Misunderstanding as to Terms of Contract.—

An action was brought by an attorney to recover compensation for services rendered in regard to the sale of real estate owned by defendant. The evidence showed that there was a want of mutual understanding between the parties as to the terms of the contract. The case was tried by the court without a jury and a decree was entered allowing \$4,000 to plaintiff as to the value of his services. It was held on appeal that this amount was grossly excessive and it should be reduced to \$500. *Belmont v. McAllister*, 116 Va. 283, 81 S. E. 81.

3. Purchases from Client.

Where an attorney, employed in litigation involving real estate, procures from his client, for himself, upon a grossly inadequate consideration, a contract for the sale thereof, equity will not, at the suit of the attorney, decree specific performance. *Ralphsnyder v. Titus*, 74 W. Va. 204, 82 S. E. 257, cit-

ing *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

At the election of the client, if exercised with reasonable promptness, equity will, in the absence of conclusive evidence to the contrary, treat such contract as presumptively invalid and voidable. *Ralphsnyder v. Titus*, 74 W. Va. 204, 82 S. E. 257.

"While ordinarily he who charges fraud must prove it, the rule is not universal in its application. The burden often shifts to the person whose conduct is assailed as fraudulent, especially where there exists between the parties a trust or confidential relation. Under such circumstances, he who claims the benefit of the contract assumes the burden of proving freedom from the taint of fraud." *Ralphsnyder v. Titus*, 74 W. Va. 204, 208, 82 S. E. 257, citing *Roller v. McGraw*, 63 W. Va. 462, 60 S. E. 410.

Purchase or Conveyance from Client.—In case of a purchase of property from the client, the attorney must be able to prove he paid the full amount that could have been obtained from any other person. Cases of this character usually turn upon the question whether the client has sustained loss. *Keenan v. Scott*, 64 W. Va. 137, 144, 61 S. E. 806.

Where, after the relationship of attorney and client has been established, the attorney procures from the client a conveyance to himself of part of the property involved in litigation, as compensation for his legal services therein, if the property so obtained by the attorney is sold by him, he will be held to account as trustee for the proceeds thereof, such conveyance will be deemed presumptively invalid, and voidable, on principles of public policy and for prevention of wrong, at the election of the client, irrespective of the fairness or unfairness of the contract, provided such election is exercised within a reasonable time. *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

4. Acquiring Property Adversely to Client's Interests.

See ante, "Purchases from Client," VIII, C, 3.

While the relationship of attorney and client exists, all purchases of outstanding interests by the attorney will be adjudged in trust for the client. *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

A relation of attorney in regard to land may preclude the attorney from securing his client's title by tax sale, but it does not preclude the attorney from buying the tax title when the same has passed from the client to others without bad faith on the part of the attorney. *Butcher v. Chidester*, 68 W. Va. 488, 69 S. E. 1009.

5. Attorney as Agent for Both Parties.

Power to Act as Trustee in Deed of Trust.—An attorney for the creditor is not incompetent to act as trustee in a deed of trust securing a debt; but being then the agent of both parties he is bound, in executing the trust, to act honestly and impartially between the parties, and endeavor by proper notice and otherwise to obtain the best price for the property, and if necessary, to invoke the aid of a court of equity in doing so. *Copelan v. Sohn*, 75 W. Va. 83, 82 S. E. 1016.

D. LIABILITY TO CLIENT.

1. Liability for Negligence.

a. In General.

Va. Code 1919, § 3427; Barnes Code, ch. 119, §§ 9, 10.

Debts Lost by Negligence or Misconduct.—Va. Code 1919, § 5406; Barnes Code, ch. 119, §§ 11, 12.

2. Liability for Money Collected.

Va. Code 1919, § 3427; Barnes Code, ch. 19, § 11.

Homestead Exemption Not to Extend to Liability for Money Collected by Attorney.—Va. Const. § 190; Va. Code 1919, § 6531, Va. Acts 1918, p. 487. See generally, post, EXEMPTIONS FROM EXECUTION AND ATTACHMENT.

IX. COMPENSATION.

See ante, "Agreement as to Compensation," VIII, C, 2.

As to attorney fee splitting with collection agency, see 2 Va. L. Reg. N. S., 628.

½A. IN GENERAL.

Fees Paid Out of Funds in Court.—Va. Code 1919, § 3430.

Counsel fees, over and above the taxable fee allowed by law, cannot be assessed upon the debtor or his property, but, when properly allowed by the court, must be paid by the creditors or out of the funds belonging to them. *German Nat. Ins. Co. v. Virginia State Ins. Co.*, 108 Va. 393, 61 S. E. 870.

Where counsel has in no sense represented any party but his own client; where he has borne no anxiety and incurred no responsibility on account of the interests of the parties; where his work, though it has incidentally secured to them their rights was not done for them, nor at their request, they cannot be said to have come under legal or equitable liability to him. *German Nat. Ins. Co. v. Virginia State Ins. Co.*, 108 Va. 393, 400, 61 S. E. 870.

When a suit is brought to administer the deposit of a foreign insurance company in the hands of the treasurer of the state and to subject it to the discharge of the liabilities with which it is chargeable under the statute, and the treasurer is made a party to such suit, the fund is under the control of the court, and by express provision of the statute is to be "distributed by the court." His only duty is to preserve the fund until it is distributed by the court. He has no need for counsel, and it is error to decree fees for his private counsel to be paid out of said deposit. *German National Ins. Co. v. Virginia State Ins. Co.*, 108 Va. 393, 61 S. E. 870.

Payment of Counsel of Other Party.—Except in rare instances, the power of the court to require one party to con-

tribute to the fees of the counsel of another party must be confined to cases where the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which enures to the common benefit of all; but the discretion vested in the court should never be exercised in a case where the interests of the party whose funds is sought to be charged, are antagonistic to the party for whose benefit the suit is prosecuted. The case in judgment belongs to the latter class, and fees were properly refused. *McCormick v. Elsea*, 107 Va. 472, 59 S. E. 411; *Stuart v. Hoffman*, 108 Va. 307, 51 S. E. 751.

When Attorney Must Contribute to Expenses.—If a client, in order to realize the money due upon the judgment, for the common benefit of himself and the attorney, necessarily expends money in the payment of costs, and counsel fees in the prosecution of a suit in equity for such purpose, the attorney must contribute ratably to such expense and take his percentage out of the net amount realized by the client from the property of the judgment debtor. *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276.

A. RIGHT TO COMPENSATION.

See post, "Statutory Provisions," IX, B, 1.

Barnes Code, ch. 119, § 13; Va. Code 1919, § 3428.

Presentment, Indictment or Information.—Va. Code 1819, § 2396.

Application for Pension.—Va. Code 1919, § 2658.

Taxed as Costs.—Va. Code 1919, §§ 2396, 3428, 3533, 3534.

Provisions for in Negotiable Instruments.—Va. Code 1919, § 5564.

Implied Agreement.—Parties to a suit accepting the services of an attorney, with knowledge thereof, as the services are performed from time to time, and in the absence of any agreement for gratuitous service and circumstances from which gratuitous

service would be implied in law, are liable therefor. *Cecil v. Clark*, 69 W. Va. 641, 72 S. E. 737.

Allowance of Counsel Fees.—Upon the proofs already in the record and upon such additional evidence as may be adduced by the parties, a reasonable fee should be ascertained and allowed to each of the appellants for their services as attorneys in the case. Great injustice has been done them by the allowance of fees heretofore made them. *Turnbull v. Buford*, 119 Va. 304, 89 S. E. 233.

Recovery After Abandonment or Discharge.—"Our cases, some of them relating to attorneys' fees, recognize the general rule prevailing in all jurisdictions, that if an attorney, after he has been employed to perform an entire service, be discharged without good cause, or he abandons the case for good cause, or be prevented by the act of his client from full performance, he may recover the value of his services, or the entire amount agreed upon, depending on the circumstance of the case." *Matheny v. Farley*, 66 W. Va. 680, 682, 66 S. E. 1060.

Right of Client to Refuse to Prosecute Writ of Error.—Where the plaintiff in a civil suit secures the services of an attorney to prosecute the same upon the basis of receiving compensation out of any recovery had, and a trial of such suit results in a verdict and judgment in favor of the defendant, the plaintiff is under no obligation to such attorney to prosecute a writ of error to such judgment, and if satisfied with the judgment of the lower court may refuse to prosecute such writ of error. *Ryan v. Miller*, 82 W. Va. 490, 96 S. E. 791.

Advice Not Founded on Knowledge.—Plaintiff, a Virginia attorney brought an action to recover compensation from defendant a resident of New York. Among other items charged was that of \$250 for advice given defendant in regard to the custody of certain of her grandchildren. The

grandchildren were residents of the state of New York and the attorney admitted that he had no knowledge of the laws of New York, but based his advice upon the presumption that they were the same as those of Virginia. At a trial by the court this item was allowed. It was held upon appeal that the allowance was erroneous as plaintiff having no knowledge of the laws of New York had no foundation for the claim for advice given defendant in regard to such laws. *Belmont v. McAllister*, 116 Va. 285, 81 S. E. 81.

Fraudulent Settlement to Defeat Rights of Attorney.—"An attorney is a licensed and sworn officer of the court, and has a right to make reasonable contracts with his client for his fees for legal advice and services rendered and to be rendered, and the law will not uphold a collusive and fraudulent settlement between parties, made for the purpose of defeating the rights of the attorney." *Burkhart v. Scott*, 69 W. Va. 694, 697, 72 S. E. 784.

City Solicitor—Extra Compensation.—An officer cannot recover additional compensation to his salary when called on to discharge duties in the line of his official duty, however onerous and difficult they may be. But, when a city solicitor is not called on in his official capacity as city solicitor, but is employed to discharge duties not contemplated at the time of his appointment or election, and to be rendered in a foreign jurisdiction, and he is designated by name and not in his official capacity to render them, and in rendering them necessary expenses of travel are incurred which must have been contemplated at the time of his employment, he is entitled to receive compensation for his services in addition to his salary. *Ward v. Winchester*, 11 Va. Law Reg. 501.

B. AMOUNT.

$\frac{1}{2}$ In General.

Absence of Contract for.—Va. Code

1919, § 3428; Barnes Code, ch. 119, § 13.

What Considered in Determining Amount of Compensation.—In determining what is reasonable compensation for professional services, consideration should be given to the nature and importance of the services rendered, the amount involved, the intricacy or doubtfulness of the claim, the attorney's standing in the profession for learning and character, and the result accomplished. *Ward v. Winchester*, 11 Va. Law Reg. 501.

There is no standard of legal fees which can be confidently appealed to. The amount appears to depend upon the circumstances of each case, among them the ability and standing of the attorney, and in case of a general retainer, the business which he cannot accept, the value of the services to the client, and the other special circumstances which mark each instance of the employment of an attorney by a client. *Bruce v. Bibb*, 129 Va. 45, 105 S. E. 570.

Allowance of Compensation upon Refusal to Enforce Contract.—In a suit by the executrix of a deceased client against the executrix of a deceased attorney to have a bond given by the client to the attorney for legal services cancelled, where it appears to the court that the bond itself could not be enforced, but it was clear that in equity and good conscience the attorney's estate was entitled to a substantial recovery for a general retainer and services rendered, the court will allow reasonable compensation; and legal services rendered by the deceased attorney's son because of his father's contract, the son having assigned to his father's estate any claims which he would otherwise have had for such services, may be considered in determining the amount for which the client's estate should be held liable. *Bruce v. Bibb*, 129 Va. 45, 105 S. E. 570.

1. Statutory Provisions.

W. Va. Code Supp. 1918, §§ 699, 957, 1727 pp.

Attending Escheator's Inquest.—Va. Code 1919, § 513.

Trust for Education—Attorney for Commonwealth.—Va. Code 1919, § 591.

Suit to Abate House of Prostitution.—Va. Code 1919, § 1526.

Proceedings for Establishing Drainage Districts.—Va. Code 1919, §§ 1771, 1774.

Title to Real Estate for Public Uses to Be Examined.—Va. Code 1919, § 2709.

Motion against County Treasurer Failing to Pay Warrant.—Va. Code 1919, § 2787.

Assigned to Represent Poor Person.—Va. Code 1919, §§ 3517, 3518.

Fees of One Attorney Only to Be Taxed.—Va. Code 1919, § 3534.

Condemnation Proceedings Dismissed.—Va. Code, 1919, § 4387.

Quo Warranto Proceedings.—Va. Code 1919, § 3847.

The provision of the Act of Congress of March 4, 1915, limiting to 20 per cent. the payments to attorneys and agents, out of moneys appropriated by said Act, for payment of certain claims against the United States, is not a denial of due process nor of the liberty of contract, to an attorney who has rendered professional services in the prosecution of one of such claims, under a contract whereby he was to receive a fee equal to 50 per cent. of whatever might be awarded or collected. *Black v. Crouch*, 85 W. Va. 22, 100 S. E. 749.

Defendant by a contract dated April 18, 1911, agreed to pay plaintiff in consideration of his professional services in the prosecution of defendant's claim against the government of the United States for property taken by the federal forces during the late civil war, a sum equal to fifty per cent. of the amount which was collected upon said claim. Held: That the contract was void under the omnibus claims act, section 4, 38 Stat. L., p. 996, and this although the services had been rendered by plaintiff and a finding of the court of claims

in favor of the claim obtained and a certification thereof to Congress before the omnibus claims act went into effect. *Calhoun v. Massie*, 123 Va. 673, 97 S. E. 576.

2. Amount as Fixed by Contract.

See ante, "Agreements as to Compensation," VIII, C, 2; Va. Code 1919, § 3428; Barnes Code, ch. 119, § 13.

F. ACTIONS TO RECOVER COMPENSATION.

Condition Precedent to Right of Action.—If a city council in employing an attorney reserves the right to determine the compensation for his services, a demand on the council as indicated, and its failure or refusal to act, or unsatisfactory or unreasonable action, is a condition precedent to the right to maintain suit. *Ward v. Winchester*, 11 Va. Law Reg. 501.

Waiver of Right to Object to Joint Action.—In an action to recover attorney's fees, defendant, previous to trial made a tender of an amount less than that demanded by the pleadings. After the verdict was rendered defendant assigned as error the fact that no joint contract of employment was proved and that the parties not being partners could not bring a joint action. It was held on appeal that the plaintiff by making a tender and admitting that something was due to defendant waived their right to object to the bringing of a joint action. *Newman v. Levi*, 74 W. Va. 223, 81 S. E. 1036.

Pleadings.—A bill of particulars filed with the declaration in an action by an attorney for compensation, giving date of the services, the suit or proceeding in which they were rendered and the sum charged for the entire services is sufficient. *Newman v. Levi*, 74 W. Va. 223, 81 S. E. 1036.

Fees for services rendered by an attorney-at-law in a suit or legal proceeding may be recovered upon the common counts in an action of assumption against his client. *Newman v. Levi*, 74 W. Va. 223, 81 S. E. 1036.

Evidence Admissible.—In an action by an attorney to recover compensation for services rendered under a contingent-fee contract where he had testified that defendant owed him for a one-third undivided interest in land, testimony that defendant owed him \$1,000 for his interest in such land is properly received. *Carpenter v. Smithey*, 118 Va. 533, 88 S. E. 321.

Question for Jury.—In *Marshall v. O'Brien*, 73 W. Va. 742, 81 S. E. 551, which was an action to recover attorney's fees, it was held that the right of plaintiff to recover was a question for the jury. See also *Newman v. Levi*, 74 W. Va. 223, 81 S. E. 1036.

Quantum. Meruit—Estoppel—Verdict.—In an action to recover attorney's fees a verdict was entered in favor of plaintiffs for \$9,500. Defendant objected to the amount of the verdict on the ground that plaintiff had previously rendered a bill for \$8,000 and therefore was estopped to recover more. It was held upon appeal that the contention was without merit. The court using the following language: "The jury were not limited to finding a verdict for \$8,000 because plaintiffs had, prior to the bringing of their suit, rendered a bill for that amount. Defendants' promise was only implied, and plaintiffs were entitled to recover upon a quantum meruit, no certain fee having been agreed on." *Newman v. Levi*, 74 W. Va. 223, 81 S. E. 1036.

Excessive Verdict.—In an action to recover attorney's fees plaintiff asked judgment in the amount of \$828.32 for certain expenses incurred in having certain property belonging to defendant photographed, surveyed, and advertised in order to effect an advantageous sale of it. On this item a credit was allowed of \$750, but plaintiff claimed a balance due of \$78.32. This balance was allowed by the court. The evidence showed that defendant had reason to believe that the sum of \$750 covered all of plaintiff's expenses in

connection with the surveying, photographing, and advertisement of the property. It was held upon appeal that the allowance of this item was erroneous and plaintiff was not entitled to recover anything over and above the sum paid him by defendant. *Belmont v. McAllister*, 116 Va. 285, 81 S. E. 81.

X. LIEN OF ATTORNEY.

See post, generally, LIENS.

A. GENERAL RULES AND GENERAL TREATMENT.

Notice of Claim of Lien.—Va. Code 1919, § 3429.

Inchoate Right in Chose in Action—Collusive—Settlement.—An attorney who has brought a suit, pursuant to an agreement that he is to have a certain per centum of the judgment that shall be recovered, as his fee for services, has an inchoate right in the chose in action and may avoid a collusive settlement made between the defendant and his client for the purpose of defeating his fee. *Burkhart v. Scott*, 69 W. Va. 694, 72 S. E. 784. See post, LIENS.

Enforcement by Assignee.—An attorney having a lien upon a judgment, such lien is assignable and may be enforced by the assignee, though the assignor, by his assignment, has lost his right to enforce it. *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276.

Obligation to Enforce Judgment.—An attorney having a lien upon a judgment, is not bound to prosecute, without additional compensation, a suit in equity to enforce the lien of the judgment upon the debtor's land, or to set aside fraudulent conveyances, in order to realize the money to which the judgment entitles his client, and his failure to do so does not destroy his lien. *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276.

Possession of Property for Special Purpose.—Attorneys have no lien upon property placed in their hands for a

special purpose which is inconsistent with or adverse to the claim of such a lien. *Watts v. Newberry*, 107 Va. 233, 57 S. E. 657.

Where certain drafts were placed in the hands of the owner's attorneys in order to enable the owner at any time to realize the money on them and apply it to the payment of his debts as he thought best, and to prevent the fund from being levied on, the drafts were not subject to a lien for claims for professional purposes held by the attorneys against the owner. *Watts v. Newberry*, 107 Va. 233, 57 S. E. 657.

B. ILLUSTRATIONS.

See ante, "General Rules and General Treatment," X, A.

An attorney has a lien, on a judgment obtained by him for his client, for his services in the case, the amount whereof is fixed by special contract, although payment thereof cannot be had under the terms of the contract until the money is actually recovered, and no money can be made under an execution on the judgment. *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276.

XI. DISBARMENT AND SUSPENSION OF ATTORNEYS, ETC.

½A. IN GENERAL.

Revocation of License.—Va. Code 1919, § 3420. See Barnes Code ch. 119, § 6.

A. POWER OF COURT TO DISBAR, REVOKE LICENSE OR REQUIRE SECURITY FOR GOOD BEHAVIOR.

Revocation of License.—Va. Code 1919, §§ 3423, 3424; Barnes Code, ch. 119, §§ 6, 11.

Security for Good Behavior.—Va. Code 1919, § 3425; Barnes Code, ch. 119, § 7.

Nature of Power.—"With scarcely an exception it has been held that both in the admission to and suspension from practice of the law, courts act judi-

cially in the exercise of an inherent power, and not in a mere administrative or ministerial capacity, and in the execution of the will of some other branch of the government." In re Application, 67 W. Va. 213, 218, 67 S. E. 597.

Liability to Indictment as Affecting Power of Court to Disbar.—The mere fact that an attorney is liable to indictment for malfeasance in office, and to removal therefrom, does in no way affect the power and duty of the court to strike his name from the roll of attorneys for the same misconduct for which he could be, also, both indicted and removed. It is all the more reason why his name should be stricken from the roll that the misconduct which unfits him is a breach of fidelity to the public, whose welfare he is sworn to maintain. *State v. Hays*, 64 W. Va. 45, 49, 61 S. E. 355.

B. GROUNDS.

Suspension of License.—Va. Code 1919, §§ 3423, 3424; Barnes Code, ch. 119, § 6.

Meaning of "Any Malpractice or Any Corrupt or Unprofessional Conduct."—Va. Code 1919, § 3424.

Disbarment for Advertising Offer to Obtain Divorce.—Va. Code 1919, § 5116.

Misconduct Justifying Disbarment or Suspension.—In *State v. McLaugherty*, 33 W. Va. 250, 10 S. E. 407, it is held: "When an attorney commits an act, whether in the discharge of his duties as an attorney or not, showing such a want of professional or personal honesty as renders him unworthy of public confidence, it is not only the province but the duty of the court, upon a proper presentation of the case, to strike his name from the roll of its attorneys. But the base character which will justify such action must be such as shows the attorney to be an unsafe and unfit person to be entrusted with the powers of the profession." *State v. Hays*, 64 W. Va. 45, 48, 61 S. E. 355.

Soliciting employment by an attorney will not, under all circumstances, justify his disbarment or suspension. In order to justify such a result, such solicitation must be in a dishonorable or disreputable manner. Where it consists of a mere effort to procure employment in an honorable way for legitimate purposes it is not ground for suspicion or disbarment. *State v. Smith*, 84 W. Va. 59, 99 S. E. 332.

Indictment and Conviction Not Essential.—Indictment and conviction for the offense which constitutes gross misconduct are not essential to justify an action by summary process to have the name of an attorney stricken from the roll. *State v. Hays*, 64 W. Va. 45, 61 S. E. 355.

"We observe in 3 Am. & Eng. Enc. of Law 304, where the cases are cited supporting the text: 'Where the crime, the commission of which is charged, is unconnected with the professional conduct of the attorney, a previous indictment and conviction are in general necessary to warrant disbarment; but this requirement is not inflexible, and the courts will sometimes proceed without conviction.' But mark the words 'unconnected with the professional conduct of the attorney.' This phrase, throughout the authorities, seems to illustrate the distinction to be made as to necessity of conviction by indictment before disbarment." *State v. Hays*, 64 W. Va. 45, 50, 61 S. E. 355.

C. PROCEDURE.

Opportunity to Be Heard.—"It is * * * uniformly held that one who has been licensed to practice the profession of an attorney-at-law should not be suspended or disbarred therefrom in an arbitrary manner. He must be given an opportunity to be heard; he must be notified of the charges against him, and this notice should be sufficiently specific to enable him to procure the evidence to overcome the charges, or make an explanation thereof." *State v. Smith*, 84 W. Va. 59, 60, 99 S. E. 332.

Where it is sought to disbar or suspend an attorney for misconduct, a rule setting forth the facts constituting such misconduct should be served upon him, in order that he may have an opportunity to prepare his defense. *State v. Smith*, 84 W. Va. 59, 99 S. E. 332.

Charges Limited by Rule.—In a proceeding to disbar or suspend an attorney, he can only be tried upon the charges contained in the rule. *State v. Smith*, 84 W. Va. 59, 99 S. E. 332.

Statute of Limitation.—A charge of misconduct against an attorney as ground of disbarment is not subject to the defense of the statute of limitations as matter of law; though the court might not be willing to disbar or suspend an attorney if it appeared that there had been unreasonable delay in the presentation of the charges, so that a fair opportunity could not be had for procuring the witnesses and meeting the accusation. *State v. Hays*, 64 W. Va. 45, 50, 61 S. E. 355.

Sufficiency of Charges.—A charge in a rule that an attorney solicited employment, without showing that the same was by dishonorable or disreputable means, is not sufficient. *State v. Smith*, 84 W. Va. 59, 99 S. E. 332.

Where the misconduct charged is that of falsely and fraudulently procuring money from a client, the rule, or some paper therein specifically referred to, should state the facts which it is contended constitute false and fraudulent procurement of the money. A general statement that he procured money by false and fraudulent means is not sufficient. *State v. Smith*, 84 W. Va. 59, 99 S. E. 332.

Same—Place of Misconduct.—In a charge of misconduct, as ground of disbarment the place of such misconduct is not material. *State v. Hays*, 64 W. Va. 45, 61 S. E. 355.

Same—Sufficiency of Notice.—Where gross infidelity by a prosecuting attorney to his trust and duty as such

officer, being connected with his character as an attorney is charged, formal allegations and technical descriptions of the misconduct are not required. It is sufficient that defendant is plainly charged and reasonable notice given him to answer. *State v. Hays*, 64 W. Va. 45, 61 S. E. 355.

D. EVIDENCE.

To disbar or suspend an attorney the evidence of the misconduct charged against him must be full, preponderating, and clear. *State v. Smith*, 84 W. Va. 59, 99 S. E. 332.

E. REVIEW OF ERROR.

The supreme court of appeals has jurisdiction of a writ of error to a judgment of a circuit court disbaring or suspending an attorney from the practice of his profession. *State v. Smith*, 84 W. Va. 59, 99 S. E. 332.

XII. CRIMINAL LIABILITY OF ATTORNEY.

See post, CONTEMPT.

When Cause Matures.—Cause for a criminal prosecution against an attorney under the provisions of § 11, ch. 119, Code (Barnes Code, ch. 119, § 11), matures at the expiration of six months from the receipt of the money, unless, within that period, the client demands payment thereof, in which event cause therefor matures upon demand. *State v. Locke*, 73 W. Va. 713, 81 S. E. 401.

Limitation of Actions.—A criminal prosecution under the provisions of § 11, ch. 119 (Barnes Code, ch. 119, § 11), of the Code of West Virginia is barred, after one year from the date the cause therefor arose. *State v. Locke*, 73 W. Va. 713, 81 S. E. 401.

Demands made after the lapse of the six months fixed by § 11, ch. 119 (Barnes Code, ch. 119, § 11), do not suspend the operation of the statutory bar. When it begins, it continues to run until the limitation period becomes complete. *State v. Locke*, 73 W. Va. 713, 81 S. E. 401.

ATTORNEY GENERAL.

I. In General.

II. Compensation.

III. Duties and Privileges of Attorney General.

1. In General.

2. Relating to Bonds of Public Officers.

B. Privileges, etc.

IV. Offenses.

CROSS REFERENCES.

See the title ATTORNEY GENERAL, vol. 2, p. 172, and references there given. As to notice to attorney general of writ of error in criminal cases, see Va. Code 1919, § 4936; ante, generally, APPEAL AND ERROR. As to notice to attorney general by corporation of application for relief from assessment of taxes, see Va. Const., § 180; post, generally, TAXATION. As to venue of actions against attorney general and in which court such actions shall be brought, see Va. Code 1919, § 6051; post, generally, COURTS; JURISDICTIONS; VENUE.

I. IN GENERAL.

Qualifications.—W. Va. Const., Art. 4; Va. Const., § 32.

Election.—Va. Const., § 107; Va. Code 1919, § 118; W. Va. Const., Art. 1, § 1; Barnes Code, ch. 3, §§ 2, 69, ch. 6, § 13.

Election Contested.—Va. Code 1919, §§ 264, 265; Barnes Code, ch. 6, §§ 13-16.

Commission.—Va. Const., § 107; Barnes Code, ch. 7, § 20.

Form of Oath.—Barnes Code, ch. 9, § 1; Va. Code 1919, § 269.

Record of Oath.—Va. Code 1919, § 277; Barnes Code, ch. 9, § 5.

Term of Office.—Va. Const., § 107; Va. Code 1919, § 118; W. Va. Const., Art. 7, § 1; Barnes Code, ch. 7, § 1.

Vacancies in Office.—Va. Code 1919, § 122, amended by Va. Acts 1920, p. 11; W. Va. Const., Art. 7, § 17; Barnes Code, ch. 4, § 3, ch. 10 § 17.

Holding Other Office.—W. Va. Const., Art. 7, § 4.

Residence.—W. Va. Const., Art. 7, § 1.

Office Room.—Va. Code 1919, § 378.

Removal of Attorney General.—See post, "Offences," IV.

Origin of Office.—"The office of attorney general is of very ancient origin

and its duties and powers were recognized by the common law." *State v. Ehrlick*, 65 W. Va. 700, 702, 64 S. E. 935.

II. COMPENSATION.

Salary.—Va. Code 1919, § 3433; W. Va. Const., Art. 7, § 19; Barnes Code, ch. 11, § 1; ch. 120, § 2a.

Appropriation for Salary.—W. Va. Acts 1919, pp. 3, 5.

Mileage.—Va. Const., § 107; Va. Code 1919, § 3433.

Contingent Expenses.—Va. Code 1919, § 3433; Barnes Code, ch. 11, § 4.

Fees.—Barnes Code, ch. 37, § 2, ch. 120, § 4.

Of Assistant.—Va. Acts 1919 (Extra Session), p. 32, repealing part of § 3433, Va. Code 1919; Pollard's Code 1920, p. 680; Barnes Code, ch. 120, § 2a.

Salaries of Clerical Force.—Va. Code 1919, § 3433; Barnes Code, ch. 11, § 3.

III. DUTIES AND PRIVILEGES OF ATTORNEY GENERAL.

A. DUTIES.

1. In General.

In General.—Va. Const., § 107; W. Va. Const., Art. 7, § 1.

Appeals from Orders of State Corporation Commission.—Cl. d., Va. Const., § 156.

Application for Relief from Assessment of Taxes.—Va. Const., § 180.

Who May Require Opinions and Advice of.—Va. Const., § 74; Va. Code 1919, § 375; Barnes Code, ch. 120, § 1.

Duty to Represent State in What Courts.—Va. Code 1919, § 376; Barnes Code, ch. 120, § 2.

Annual Report of.—Va. Code 1919, § 377; Barnes Code, ch. 120, § 3.

Proceedings to Recover from Escheator for Failure to Perform Duty.—Va. Code 1919, § 511.

Approval of Title to Property of Negro Reformatory Association of Virginia.—Va. Acts 1920, p. 515.

Conveyances to State Geological Commission.—Va. Code 1919, §§ 526, 527, amended by Va. Acts 1920, p. 614.

Mandamus Proceedings to Compel State Officer to Adopt System of Accounting.—Va. Code 1919, § 555.

Revocation of Certificate of Public Accountant.—Va. Code 1919, § 570.

Selection of Member of State Board of Education.—Va. Code 1919, § 596.

Member of State Board of Education.—Va. Const., § 130; Va. Code 1919, § 596.

Disinfection of Cars Used in Transporting Live Stock.—Va. Code 1919, § 911.

Violation of Laws Relating to Agricultural Seeds.—Va. Code 1919, § 1150.

Enjoining House of Prostitution.—Va. Code 1919, § 1522.

Recovery of Penalty from Water Works.—Va. Code 1919, § 1793.

To Represent Board of Health.—Va. Code 1919, § 1795.

Reopening Coal Mine.—Va. Code 1919, § 1870; W. Va. Code Supp. 1918, §§ 495-25.

Correction of Tax Assessment.—Va. Code 1919, § 2392.

Recovery of Fine from Court Clerk.—Va. Code 1919, § 2406.

Delinquent Treasurers and Their Sureties.—Va. Code 1919, § 2432.

Liability of Auditor and Sureties for Failure to Report Delinquent Treasurers.—Va. Code 1919, § 2434.

Approval of Adjustment of Debt Due State.—Va. Code 1919, § 2532.

Forfeiture of Corporate Charter.—Va. Code 1919, §§ 2617, 3831.

As Member of Board of Indemnity.—Va. Code 1919, § 2619.

Appeal in Proceedings for Forming City.—Va. Code 1919, § 2912.

Officer Claiming Salary Withheld.—Va. Code 1919, § 3476.

Supersedas to Order of State Corporation Commission.—Va. Code 1919, § 3734.

Corporation Failing to Appoint Agent upon Whom Process May Be Served.—Va. Code 1919, § 3854.

Corporation Failing to File List of Officers and Directors.—Va. Code 1919, § 3854.

Recovery of Capital Stock of Company Acting as Bank of Circulation.—Va. Code 1919, § 4152.

Relating to Insurance.—Va. Code 1919, §§ 4215, 4243.

Quo Warranto against Fraternal Benefit Society.—Va. Code 1919, §§ 4297, 4298, 5842, 5844.

Advertisement of Intoxicating Liquors.—Va. Code 1919, § 4609.

Criminal Case Removed to United States Court.—Va. Code 1919, § 4971.

Docketing Judgments.—Va. Code 1919, § 6468.

Printing Supreme Court Reports.—Barnes Code, ch. 15, § 3.

Members of Board of Public Works.—Barnes Code, ch. 56, § 1.

Release of Person Confined as Lunatic.—Barnes Code, ch. 58, § 13.

Anti-Trust Law.—Va. Acts, 1919, (Extra Session), p. 82; Pollard's Code 1920, p. 700.

Disposition of Old Bank Accounts.—Va. Acts 1918, p. 430; 1919 (Extra Session), p. 129.

Duties of as to Laurel Industrial School.—Va. Acts 1918, p. 532; 1920, p. 65.

Suits against. — Barnes Code, ch. 37, § 4.

Road Commission. — W. Va. Code Supp. 1918, § 1940-19.

Member of State Auditing Board. — W. Va. Code Supp. 1918, § 3062.

Blue Sky Law. — W. Va. Code Supp. 1918, §§ 3277j, 3277p.

Virginia Debt. — W. Va. Code Supp. 1918, p. 869; W. Va. Acts 1919, p. 516.

Contract with Publishers of Text Books. — W. Va. Acts 1919, p. 46.

Gross Sales Tax Law. — W. Va. Acts 1921, p. 293.

As the chief law officer of the state, the attorney general is clothed and charged with all the common law powers and duties, pertaining to his office, except in so far as they have been limited by statute. *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935.

In the absence of any statutory provision to the contrary, the attorney general has the management and control of civil litigation on behalf of the state. *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935.

To Advise Prosecuting Attorney. — "In the exercise of his common law powers, the attorney general may, no doubt, advise the prosecuting attorney, as he does other officers, since he is regarded as the chief law officer of the state." *State v. Ehrlick*, 65 W. Va. 700, 702, 64 S. E. 935.

2. Relating to Bonds of Public Officers.

Approval of Bonds. — Barnes Code,

ch. 10, § 11; Va. Code 1919, §§ 325, 326, 382, 383, 1105, 4626; Va. Acts 1920, p. 245; Barnes Code, ch. 10, § 11, ch. 15p, § 20; W. Va. Code Supp. 1918, §§ 2501a-2501d.

County Treasurers. — Va. Code 1919, § 2698.

Of City Treasurer. — Va. Code 1919, § 2699.

Of State Depository. — Va. Code 1919, § 2161.

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B. PRIVILEGES, ETC.

Exemption from Jury Service. — Va. Code 1919, § 5985; Barnes Code, ch. 50, § 77.

Employment of Assistants. — Va. Code 1919, § 3433; Barnes Code, ch. 180, § 2a.

Employment of Special Counsel. — W. Va. Acts 1921, p. 294.

Clerical Force. — Va. Code 1919, § 3433.

State Reports Furnished to. — Va. Code 1919, § 347.

May Use State Law Library. — Va. Code 1919, § 371.

IV. OFFENSES.

Impeachment of Attorney General. — Va. Const., § 54; W. Va. Const., Art. 4, § 9, Barnes Code, ch. 7, § 8.

Removal of Attorney General. — Va. Const., § 107; Barnes Code, ch. 7, §§ 4, 8; W. Va. Code Supp. 1918, § 225.

ATTORNEY'S FEES. — See ante, ATTORNEY AND CLIENT. As to validity of stipulation in note for attorney's fees or collection costs, see post, BILLS, NOTES AND CHECKS. As to the recovery of attorney's fees as damages or costs in an action on an injunction bond, see post, INJUNCTIONS.

Attorney's Fee Not Allowed in Certain Prosecutions. — Va. Code 1919, § 4705.

ATTRACTIVE NUISANCE. — See post, NEGLIGENCE.

AUCTIONS AND AUCTIONEERS.

- I. Definition, etc.**
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CROSS REFERENCES.

See the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 174, and references there given. In addition, see post, JUDICIAL SALES AND RENTINGS; LICENSES; MUNICIPAL CORPORATIONS. As to authority of trustee to employ auctioneer to cry sale, see post, MORTGAGES AND DEEDS OF TRUST. As to regulation of by municipal corporations, see post, MUNICIPAL CORPORATIONS.

I. DEFINITION, ETC.

Definitions and Application of Act.—Pollard's Code 1920, pp. 478, 479; Va. Acts 1918, p. 490.

II. AUCTIONEER AS AGENT.

B. DISCLOSURE OF PRINCIPAL.
Failure to Disclose Principal.—Barnes Code, ch. 100, § 13.

VI. AUCTION SALES.

½A. IN GENERAL.

Property of County.—Va. Code 1919, § 2723.

Wrecks, etc. — Va. Code 1919, §§ 3606-3608.

Business Hours. — Pollard's Code 1920, p. 478; Va. Acts 1918, p. 490.

B. NONENFORCEMENT.

4. Chilling Bidding.

All contracts for the purpose of suppressing and chilling competitive bidding upon property offered for sale at public auction, in order to obtain it at under value, or to obtain undue and

unconscious advantages, are fraudulent and void, and will not be enforced at the instance of the contracting parties, or either of them. *Henderson v. Henrie*, 61 W. Va. 183, 56 S. E. 369. See post, JUDICIAL SALES AND RENTINGS; TAXATION.

In *Railway Co. v. Marple*, 70 W. Va. 136, 139, 73 S. E. 261, the court said: "The rights of the delinquent land owner stand next to those of the state. He has a right to demand that competition at the sale shall be unfettered by any arrangement, or agreement between prospective bidders, which has for its object the acquisition of the greatest amount of his land for the taxes due on it. Such an agreement between competitive bidders, or prospective bidders, is a fraud upon the law. * * *"

If an arrangement between two competitive bidders could be considered lawful, then it would follow that the same arrangement between any number of persons would likewise be lawful, be-

cause there is no limit upon the number of persons that may form a partnership, and that would lead to the destruction of competition altogether. But such an agreement is against public policy and is ground for avoiding the — sale and deed."

An agreement between two or more persons, not general partners, who are competitive bidders at delinquent tax sales, that they will become partners in all lands that may thereafter be purchased by either of them, contravenes public policy, and will render void a tax deed pursuant to such agreement. *Railway Co. v. Marple*, 70 W. Va. 136, 73 S. E. 261.

Honest Combination. — "As a general rule, any arrangement made for the purpose of reducing or suppressing competition at a judicial sale, or any device, trickery, agreement, or contrivance to chill the bidding thereat, is fraudulent and void, and will furnish sufficient ground for setting aside the sale, or even, it has been held in some cases, render the sale void. But there is nothing improper in an honest combination or association of several persons, entered into in order to enable them to bid at a judicial sale, and become the purchasers of property which singly they could not purchase." *Henderson v. Henrie*, 61 W. Va. 183, 186, 56 S. E. 369.

Opportunity to Bid.—Where the bidding at an auction occupied over three hours' time, and prospective purchasers

had every opportunity afforded that they could reasonably expect, these facts will not sustain a charge that the trustee who made the sale sought to be set aside did not give bidders ample opportunity to bid. *Hamilton v. Stephenson*, 106 Va. 77, 55 S. E. 577.

C. RIGHTS OF PURCHASERS.

1. Entitled to Clear Title, etc.

Warranty of Quality. — Pollard's Code 1920, p. 478; Va. Acts 1918, p. 490.

IX. EVIDENCE.

A. PAROL EVIDENCE, ETC.

Conversation of Vendor with Bidders.—In the absence of deceit or fraud upon innocent persons, conversations between the vendor and bidders at an auction sale of real property as to what property would be included if a certain price was obtained, constitute a part of the *res gestae*, and any promises which the owner of the property held out to prospective purchasers as inducements to bid, even though they controvert statements made by his agent, the auctioneer, would control. *Watson v. Mitchell*, 128 Va. 312, 104 S. E. 826.

XI. TAXATION.

B. LICENSES.

Va. Code 1919, pp. 3127-3129; Pollard's Code 1920, p. 476; Va. Acts 1918, p. 490; Barnes Code, ch. 32, §§ 2 (d), 3, 62a, 111.

AUDI ALTERAM PARTEM.—*Audi alteram partem*, hear the other side, is a motto of impartial justice. *State v. Stepp*, 63 W. Va. 254, 258, 59 S. E. 1068.

AUDITA QUERELA.

CROSS REFERENCES.

See the title AUDITA QUERELA, vol. 2, p. 180, and references there given.

Superseded by Motion—Statute of Limitations.—"It seems to be true that in our practice the motion to quash is a summary remedy in use in all cases where by the ancient practice the party would be entitled to a writ of audita querela. * * * But it also seems that where that ancient writ is in use the statute of limitations does not apply unless it is expressly named. The reason given is, that since the party injured may neither know of a judgment or execution in the former proceeding or the manner of procuring the same until some time after the rendition of the judgment or the issue of the execution, he is not limited to a specific time within which he must sue out his writ." *Lowenbach v. Kelley*, 111 Va. 439, 69 S. E. 352.

AUDITOR—See post, PUBLIC OFFICES; STATE; TAXATION. As to institution of proceedings by auditor to collect costs due the state in a criminal prosecution, see post, FINES AND COSTS IN CRIMINAL CASES.

AUTHENTICATION—As to authentication of writing within the meaning of statute of frauds, see post, FRAUDS, STATUTE OF. As to authentication of service of process, see post, SERVICE OF PROCESS. As to authentication of deeds and records, see ante, ACKNOWLEDGMENTS; post, RECORDING ACTS; RECORDS.

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I. STATUTORY PROVISIONS IN GENERAL.

A. IN VIRGINIA.

Va. Code 1919, §§ 2125-2154, 4083, 4480, 4567, 4631, 4657, 4658, 4722, 6445, 6449. Sections 2128, 2129, 2132, 2154 of this Code were amended by Acts of 1919, p. 62; Pollard's Code Biennial, pp. 87, 88, 89. Section 2137 of this Code was amended by Acts 1920, p. 283; Pollard's Code Biennial, p. 88. Va. Acts 1918, ch. 32, §§ 1-3; Pollard's Code Biennial, pp. 353, 354. Va. Acts 1918, ch. 232, § 14; Pollard's Code Biennial, p. 430. Va. Acts 1918, ch. 256, § 34; Pollard's Code Biennial, p. 441. Va. Acts 1918, ch. 421, § 23; Pollard's Code Biennial, p. 669. Va. Acts 1918, ch. 422, § 15; Pollard's Code Biennial, p. 670. Va. Acts 1919, ch. 57, §§ 1-15; Pollard's Code Biennial, pp. 707-710.

B. IN WEST VIRGINIA.

Barnes W. Va. Code, ch. 32, §§ 2, 3, 3a, 4, 39, 42a, 44, 45, 46, 47, 48, 104; ch. 43B, §§ 1, 19. Repealed so far as inconsistent by Acts 1921, p. 401, ch. 112, § 194; Supp. W. Va. Code 1918, §§ 1394a, 1940-24, 1940-117 to 1940-142. Repealed so far as inconsistent by Acts 1921, ch. 112, § 194. Acts W. Va. 1919, p. 434, ch. 121. Acts W. Va. 1921, pp. 307, 328, 336-362, 400, 401, ch. 112, §§ 12, 57, 58, 75-102, 186, 188, 192.

II. RIGHTS, DUTIES AND LIABILITIES IN RELATION TO.

A. IN GENERAL.

An automobile is not such a dangerous machine or agency as to make applicable to it the rules requiring extraordinary care in the use and control of instrumentalities which are dangerous per se. *Blair v. Broadwater*, 121 Va. 301, 93 S. E. 632; *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876.

B. ON STREETS AND HIGHWAYS.

1. In General.

"That the use of automobiles on the highways for business or recreation is lawful, is no longer open to question. Such use involves only the application of a new appliance and mode of travel, rather than any new legal principle. It does not exclude or seriously interfere with the original modes in which the highways were used, but simply adds another use in furtherance of the general object for which they were dedicated." *Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919.

Because of the character of the vehicle and the unusual dangers incident to its use, a greater degree of care is required of the operator of an automobile, while on the public highway, and especially at street crossings, than is required of persons using the ordi-

nary or less dangerous instruments of travel. He should exercise such care in respect to speed, warnings of approach and the management of the car as will enable him to anticipate and avoid collisions which the nature of the machine and the locality may reasonably suggest likely to occur in the absence of such precautions. *Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919.

Enforcement of Virginia Statute.—The Act of March 17, 1910 (Acts 1910, ch. 326, p. 503; Code 1919, § 2125, et seq.), was passed for the express purpose of regulating the use of automobiles on the public highways. Whether merely declaratory of the common law or not, the statute is an important one, and its enforcement in letter and spirit is demanded by very high considerations of humanity and public safety. *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876.

Speed Limits for Motor Vehicles—Control of Vehicle. — Supp. W. Va. Code, 1918, §§ 1940-118.

The phrase "absolute control at all times" used in Supp. W. Va. Code 1918, §§ 1940-118, means such control as makes the operation of the car safe, in view of, and as determined by, its apparent situation and surroundings. A car is in absolute control, while running at a reasonably high rate of speed on a smooth, straight, unobstructed road. To be under absolute control, it need not be susceptible of instant stoppage. *Goff v. Clarksburg Dairy Co.*, 86 W. Va. 237, 242, 103 S. E. 58.

Lights to Be Displayed.—Va. Code 1919, § 2142.

Absence of Headlight Having No Causal Connection with Injury.—The failure of an automobile to carry a headlight one hour after dark, as required by statute, is not sufficient to charge the operator thereof with negligence, where such failure had no causal connection with the injury complained of. *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174.

Consent of Municipal Authorities to

Running Jitney Buses on Streets Not Required.—A jitney bus association, engaged in carrying passengers along the streets of a city in auto cars, does not make use of the streets in a way similar to the use made of the streets by the various enterprises designated in § 124 of the Constitution, and in clause 1 of § 1294-b (Code 1919, § 3882) and clause 1 of § 1294-i (see Code 1919, §§ 4058, 4035-4038) of the Code, and it does not come within the purview of the constitutional or legislative provisions as to require it to obtain the consent of the municipal authorities before running vehicles along the streets of the city. *Virginia Railway, etc., Co. v. Jitney Ass'n*, 1 Va. Law Reg. (N. S.) 102. See post, **STREETS AND HIGHWAYS**.

2. As to Ridden Horses and Vehicles Drawn by Horses or Other Animals.

Duties of Driver, etc., as Regards Vehicles Drawn by Horses, etc., in General; When Driver in an Opposite Direction to That of Machine. — Va. Code 1919, § 2139.

In an action to recover damages for a personal injury resulting from the fright of a horse by an automobile while the horse was being ridden on a public road, it is not error to refuse an instruction which disregards the statutory duty of the driver of the automobile "to slow up and keep his machine under thorough and careful control." The purpose of the statute was to give the rider of the horse the benefit of every reasonable precaution on the part of the driver of the machine, until the horse has actually passed the machine, or been passed by it. *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876.

In view of the act of March 17, 1910 (Acts 1910, ch. 326, § 12; Code 1919 § 2139), declaring that the driver of an automobile shall keep a careful look ahead for the approach of horseback riders, and, upon their approach, shall

slow up and keep his machine under thorough and careful control, it is not error to refuse to instruct the jury that such driver has the right to presume that a horse ridden along a road frequented by automobiles is gentle and not liable to become frightened and unmanageable, and that he has the right to act upon, that presumption until he knows, or by the exercise of ordinary care should know, that such horse is liable to become frightened and unmanageable. The instruction is plainly in conflict with the statute. *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876.

Duties of Driver, etc., as Regards Vehicles Drawn by Horses, etc., When Driven in Same Direction.—Va. Code 1919, § 2140.

Facts Not Creating Liability for Injury by Horse Frightened by Automobile. — The owner of an automobile who is running his machine in a careful manner, at a slow rate of speed, along a city street thronged with travelers and vehicles, and keeping a lookout to avoid accidents, is not liable for an injury inflicted by a horse taking fright thereat, when he was not aware of any danger from said fright until his machine had reached a point opposite to or had passed the horse's head, and then deemed it less dangerous to pass on than to stop, and when the horse was in charge of three able-bodied men, and there was nothing in its behavior to lead him to suppose that it would become unmanageable. *Baughner v. Harman*, 110 Va. 316, 66 S. E. 86.

3. As to Pedestrians.

a. In General.

The rights of pedestrians and drivers of automobiles, when using streets or other public highways, are mutual, equal and co-ordinate, except as varied by the nature of the appliance or mode of travel employed; and as long as each observes the reciprocal rights of the other neither will be liable for any injury his use may cause. Deputy

v. Kimmell, 73 W. Va. 595, 80 S. E. 919.

Proof of Negligence — Exceeding Speed Limit.—Where the evidence in an action against the owner of an automobile for the death of one struck by the automobile shows that the driver of the automobile, a servant of the owner, was materially exceeding the lawful speed limit at the time of the accident, the negligence of defendant is established. *Stephen Putney Shoe Co. v. Ormsby*, 129 Va. 297, 105 S. E. 563.

Proximate Cause of Injury — Defendant's Car Struck by Another Car.

In an action by an administrator against the driver of an automobile for the death of his intestate, who was standing on the sidewalk when struck by the automobile, defendant's theory was that the accident was due to the fact that another automobile struck her car causing her to lose control. Plaintiff's theory was that defendant was running her car in excess of the speed allowed by a city ordinance and that while doing so she violated another ordinance by attempting to pass to the right of a vehicle moving in the same direction as her car. The trial court instructed the jury that notwithstanding defendant's machine was struck by the other automobile, yet if defendant's failure to keep her machine under control, or the speed at which she was going efficiently contributed to the accident, she was guilty of negligence. Held: No error. If the jury believed that the defendant's car was in fact struck by another car, then the question for their determination under this instruction was whether the injury complained of was attributable to a concurrence of the defendant's negligence with the impact from the other car or to the latter alone as the sole proximate cause. This was the really vital and decisive question in the case, and, in the state of the evidence, as disclosed by the record, it belonged exclusively to the province of the jury.

Trauerman v. Oliver, 125 Va. 458, 99 S. E. 647.

b. At Crossings.

Rights and Duties of Driver and Pedestrian.—The rights of a driver, of an automobile and a pedestrian at a street crossing are equal and reciprocal, and it is the duty of each to look out for the other. *Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27.

Where a wagon or other vehicle obscures or obstructs his view of a street crossing, when the presence thereon of others may reasonably be anticipated, extra vigilance and caution are required of the auto operator, in order to prevent injury to persons on such crossing. *Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919.

Facts from Which Negligence in Operation of Car May Be Inferred.—In an action by a pedestrian against the driver of an automobile for injuries sustained while attempting to cross a street, the defendant saw, or ought to have seen, the plaintiff attempting to make the crossing, and it was her duty to have her car under such control that she could have stopped it if necessary in order to have avoided the accident. The injury occurred at a corner where the defendant might reasonably have expected it to encounter foot passengers crossing the street, and it was her duty to keep a lookout for them. Her view was unobstructed—"there was no other automobile on the block"—and she had no right to endanger the lives or limbs of other people on the street whose rights in the streets were equal to her own. She gave no signal of her approach and there was no evidence that she lessened her speed. Held: That a jury would have been warranted, under these circumstances, in inferring that she did not have her car under such control as would have enabled her to have avoided the injury and that she was negligent in its operation. *Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27.

c. Children.

The vigilance and care required of the operator of an automobile vary in respect of persons of different ages or physical conditions. He must increase his exertions in order to avoid danger to children, whom he may see, or, by the exercise of reasonable care, should see, on or near the highway. More than ordinary care is required in such cases. *Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919. See post, "Contributory Negligence," III.

Presumption that Pedestrian Will Use Ordinary Care Not Applicable to Young Child.—The driver of an automobile may have a right to presume that a person of responsible age and apparently in possession of his faculties, will exercise ordinary care for his own protection, and will not negligently or recklessly expose himself to danger. But a driver has no right to indulge such presumption in the case of a child only four years of age. *Ratcliffe v. McDonald*, 123 Va. 781, 97 S. E. 307.

Sudden Intrusion of Child from Another Vehicle upon Path of Automobile.—The driver of one vehicle following another on the rear of which there are children whose attitudes indicate purpose or liability suddenly to step off of it, desiring to pass such other, is bound to adopt and use reasonable precautions for the safety of the children, such as vigilance, warning and reduction of speed, if necessary. Sudden intrusion of a child so situated, upon the path or course of a passing vehicle, does not necessarily preclude liability of the driver of such vehicle for injuries resulting, since both parties have the right to use the highway and are under duty to exercise care and caution. *Goff v. Clarksburg Dairy Co.*, 86 W. Va. 237, 103 S. E. 58.

But the driver of an automobile, under such circumstances, is not required to have his car under such control that he may stop it instantly, upon a sudden

and unexpected intrusion of a child so situated, upon the path or course of the car and immediately in front of it. *Goff v. Clarksburg Dairy Co.*, 86 W. Va. 237, 103 S. E. 58.

C. PERSONS LIABLE.

1. Owner.

a. When His Servant Is in Control of Automobile.

The liability or non-liability of the owner of a car for the negligence of his chauffeur depends upon whether the chauffeur, at the time of the accident, was acting within the scope of his employment and in the discharge of the master's business. *Kidd v. DeWitt*, 128 Va. 438, 105 S. E. 124.

"Liability arises from the relation of master and servant, and it must be determined by the inquiry whether the driving at the time was within the authority of the master in the execution of his orders or in the doing of his work. See also *Doran v. Thompson*, 76 N. J. L. 754, 71 Atl. 396, 131 Am. St. Rep. 667; *Erlick v. Heis* (Ala.), 69 So. 530; *Heissenbittel v. Meagher*, 162 App. Div. 752, 147 N. Y. Supp. 1087; *Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A., N. S., 87." *Cohen v. Meador*, 119 Va. 429, 437, 89 S. E. 876.

"The negligence of the servant is imputed to the master, because the master employs and can discharge the servant and direct his actions." *Virginia R., etc., Co. v. Gorsuch*, 120 Va. 655, 658, 91 S. E. 632, Ann. Cas. 1918B, 838.

The principles of liability of motor car owners in Virginia are the established principles that fix the liability of the master to third persons, for torts committed by his servant resulting in injury to such persons. The advent of the automobile has introduced no new principle in this branch of the law of agency. If the liability of the owners of automobiles for torts committed by their servants is to be extended and enlarged, so as to include injuries inflicted when the servant is

engaged about his own and not the master's business, that extension should be afforded by the legislative department in the exercise of its own proper authority. *Kidd v. DeWitt*, 128 Va. 438, 105 S. E. 124.

Once in control of the master's property, it is no answer that the servant acted improperly in its management, or that he has failed to perform his duty in the strictest and most convenient manner, as, for instance, when the servant, on the master's business, deviates from the most direct road, to accomplish some purpose of his own. In such case he is still discharging the master's business, though coupled with his own affairs. This joinder of the servant's and the master's business will not relieve the master from responsibility if the deviation is not too extensive. *Kidd v. DeWitt*, 128 Va. 438, 105 S. E. 124.

But where there is not merely deviation but a total departure from the course of the master's business, so that the servant may be said to be on a frolic of his own, the master is no longer answerable for the servant's conduct. *Kidd v. DeWitt*, 128 Va. 438, 105 S. E. 124.

Where a chauffeur uses the employers' auto for his own personal and private purpose, without the consent, express or implied, of the owner, the latter is not liable for injuries caused by the former's negligent operation of the machine. *Kidd v. DeWitt*, 128 Va. 438, 105 S. E. 124.

Motor Truck Driven by Servant Returning from Luncheon—Assent of Master.—A jury may properly find that an injury negligently inflicted upon a person by a motor truck driven by a servant of its owner, while returning from his luncheon agreeably to his usual custom and practice assented to by the master, was a result or an incident of an act done by the servant within the scope of his employment, for which the master is liable. *Goff v. Clarksburg Dairy Co.*, 86 W. Va. 237, 103 S. E. 58.

Servant Not Acting within Scope of Employment.—"The owner of an automobile can not be held liable for the killing of a child by his chauffeur where it appears that the accident occurred when the chauffeur was not using the machine in the course of his employment, and on the master's business, but on the contrary in practical opposition to the master's instructions, and upon a pleasure trip in which the chauffeur's personal friends or acquaintances were sharing the pleasure with him." *Sarver v. Mitchell*, 35 Pa. Super. Ct. 69." *Kidd v. DeWitt*, 128 Va. 438, 447, 105 S. E. 124.

"Where a chauffeur was told to take the defendant's car to a hotel at a specified time, and instead takes the automobile in another direction to call on a friend, and while returning runs against plaintiff's horse, which ran away and injured plaintiff, defendant is not liable for the injuries, a master not being liable for an injury caused by his servant not acting within the scope of his employment. *Denforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670." *Kidd v. DeWitt*, 128 Va. 438, 448, 105 S. E. 124.

The wife of the owner of an automobile directed her husband's chauffeur to take her cook from Lynchburg to Amherst and bring her back. After taking the cook to her destination the chauffeur went off on a joy-ride or trip of his own for about an hour and a half or two hours. While on this trip he picked up a friend and started back to Lynchburg, and ran into and injured plaintiff's car. At the time of the accident the chauffeur was neither going for the cook, nor returning with her. Held: That the owner of the car was not liable for the negligence of the chauffeur. *Kidd v. DeWitt*, 128 Va. 438, 105 S. E. 124.

b. When His Son or Daughter Is in Control.

An automobile is not such a dangerous machine or agency as to make ap-

plicable to it the rules requiring extraordinary care in the use and control of instrumentalities which are dangerous per se. The liability of the owner, therefore, for injuries occurring while the car is being used by another, depends ordinarily upon the existence of the relation of master and servant between the owner and driver of the machine. Relationship alone does not make a father answerable for the acts even of his minor son, and clearly not a son over twenty-one years of age. The liability in such cases results, if at all, from the fact of agency, which fact must be proved. No presumption of agency arises merely from the domestic relationship. *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876.

In an action for damages against a father by plaintiff, who was struck by an automobile owned by the father and operated by his daughter, a minor nineteen years of age, the evidence showed that the father bought and kept the car for the use and pleasure of himself and family. He was a deputy sheriff, and also used the car sometimes in the discharge of his official duties. The daughter was a careful and experienced driver, and on the day of the accident she sought and obtained permission from her father to use the car that afternoon for the entertainment of herself and her cousin. It affirmatively appeared that the daughter was not using the car on any errand or business of the father. Held, that the relationship standing alone does not render the father liable for the acts of his minor daughter; that such liability must result from the relation of master and servant or principal and agent, and the absence of that element of responsibility in this case affirmatively appears. *Blair v. Broadwater*, 121 Va. 301, 93 S. E. 632. See ante, "When His Servant Is in Control of Automobile," II, C, 1, a.

c. When His Wife Is in Control by His Authority.

If the owner of an automobile di-

rects or authorizes his wife as his agent to operate the same in carrying him from their home to a railroad station to drive the machine back, and in so returning she negligently and carelessly runs into or collides with the machine of a third person resulting in personal injury to him and damages his machine, the owner of the colliding machine is liable therefor upon the principle of respondeat superior and may be sued by the injured party without joining his wife as defendant in the action. *Beard v. Davis*, 86 W. Va. 437, 103 S. E. 278.

d. When Wife Is Owner and Husband Is in Control.

The negligence of a husband driving an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation. *Virginia R., etc., Co. v. Gorsuch*, 120 Va. 655, 91 S. E. 632.

2. Passenger.

"The doctrine of imputable negligence has been discussed, and the books are full of cases dealing with the question. There are some conflicts in the decisions, but it may be regarded as settled by the overwhelming weight of authority, that the negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver." *Virginia R., etc., Co. v. Gorsuch*, 120 Va. 655, 658, 91 S. E. 632.

3. Guest of Driver.

The negligence of the driver of an automobile is not imputable to his guest merely because he is riding with him by invitation. *Virginia R., etc., Co. v. Gorsuch*, 120 Va. 655, 91 S. E. 632, Ann. Cas. 1918B, 838.

III. CONTRIBUTORY NEGLIGENCE.

A. OF PERSON RIDING OR HITCHING A HORSE.

It is not error to refuse to instruct the jury that if they believe from the evidence that the plaintiff's horse was

afraid of automobiles and upon meeting one was likely to become frightened and unmanageable, and that automobiles were frequently passing along the road upon which the plaintiff was riding at the time of the accident, and that the plaintiff knew these facts, then he was guilty of contributory negligence. The statute, act of March 17th, 1910 (Code 1919, § 2139) was passed to meet just such a state of facts as is suggested by the instruction. There may be exceptional cases in which the wild and dangerous character of a horse would make his use, on a road frequented by automobiles, negligence per se, but such is not the average case, nor the case at bar. *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876.

It is reasonable to presume that the fright of a horse will be increased by stopping an automobile just opposite to him, rather than by passing on by; and if the driver of the machine passes on he is not responsible for the damages inflicted by the horse where the emergency in which he was placed was occasioned by the imprudence of the plaintiff in undertaking to hitch the horse, which was "automobile shy," to a buck-board, in a crowded street, when there were other suitable places to hitch him in the immediate vicinity. *Baughner v. Harman*, 110 Va. 316, 66 S. E. 86.

B. OF PEDESTRIANS.

A person lawfully in a public highway may rely upon the exercise of reasonable care by drivers of automobiles to avoid injury. Failure to anticipate omission of such care does not render him negligent. A pedestrian is not bound, as a matter of law, to be continuously looking or listening to ascertain if automobiles or other vehicles are approaching, under penalty that if he fails to do so and is injured his own negligence will defeat recovery of damages sustained. *Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919.

While the pedestrian must bear in mind the dangers he may encounter in

the street, he is only bound to use such precautions for his own safety as the danger to be apprehended would reasonably suggest to a person of ordinary prudence. *Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27.

"In *Baker v. Close*, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. (N.S.) 487, the negligence of the defendant was admitted, but there was conflict in the testimony as to the plaintiff's contributory negligence. In that case it was said: 'The footman is not required, as a matter of law, to look both ways and listen, but only to exercise such reasonable care as the case requires, for he has the right to assume that a driver will also exercise due care and approach the crossing with his vehicle under control. (*Buhrens v. Dry Dock E. B. & B. R. Co.*, 53 Hun. 571, 6 N. Y. S. 224, Aff'd 125 N. Y. 702). At such crossings both pedestrians and drivers are required to exercise that degree of prudence and care which the conditions demand. *Brooks v. Schwerin*, 54 N. Y. 343. It is impossible to formulate any more precise definition of these relative rights and duties.'" *Core v. Wilhelm*, 124 Va. 150, 154, 98 S. E. 27.

The rule of "look and listen" applicable to grade crossings of steam railroads is not applicable to street crossings. The measure of duty imposed upon a pedestrian about to cross a city street, where motor vehicles of all kinds are frequently passing, is that he shall use such care as a person of ordinary prudence would use under like circumstances, and whether or not he did use such care is ordinarily a question for the jury. Of course, he can not blindly, or negligently expose himself to danger, but he is not required to be continuously looking and listening to ascertain if automobiles are approaching, under penalty that upon failure to do so, if he is injured, his negligence must be conclusively presumed. *Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27.

In the instant case, plaintiff's decedent, a pedestrian, was guilty of contributory or concurring negligence under the circumstances in evidence in stepping from the sidewalk to the roadway, at the intersection of two streets, where if he had looked before stepping from the curb, he would have been bound to see within a few feet of him a rapidly approaching automobile just at the turn. *Stephen Putney Shoe Co. v. Ormsby*, 129 Va. 297, 105 S. E. 563.

While the look and listen rule is not as strictly applied to street crossings as it is to railroad crossings, a reasonable lookout is required; and nothing but an utter lack of prudence could have accounted for plaintiff's decedent's failure to look in stepping from the curb to the street. In other words, if the decedent did look, he was bound to have seen the automobile and was negligent as a matter of law in stepping in front of it; and, if he did not look, he was none the less negligent. *Stephen Putney Shoe Co. v. Ormsby*, 129 Va. 297, 105 S. E. 563.

Last Clear Chance Doctrine.—In the instant case, an action for the death of a pedestrian struck by an automobile when attempting to cross a street, where it appeared from the evidence that the automobile could not have been stopped at the rate at which it was going in time to have saved decedent after he stepped from the sidewalk into the roadway, the driver of the automobile had no last clear chance to avoid the accident, and that doctrine does not apply, and the case is one of contributory negligence. If, on the other hand, the automobile had been going slow enough to stop or reduce its speed sufficiently to save decedent, then it is self-evident that decedent likewise would have had sufficient time to get out of the way, and he would have had the last clear chance, or at least an equal chance to avoid the accident. In any view of the case, it must be held to have been one of

either contributory or concurring negligence. *Stephen Putney Shoe Co. v. Ormsby*, 129 Va. 297, 105 S. E. 563.

C. OF CHILDREN.

In determining the question of contributory negligence, the conduct of children should not be judged by the same rules which govern that of adults. Ordinary caution for them is that degree of care and prudence which children of the same age are accustomed to exercise under like circumstances. *Deputy v. Kimmell*, 73 W. Va. 595, 80 S. E. 919.

IV. ORDINANCES REGULATING THE GRANTING OF LICENSES TO OPERATORS.

So much of the ordinance of the city of Richmond regulating the granting of licenses to operators of "jitneys" as requires that the applicant for a license shall be the owner of the vehicle he proposes to operate is unreasonable, as it does not tend to promote the public safety and convenience, and is therefore void. A municipal ordinance that is unreasonable is void. *Parrish v. Richmond*, 119 Va. 180, 89 S. E. 102. See post, ORDINANCES.

V. DUTIES AND LIABILITIES OF GARAGE KEEPERS.

The law enjoins on the keeper of a garage for hire the duty safely to keep an automobile left in his custody, and he is bound to the exercise of reasonable diligence and care to that end. He is not an insurer. *McLain v. West Virginia Automobile Co.*, 72 W. Va. 738, 79 S. E. 731.

A count in assumpsit charging a garage keeper with the duty to take due and proper care of an automobile left in his custody and safely and securely to keep, store and care for the automobile without damage or injury, does not charge a higher degree of care than the law enjoins—reasonable or ordinary care to protect from injury. *McLain v. West Virginia Automobile Co.*, 72 W. Va. 738, 79 S. E. 731.

Release of Custody of Car to Other than Owner.—No garage keeper in the exercise of reasonable care can release a car left in his custody to another than the owner, without the latter's order, expressed or reasonably implied. *McLain v. West Virginia Automobile Co.*, 72 W. Va. 738, 79 S. E. 731.

Custom Can Not Absolve Garage Keeper from Reasonable Care.—A custom of garage keepers contrary to the implied obligation of reasonable care for safe keeping, arising in favor of an automobile owner by the storing of his car at a public garage, can not absolve the garage keeper from observance of such care. *McLain v. West Virginia Automobile Co.*, 72 W. Va. 738, 79 S. E. 731.

Liability for Acts of Servant—Scope of Employment.—A garage keeper can not leave the garage solely in the hands of a servant and then say that the latter's negligence in releasing a car to one without authority from the owner is beyond the scope of his employment. *McLain v. West Virginia Automobile Co.*, 72 W. Va. 738, 79 S. E. 731.

VI. PRESUMPTIONS AND BURDEN OF PROOF.

Inference of Absence of Contributory Negligence.—The instinct of self-preservation generally forbids the imputation of recklessness, and, in the absence of evidence as to the want of due care on the part of the plaintiff, in an action against the driver of an automobile for injuries sustained in an accident at a street crossing, the jury would have been warranted in inferring that the plaintiff was not negligent and hence, on a demurrer to the evidence by the defendant, the court must so find. *Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27.

Burden upon Defendant to Show Contributory Negligence.—In the case at bar it affirmatively appears that the plaintiff looked just as he started to cross the street, and the way appeared clear, as there was no automobile in

the block. What, if any, further precautions he took for his safety does not affirmatively appear from the evidence. The failure to take such precautions was a matter of defense, as to which the burden of proof was upon the defendant unless it was disclosed by the plaintiff's evidence, or was fairly to be inferred from all the circumstances, for it is as much the duty of the defendant to show the negligence of the plaintiff as it is of the plaintiff to show the negligence of the defendant. *Core v. Wilhelm*, 124 Va. 150, 98 S. E. 27.

Injury to Pedestrian on Sidewalk—Burden of Proof.—Defendant was driving an automobile propelled by electricity and controlled by a steering lever and foot-brakes. Decedent was standing on the sidewalk, with his back toward the street. The automobile, for some reason, ran wild, mounted the sidewalk, struck decedent and inflicted the injuries from which he died. Defendant requested and obtained an instruction that the burden was upon the plaintiff to prove the allegations of his declaration by a preponderance of the evidence. This was a proper instruction, but the evidence was such as to entitle the plaintiff to have the jury instructed that, if decedent was struck by the car while he was standing on the sidewalk, that fact would cast upon the defendant the burden of showing that the accident did not result from negligence on her part, and the refusal of the court to give an instruction to that effect warranted the trial court in setting aside a verdict for the defendant for misdirection to the jury upon the law of the case. *Trauerman v. Oliver*, 125 Va. 458, 99 S. E. 647.

The requested instruction referred to in the preceding paragraph, which the court refused, was to the effect that if the jury believed that decedent "was killed by defendant's automobile while he was standing on the sidewalk on Broad street, the burden of proof is upon the defendant to show by a pre-

ponderance of evidence that said killing was unavoidable, and that she did everything that a reasonably prudent person would do, under all the facts and circumstances of the case, to prevent killing him, and unless she did this she is guilty of negligence." Held: That while the word "unavoidable" in the instruction, without the aid of the context, might have placed too much of a burden upon the defendant, yet the instruction read as a whole was not subject to this objection, and the inaccuracy of the phraseology would not have constituted error if the instruction as asked had been given. *Trauerman v. Oliver*, 125 Va. 458, 99 S. E. 647.

The instruction quoted in the preceding paragraph, when read as a whole, can hardly fail to convey the idea that the burden which was shifted to the defendant by the plaintiff's proof of the facts therein recited required no more than proof on her part that she did "everything that a reasonably prudent person would do, under all the facts and circumstances of the case," to prevent the injury. Thus interpreted there can be no doubt of the correctness of the instruction as a legal proposition applicable to the instant case. *Trauerman v. Oliver*, 125 Va. 458, 99 S. E. 647.

VII. INSTRUCTIONS.

See ante, "Presumptions and Burden of Proof," VI.

No Failure in Instruction to Consider Defense of Intervening Cause.—

In an action by an administrator against the driver of an automobile for the death of his intestate, who was standing on the sidewalk when struck by the automobile, defendant's theory was that the accident was due to the fact that another automobile struck her car causing her to lose control. An instruction which expressly assumed that defendant's car was struck by the other automobile, and then proceeded

to explain how, under one view of the evidence, this fact would not constitute such an intervening cause as to exempt the defendant from liability, was not open to an objection that it failed to take into consideration the defense of an intervening cause. *Trauerman v. Oliver*, 125 Va. 458, 99 S. E. 647.

Instruction Not Unsupported by Evidence.—Where there was evidence tending to show that if defendant's car was in fact struck by a passing automobile, it thereafter ran far enough to have been stopped by an ordinarily prudent driver before the injury complained of was inflicted, an instruction which told the jury that even if defendant's steering lever was knocked out of her hands by reason of a passing automobile striking her car, yet if a sufficient interval thereafter elapsed to enable her in the exercise of ordinary care to stop her car, and if her failure to do so was the proximate cause of the injury, they must find for

the plaintiff, is not subject to the objection that there was no evidence to support it. *Trauerman v. Oliver*, 125 Va. 458, 99 S. E. 647.

Sale by Agent—Designating Agent's Compensation a Commission.—Although an agency within the meaning of the automobile trade consists in giving the agent the exclusive right to purchase for cash from the manufacturer machines, at a discount from the list price, and retail them to purchasers at the full list price, where the compensation of the person making the sale is fixed by a percentage of the price obtained for a machine, it is wholly immaterial whether such compensation be called a discount or a commission, and it is not reversible error for the trial court to designate it a commission in an instruction given in an action to recover such compensation. *Eastern Motor Sales Corp. v. Apperson-Lee Motor Co.*, 117 Va. 495, 85 S. E. 479.

AUTREFOIS, ACQUIT AND CONVICT.

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CROSS REFERENCES.

See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181, and references there given. In addition, see post, INTOXICATING LIQUORS. As to discharge for delay in bringing to trial, see post, CONSTITUTIONAL LAW.

I. PROVISIONS OF LAW RELATING TO JEOPARDY.

A. CONSTITUTIONAL AND STATUTORY PROVISIONS.

See post, "General Rule," II, B, 2, a. Va. Const. § 8; W. Va. Const. Art. III, § 5.

"The constitution does forbid that one be twice put in jeopardy of life or liberty for the same offense." *State v. Graham*, 68 W. Va. 248, 252, 69 S. E. 1010.

Provision of United States Constitution Not Applicable to the States.—The provision in the Constitution of the United States, that no person shall be liable to be put twice in jeopardy of life or limb for the same offense, which is construed to deny the government the right of appeal in criminal cases, applies only to the federal courts and not to the courts of the several States. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

Former Conviction or Acquittal in Another State.—Va. Code 1919, § 4422.

C. CHARACTER OF PUNISHMENT.

Whatever view may prevail in other jurisdictions, in this state the rule

against putting any person in jeopardy more than one time for the same offense is to be applied in all criminal cases—regardless of the character and degree of the punishment. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

II. WHAT CONSTITUTES A JEOPARDY.

A. GENERAL RULE.

See post, "Jury Must Pass upon the Case," II, B, 3.

Meaning of Second Jeopardy.—At the common law and under the interpretations in American jurisprudence, protection from second jeopardy for the same offense includes immunity from further prosecution where on a valid indictment in a court of competent jurisdiction the accused is acquitted by a jury regularly empaneled and sworn to try the issue of his guilt. *Ex parte Bornee*, 76 W. Va. 360, 85 S. E. 529.

In order to make such a defense with success, the party relying upon it must show that he has been put upon his trial before a court which has jurisdiction, upon indictment or information which is sufficient in form

and substance to sustain a conviction, and that a jury has been empaneled and sworn, and thus charged with his deliverance. Anything short of this is insufficient to raise a bar against a new indictment or prosecution for the same offense. *Com. v. Willcox*, 111 Va. 849, 852, 69 S. E. 1027.

Same—Legislative Power to Change.—The constitutional amendment of 1879-80, having for its purpose the revision of the judicial department, did not, wherein it provided that this court should have "such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law," give legislative power to alter the originally understood meaning of jeopardy in the bill of rights. *Ex parte Bornee*, 76 W. Va. 360, 85 S. E. 529.

Barnes Code, ch. 152, § 14, provides: "A person acquitted by the jury, upon the facts and merits on a former trial, may plead such acquittal in bar of a second prosecution for the same offense, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted."

Va. Code 1919, § 4773 is identical with above code provision except it adds: "Unless the case be for a violation of the law relating to the state revenue and the acquittal be reversed on a writ of error on behalf of the commonwealth."

B. ESSENTIAL ELEMENTS.

1. Competent Jurisdiction of the Trial Court.

a. In General.

See ante, "General Rule," II, A.

2. Must Have Been Tried on Good Indictment or Information.

a. General Rule.

See ante, "General Rule," II, A.

When Acquittal Not Bar to Further Prosecution.—Va. Code 1919, § 4774; Barnes Code, p. 1257, ch. 152, § 15.

b. Material Variance.

See ante, "General Rule," II, B, 2, a.

c. Dismissal or Quashal of Indictment.

Statutory Provision.—Barnes Code, p. 1156, ch. 135, § 31.

Where Indictment Dismissed upon Demurrer.—If a demurrer to an indictment has been sustained and the indictment dismissed, before any jury is sworn, the accused has never been in jeopardy, and may be again indicted and tried for the same offense charged in the indictment. *Commonwealth v. Willcox*, 111 Va. 849, 69 S. E. 1027.

3. Jury Must Pass upon the Case.

See ante, "General Rule," II, B, 2, a.

Jeopardy, as ordinarily understood in legal parlance, refers to the danger of conviction and punishment which a defendant incurs in a criminal case where a jury has been empaneled and sworn. But the spirit and purpose of the immunity intended to be secured by the doctrine will be violated whenever a defendant in any criminal case has been formerly tried by competent authority—whether court or jury—and discharged upon a defense constituting a bar to the proceeding, whether that defense be rested upon the law or the facts. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

Jury Not Empaneled and Sworn.—

Section 3893 of the Va. Code of 1904 (Code 1919, § 4773), providing immunity against a second trial for the same offense, speaks only of cases in which there has first been an acquittal "by the jury upon the facts and merits," and does not in terms at least, apply to the instant case, where no jury was sworn, but the warrant of a justice of the peace was quashed and dismissed on the ground that the statute under which it was issued was unconstitutional and void. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

E. NOLLE PROSEQUI.

A nolle prosequi does not preclude

reindictment. *State v. Crawford*, 83 W. Va. 556, 98 S. E. 615.

G. APPEAL OR NEW TRIAL, BY STATE.

1. In Virginia.

Prior to the adoption of the constitution of 1902, there was no express or implied constitutional inhibition upon the right of appeal to the commonwealth, and as the subject was then controlled entirely by the common law, there was no legal reason why the legislature might not, by express statute, have allowed the state a writ of error in any criminal case. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

Under both § 8 and § 88 of the constitution of 1902 the legislature may allow the commonwealth an appeal in any criminal case involving the revenue law regardless of the degree of punishment, but by virtue of the operation of § 8 such appeal does not lie in any other kind of criminal cases; and therefore, § 4052 of the Va. Code of 1904 (Code 1919, § 4931), is unconstitutional except in so far as it refers to appeals in revenue cases. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

Section 8 of the Constitution of 1902 incorporated for the first time in the fundamental written law of the state the well known common law doctrine of former jeopardy. When the purpose of an appeal in a criminal case is to procure on behalf of the state a reversal of the judgment and a new trial of the accused (as distinguished from a mere review and decision of the legal question involved for use as a precedent in future cases) the rule against a second jeopardy for the same offense operates *proprio vigore* to destroy the right of appeal. The matter is jurisdictional, and the accused is not obliged to first abide the result of the appeal, and, in the event of a reversal, resort to his plea of *autrefois acquit* or *autrefois convict* to avoid a second trial.

Commonwealth v. Perrow, 124 Va. 805, 97 S. E. 820.

Section 88 of the constitution of 1902 provides that "no appeal shall be allowed to the commonwealth in any case involving life or liberty of a person, except that appeal by the commonwealth may be allowed by law in any case involving the violation of a law relating to the state revenue." Under the provision, a writ of error does not lie upon the petition of the commonwealth in any case involving the life or liberty of a person where no question touching the state revenue is involved, and hence so much of § 4052 of the Code of 1904 as provides for a writ of error at the instance of the commonwealth in a case merely involving the violation of a law declared to be unconstitutional, is itself null and void. But § 88 of the constitution applies only to cases where the life or liberty of accused is involved, leaving to the legislature, so far as this particular section of the constitution is concerned, a free hand with reference to appeals in a criminal case where no other punishment than a fine is prescribed. As to this latter class of cases it is apparent, therefore, that § 4052 of the Code of 1904 is not in conflict with this provision of the constitution. *Commonwealth v. Perrow*, 124 Va. 805, 97 S. E. 820.

2. In West Virginia.

No Right of State to Appeal.—Prior to the adoption of our constitution it was the general judicial acceptance that an appeal by the state in a criminal case involving life or liberty, after one jeopardy had attached by the empanelling and swearing of a jury, was violative of the principle that one should not twice be put in jeopardy for the same offense, and with this meaning the inhibition became a part of the constitutional law of the state. *Ex parte Bornee*, 76 W. Va. 360, 85 S. E. 529.

Acts 1913, ch. 13, § 22, giving right

of appeal to the state, is unconstitutional and ineffective in any imprisonment case wherein it operates to put the accused again in jeopardy for the same offense. *Ex parte Bornee*, 76 W. Va. 360, 85 S. E. 529.

Power of Judge to Set Verdict Aside and Grant New Trial to State.—A judge has no authority to set aside a verdict of not guilty in a criminal case on the ground that it is contrary to the law and the evidence and award the state a new trial. *Ex parte Bornee*, 76 W. Va. 360, 85 S. E. 529.

H. ADDITIONAL SENTENCE FOR HABITUAL CRIMINAL.

A former convict is not placed twice in jeopardy by bringing him after conviction before the court of another county in a separate proceeding instituted conformably to W. Va. Code, chap. 165, §§ 1-5 (*Barnes Code*, p. 1292), by information charging him with prior convictions which were not alleged in the indictment on which he was tried and convicted, and, on the finding of the jury that he was the former convict, sentencing him to the additional punishment which chap. 152, §§ 23, 24, in such cases prescribes. *Graham v. State*, 70 W. Va. 793, 224 U. S. 616, 32 S. Ct. 583; *S. C.*, 68 W. Va. 248, 69 S. E. 1010.

III. IDENTITY OF OFFENSES.

A. IN GENERAL.

In order to entitle the defendants to the plea of autrefois acquit or convict, it is necessary that the crime and the acts constituting the crime must be the same in both the former and subsequent indictments. *Commonwealth v. Davis*, 17 Va. Law Reg. 509; *Commonwealth v. Harris*, 12 Va. Law Reg. 36.

No fact, however essential to a verdict, is by such verdict res adjudicata against the commonwealth in a criminal case, unless there is such identity of offenses as would support a plea of

former jeopardy. *Commonwealth v. Allen*, 18 Va. Law Reg. 410.

Sufficiency of Facts Charged in Second Indictment to Sustain Former Prosecution.—On the trial of the issue on a special plea of autrefois acquit, the test is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. *State v. Friedley*, 73 W. Va. 684, 80 S. E. 1112. See *Commonwealth v. Davis*, 17 Va. Law Reg. 509.

Offense against Two or More Statutes or Two or More Municipal Ordinances.

—If the same act be a violation of two or more statutes, or of two or more municipal ordinances, a prosecution or proceeding under one of such acts or ordinances shall be a bar to a prosecution under the other or others. Va. Code 1919, § 4775.

Conviction in One Court as Bar to Prosecution in Another.—Accused was tried and convicted upon a warrant issued by the mayor of a city, charging him with unlawfully transporting intoxicating liquor along one of the streets in that city. Subsequently accused was indicted in the circuit court of the county for the same offense and pleaded to the indictment former conviction. Held: That Acts 1918, ch. 388, changing the original prohibition statute, Acts 1916, ch. 146, conferred upon the mayor of the city concurrent original jurisdiction with the circuit court of the county to try the case in question, and that the mayor's judgment therein was a bar to the second prosecution in the circuit court by virtue of § 8 of the bill of rights, which ordains that no man shall "be put twice in jeopardy for the same offense." *Bryan v. Commonwealth*, 126 Va. 749, 101 S. E. 316.

Where any person has been convicted in the municipal or police court of any incorporated town or city such conviction shall be a bar to any criminal proceeding before a justice for the same

offence. Barnes Code, p. 717, ch. 50, § 220.

D. CRIME INCLUDING SEVERAL OFFENSES.

1. Conviction of Lower on Prosecution for Higher.

If a person indicted for felony be by the jury acquitted of part and convicted of part of the offense charged, and the verdict be set aside and a new trial granted the accused, he shall not be tried for any higher offense than that of which he was convicted on the last trial. Va. Code 1919, § 4918.

"If, on a trial for murder, the evidence proves only an assault and battery, or manslaughter, the jury must convict of the lower offense or refuse to perform their sworn duty. These lower offenses are included in the charge of murder and inseparable from it." *State v. Angus*, 70 W. Va. 772, 74 S. E. 998.

After a previous conviction of involuntary manslaughter, on the indictment for murder the prisoner could not be convicted, in a subsequent trial on the same indictment, of any offense higher than involuntary manslaughter, because of the constitutional inhibition of second jeopardy. *State v. Vineyard*, 85 W. Va. 293, 297, 101 S. E. 440.

A verdict of guilty of an attempt to commit rape is an acquittal of the offense of rape, and if such verdict be set aside, the accused can not on a second trial, be convicted of rape, as this is a higher offense, and he can not, under the express terms of the Code, be tried for any higher offense than that of which he was convicted on the last trial. *Cates v. Commonwealth*, 111 Va. 837, 69 S. E. 520. See post, RAPE.

2. Acquittal of Greater Barring Prosecution for Lesser.

Va. Code 1919, § 4922, provides: On an indictment for felony, the jury may find the accused not guilty of the felony, but guilty of an attempt to commit such felony; and a general ver-

dict of not guilty, upon such indictment, shall be a bar to a subsequent prosecution for an attempt to commit such felony.

E. CONVICTION OF ONE OFFENSE NO BAR TO PROSECUTION FOR ANOTHER COMMITTED AT THE SAME TIME.

If the accused, on the trial of an indictment for larceny, committed two separate and distinct offenses, an acquittal or conviction of one will not bar a prosecution for the other. *Commonwealth v. Harris*, 12 Va. Law Reg. 36.

The offense of carrying an unlawful weapon is not merged in an indictment for maiming with the weapon alleged to have been so carried; the two offenses being wholly separable and legally independent. *State v. Angus*, 70 W. Va. 772, 74 S. E. 998.

H. EVIDENCE.

Admissibility of Evidence.—Where there has been no trial and no evidence has been adduced, but the prisoner discharged for want of prosecution under the statute, should a plea of former jeopardy be interposed, evidence aliunde may be introduced to show what were the transaction or transactions investigated and passed upon by the grand jury, and the grand jurors are competent witnesses for that purpose. *Commonwealth v. Davis*, 17 Va. Law Reg. 509.

On the trial of the issue on a special plea, of autrefois convict it may be shown, however, if such be the fact, that though similar, the offenses charged in the two indictments are not in fact the same. *State v. Friedley*, 73 W. Va. 684, 80 S. E. 1112.

Presumption and Burden of Proof.—The burden of proof as to the identity of the offense is with the defendant. *Commonwealth v. Davis*, 17 Va. Law Reg. 509.

Where two indictments for grand larceny or embezzlement of money are presented against the same defendant,

varying as to dates and amounts, the natural presumption must be that they charge distinct offenses, and this presumption must be rebutted by proof by the one whose contention is that they relate to one and the same act or transaction. *Commonwealth v. Davis*, 17 Va. Law Reg. 509.

That the first indictment was such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, only establishes a link in the chain of evidence necessary to make good the plea of former jeopardy, especially, when, upon the face of the indictments, there is reference to distinct transactions. Where such is the case the defendant must, in addition, show that the transactions charged are in fact the same. *Commonwealth v. Davis*, 17 Va. Law Reg. 509.

IV. GENERAL CONSIDERATION OF THE PLEA OF AUTREFOIS, ACQUIT AND CONVICT.

½A. IN GENERAL.

Discharge from Prosecution by Lapse of Time.—Where defendants were discharged from prosecution, under § 4047 of the Code (Va. Code 1919, § 4926) under indictments charging grand larceny and embezzlement, and were then indicted for embezzlement, the acts charged in the previous indictments being for alleged embezzlement of different amounts and at different dates from those set out in the latter, it was held that a plea of former discharge filed to the latter indictment, and afterwards withdrawn, and a motion thereupon made that the defendants be forever discharged from prosecution for the offense charged in the latter indictment, because they had been held for said offenses for more than four terms without trial, had the same practical effect, except as to the necessity for a jury to try the plea, and the defendants are entitled to no more un-

der their motion than under their plea of discharge, and both are analogous to the plea of autrefois, acquit and convict. *Commonwealth v. Davis*, 17 Va. Law Reg. 509.

Where the result of a previous trial is an adjudication of a certain fact in favor of the defendant which shows his innocence of the charge in the case at bar, and such fact was directly and necessarily in issue on the former trial, and was decided on its merits in favor of the accused, it is *res judicata* on the subsequent trial, and the proper manner of raising the objection is by plea of *res judicata*. *Commonwealth v. Harris*, 12 Va. Law Reg. 36.

Verdict Finding Accused Guilty of Two Offenses.—In the instant case, it was urged that the record did not show for which offense mentioned in the verdict the fine and imprisonment were imposed—the offense of transporting, or that of selling the liquor—and, hence, that the verdict should have been set aside by the trial court, because the accused can not plead the record in this case as a bar to future prosecution. Held: That the record of said verdict shows that the accused was convicted of both of the offenses last named. Such conviction was in effect an acquittal of all the other offenses charged in the indictment. The plea of autrefois convict as to both of the former and the plea of autrefois acquit as to all of the latter offenses are made available to the accused by the record in the instant case. *Collins v. Commonwealth*, 123 Va. 815, 96 S. E. 826.

C. ESSENTIALS.

2. Identity of Offenses.

Where defendant relies upon a plea of former jeopardy he must definitely and substantially show by the allegations of his plea the identity, both in law and in fact, of the two offenses. *Commonwealth v. Allen*, 18 Va. Law Reg. 410.

A special plea of autrefois acquit, al-

leging identity of the person of the defendant which in both indictments and showing by reference to the record, the identity of the property described, with the felonious stealing, taking and carrying away of which as charged in the first indictment defendant was acquitted, except only as to the value of the property, not material, is good in law, as sufficiently showing the identity of the offenses charged. *State v. Friedley*, 73 W. Va. 684, 80 S. E. 1112.

D. REPLICATION.

In making up the issue on a special plea of autrefois acquit proper practice requires a special replication traversing the fact of the identity of the offense

charged, if it is intended to controvert that fact. *State v. Friedley*, 73 W. Va. 684, 80 S. E. 1112.

E. EVIDENCE IN SUPPORT OF PLEA.

See ante, "Evidence," III, H.

VI. IN WHAT COURT DEFENSE MADE.

The defense of autrefois acquit is a matter within the jurisdiction of the court in which the charge to which it is applicable is pending, and can not be set up in another court by an independent proceeding such as prohibition, while the case in which it may be a proper defense is pending and undetermined. *Bracey v. Robinson*, 83 W. Va. 9, 97 S. E. 295.

AVENUE.—Under W. Va. Acts 1895, § 1, providing that the city of Charleston shall have control of "all **avenues** for public use" in said city, the words "all **avenues** to public use" must be construed, to include a bridge. *Cavender v. City of Charleston*, 62 W. Va. 654, 59 S. E. 732. See post, **STREETS AND HIGHWAYS**.

AVOIDABLE CONSEQUENCES.—See post, **CONTRIBUTORY NEGLIGENCE; DAMAGES**.

AWARD.—See ante, **ARBITRATION AND AWARD**.

AWARDED.—See *Citizens Nat. Bank v. Graham*, 68 W. Va. 1, 4, 69 S. E. 801.

AWNINGS.—See ante, **ABUTTING OWNERS**.

BADGE OF FRAUD.—See ante, **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**; post, **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

BAGATELLE SALOON.—What constitutes—**License.**—Va. Code 1919, appendix, p. 3140; Barnes Code, ch. 32, secs. 1, 108.

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CROSS REFERENCES.

See the title BAIL AND RECOGNIZANCE, vol. 2, p. 196, and references there given. In addition, see ante, ARBITRATION AND AWARD; post, EXECUTIONS; EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES; FALSE IMPRISONMENT; HABEAS CORPUS; JURISDICTION; PRISONS AND PRISONERS; PROFERT AND OYER; SCIRE FACIAS; SHERIFFS AND CONSTABLES; SUBROGATION; SURETYSHIP. As to bail bonds in attachment proceedings, see ante, ATTACHMENT AND GARNISHMENT. As to the validity of a bond given by a person under charge of felony to indemnify his bail, see post, BONDS; INDEMNITY. As to bail or recognizance to keep the peace, see post, BREACH

OF THE PEACE. As to excessive bail or fines, see post, **CONSTITUTIONAL LAW; FINES AND COSTS IN CRIMINAL CASES.** As to recognizance in extradition proceedings, see post, **EXTRADITION.** As to bond to indemnify bail, see post, **INDEMNITY.** As to scire facias on recognizance, see post, **SCIRE FACIAS.**

½I. IN GENERAL.

Origin of Bail.—Bail rests on the common law, except as statute controls. *Ex parte Doyle*, 62 W. Va. 280, 282, 57 S. E. 824.

Object of State in Letting Prisoner to Bail.—In letting a prisoner to bail the object of the state is to secure the presence of the prisoner to answer the judgment of the court, and not the money that may be recovered upon a faulted recognizance. *Carr v. Sutton*, 70 W. Va. 417, 74 S. E. 239, 240.

A recognizance is an acknowledgment of conditional indebtedness entered of record in a court or certified by an officer authorized to take it. *State v. Smoot*, 82 W. Va. 63, 95 S. E. 526.

Validity of Recognizances Entered into before Adoption of Constitution of Virginia of 1902.—Const. of Va., schedule, § 5.

I. BAIL IN CIVIL CASES.

B. SINCE JULY 1ST, 1850.

1. In General.

Docketing Recognizances and Bonds.—Va. Code 1919, § 6479.

Bonds Required and Proceeding Thereunder When Capias Sued Out in Action or Suit.—Va. Code 1919, §§ 6420-6425. Barnes Code, ch. 106 § 33.

Defendant Leaving State — When Bail Required.—Va. Code 1919, § 6419. For form of capias, see Pollard's Code, 1920, p. 310.

4. Action on Bond.

Sufficiency of Declaration.—A declaration, in an action upon a bond executed by a debtor to secure his release from arrest, held bad on demurrer for want of sufficient averment of a breach of conditions in the bond. *State v. Keller*, 74 W. Va. 217, 81 S. E. 972.

Defenses.—An order of arrest issued in a pending action, under §§ 31 and 32, chap. 106, Barnes Code, is void, and the arrest of the debtor thereunder unlawful for want of jurisdiction, when the affidavit and bond required by §§ 30 and 31 of said chapter have not been filed; and, in an action on the bond executed by the debtor and his sureties to secure his release, he may defend on the ground of duress. *State v. Keller*, 74 W. Va. 217, 81 S. E. 972.

II. BAIL IN CRIMINAL CASES.

A. WHEN BAIL SHOULD BE GRANTED.

½. In General.

See Barnes Code, ch. 156, §§ 6, 7.

Applications for Bail—How Heard and Determined.—Const. of Va., § 109.

1. Before Conviction.

a. Jurisdiction to Admit to Bail and Take Recognizance.

(½) In General.

That court has power to bail which has power to try and determine the case. The power is inherent in that court by common law, because it has charge of the accused. *Ex parte Doyle*, 62 W. Va. 280, 284, 57 S. E. 824.

Powers of Officers Limited by Law.—Va. Code 1919, § 2824; Barnes Code, ch. 41, § 12.

When Recognizances Required.—Va. Code 1919, § 4972.

By Officer Making Arrest.—Barnes Code, ch. 159, § 19.

(1) By Justice.

Justices of the Peace. — Va. Code 1919, §§ 4828, 4837, 4839, 4845, 4846, 4847, 4848. Barnes Code, ch. 156, §§ 6, 7.

The statutes authorizing justices and other officers to take recognizances of persons charged with crime, for their appearances to answer the charges

made against them, do not contemplate the taking of formal bonds. *State v. Smoot*, 82 W. Va. 63, 95 S. E. 526.

"A justice of the peace has authority to admit to bail one who has been found guilty of crime by him at any time after an appeal has been taken from such judgment so long as such party is held upon the justice's commitment, that is until he is tried in the court to which the appeal is taken and either discharged or committed under its judgment." *Ex parte Kirby*, 87 W. Va. 434, 436, 105 S. E. 393.

Police Justices.—Pollard's Code 1920, p. 716.

(3) By General and Circuit Courts.

Admission to Bail by Court or Judge—Procedure.—Va. Code 1919, §§ 4829, 4832, 4834, 4837, 4847.

Power of Original Court after Venue Changed.—Va. Code 1919, § 4915; Barnes Code, ch. 159, §§ 16, 17.

(4) By Conservator of the Peace Generally.

See Va. Code 1919, § 4887.

(5) By Bail Commissioner.

Appointed by Bail Commissioner.—Va. Code 1919, § 6188.

Admission to Bail by Bail Commissioner—Procedure.—Va. Code 1919, §§ 4830, 4831, 4834, 4835, 4837.

g. Delivery of Bail-Piece to Bail.

Bail May Receive Bail Piece—Form.—Va. Code 1919, § 4838; Barnes Code, ch. 156, § 8.

2. After Conviction.

Bail after Conviction for Felonies.—After a conviction of a felony, pending a writ of error from the judgment, it is in the discretion of the circuit court to bail or not. *Ex parte Doyle*, 62 W. Va. 280, 284, 57 S. E. 824.

Bail after Conviction for Misdemeanors.—A circuit court has power to and should bail after conviction of a misdemeanor pending a writ of error from the judgment. *Ex parte Doyle*, 62 W. Va. 280, 57 S. E. 824.

B. FORM AND SUFFICIENCY OF RECOGNIZANCE.

1/4. In General.

See Barnes Code, ch. 156, § 20; ch. 162, §§ 2, 3.

1. What Recognizance Should Show.

See Va. Code 1919, §§ 4973, 4974; Barnes Code, ch. 156, §§ 8, 20.

If a bond so taken by a justice of the peace omits some of the facts essential to the validity of a recognizance, shown by a transcript from his docket and the complaint and warrant returned or transmitted with the bond, the transcript and all the papers referred to in it, including the bond, constitute a sufficient certificate of a recognizance, the bond being regarded and treated as the equivalent of an oral acknowledgment of conditional indebtedness, which the law authorizes the justice to take and certify, and the transcript, as the equivalent of a formal certificate he is legally authorized to make and transmit. *State v. Smoot*, 82 W. Va. 63, 95 S. E. 526.

In such case, the purpose for which the accused is required by his recognizance, to appear, may be sufficiently disclosed by necessary implication arising from terms used in the certificate so constituted. *State v. Smoot*, 82 W. Va. 63, 95 S. E. 526.

Formal acknowledgment of such a bond is not essential to the validity of a recognizance so taken and certified. *State v. Smoot*, 82 W. Va. 63, 95 S. E. 526.

A bond with such condition as would be proper in a recognizance, taken by a justice or other officer empowered to take recognizances, is, however, the legal equivalent of such recorded or certified acknowledgment. *State v. Smoot*, 82 W. Va. 63, 95 S. E. 526.

2. Penalty.

See Va. Code 1919, § 4973.

Increase in Amount of Bail.—Va. Code 1919, §§ 4833, 4836.

3. Oblige—Description.

See Va. Code 1919, § 4976.

4. Condition.**a. Place of Appearance.**

See Va. Code 1919, § 4973.

b. To Answer Offense Charged.

See Va. Code 1919, § 4973.

5. Recognizance for Infant or Insane Person.

See Va. Code 1919, § 4975; Barnes Code ch. 162, § 4.

7. Life of Recognizance.

In *Bratt v. Cornwell*, 68 W. Va. 541, 70 S. E. 271, it is held that an order of continuance is not required to keep the recognizance of the accused in force and to hold him for appearance to answer. The recognizance remains in force until final judgment, unless it is superseded by a new one, or the accused is committed to jail in default of giving a new one when required. *Kimes v. Showalter*, 68 W. Va. 545, 546, 70 S. E. 273.

C. DISCHARGE OR EXONERATION OF BAIL.**½. In General.**

See Va. Code 1919, § 4976.

Bail will generally be exonerated from liability where the performance of the conditions of the recognizance are rendered impossible by (1) the act of God, (2) the act of the law, or (3) the act of the obligee. *Bowling v. Com.*, 123 Va. 340, 96 S. E. 739.

Where the bail was guilty of no negligence whatever, and, without fault on his part, the commonwealth's attorney, the representative of the State, with full knowledge of the facts, voluntarily suffered the principal to be taken out of the control of his bondsmen by federal authority, by which act the latter was rendered powerless to produce the principal at the time and place of trial the bail should be exonerated from liability upon recognizance. *Bowling v. Com.*, 123 Va. 340, 96 S. E. 739.

1. Power of Courts over Recognizance.

Discharge of Recognizance in Misdemeanor Cases—Injured Party Acknowledging Satisfaction.—Va. Code 1919, §§ 4849, 4850.

Remission of Penalty—Discretionary with Courts.—At common law our courts possessed and in proper cases exercised the power of sparing the recognition before the same was adjudged to be forfeited and to decline to award a scire facias thereon. This rule has been extended and enlarged by statute so as to invest the courts with discretionary powers to meet the exigencies of particular cases by remitting the penalty in whole or in part, and rendering judgment on such terms and conditions as it deems reasonable. Code of 1904, § 4099. *Bowling v. Com.*, 123 Va. 340, 96 S. E. 739.

7. Reimbursement and Subrogation of Bail.

No Implied Promise to Reimburse Bail.—"It is settled, it seems, that when the bail pays a recognizance the law does not imply a promise by the accused to reimburse the bail. The books say that this is because there is no debt." *Carr v. Davis*, 64 W. Va. 522, 524, 63 S. E. 326.

Subrogation of Bail Surety to Lien of State.—It is settled that though a criminal recognizance is a lien for the state on land, yet the bail surety can not be substituted to the lien, and this for like reasons against raising an implied promise of repayment to the bail. *Carr v. Davis*, 64 W. Va. 522, 524, 63 S. E. 326. See post, SUBROGATION.

E. BREACH OF RECOGNIZANCE.

Retaken into Custody.—When an accused in a bastardy case defaults the recognizance for his appearance to answer the charge, he may again be taken into custody by capias or other process of the court. *Kimes v. Showalter*, 68 W. Va. 545, 70 S. E. 273.

One who, on bail, has forfeited his recognizance, is liable, even after it is

paid, to be rearrested and tried for his crime, whether felony or misdemeanor. 1 Bishop Crim. Pro., § 263a. *Kimes v. Showalter*, 68 W. Va. 545, 546, 70 S. E. 273.

End of Term—Default Not Entered of Record.—If the term at which the accused is recognized to appear adjourns without his default having been entered of record, the recognizance can not thereafter be forfeited, and the recognizers will be discharged from liability thereunder. *State v. Dorr*, 59 W. Va. 188, 53 S. E. 120.

How Recognizance Forfeited. — A recognizance given in a criminal proceeding, conditioned for the appearance of the accused before a circuit court on the first day of a certain term thereof, and that he will not depart thence without leave of court, can only be forfeited by calling the accused upon the recognizance of some time during the term, and if he fails to appear, by entering his default of record. *State v. Dorr*, 59 W. Va. 188, 53 S. E. 120.

Action on Recognizance—Limitation. —Va. Code 1919, § 5815; Barnes Code ch. 104, § 11.

Breach of Recognizance by Enlistment or Draft in the Army or Navy of the United States. — Pollard's Code 1920, p. 428.

Action Not Defeated by Defects in Form of Recognizance. — Va. Code 1919, § 4981; Barnes Code, ch. 162, § 10.

When Penalty Remitted.—Va. Code 1919, § 4980; Barnes Code, ch. 162, §§ 7, 9.

Record of Default and Issuance of Process on Recognizance.—Va. Code 1919, § 4978; Barnes Code, ch. 162, § 7.

Breach of Recognizance Before Justice—Procedure. — Va. Code 1919, § 4840.

G. POWERS AND RIGHTS OF SURETIES.

Extent of Powers. — "The powers given the bail over his principal are very great to enable him to perform his onerous duties and obligations to

the state, which he has voluntarily assumed." *Carr v. Sutton*, 70 W. Va. 417, 74 S. E. 239, 240.

May Arrest Principal.—Even without bail piece, which he may have by statute, the bail may exercise his right at common law to arrest his principal at any time for the purpose of surrendering him, as an incident to his engagement. *Carr v. Sutton*, 70 W. Va. 417, 74 S. E. 239.

Subrogation to Rights of State.—Where the obligation of bail is assumed the surety becomes in law the jailor of his principal, the custody of him being but a continuance of the original imprisonment, the surety being subrogated to all the rights and means which the state possesses to make his control effective. *Carr v. Sutton*, 70 W. Va. 417, 74 S. E. 239.

Discharge of Surety.—Where bail in disregard of his duty, and when required by a surety on a bond of indemnity taken by him, negligently fails to arrest and deliver his principal into custody and negligently allows him to escape and be and remain a fugitive from justice, such surety will be discharged, and may on that ground defend any action on his bond by the bail against him. *Carr v. Sutton*, 70 W. Va. 417, 74 S. E. 239.

Discharge of Surety by Surrender of Principal—Procedure. — Va. Code 1919, §§ 4982, 4983; Barnes Code, ch. 162, §§ 11, 12.

Discharge of Surety by Payment.—Va. Code 1919, § 4979; Barnes Code, ch. 162, § 8.

Right of Surety to Take Indemnity from Bail.—Va. Code 1919, § 4836.

H. RECOGNIZANCES FROM WITNESSES.

See Va. Code 1919, §§ 4845, 4973.

I. WHERE RECOGNIZANCES DEPOSITED.

When Taken out of Court. — Va. Code 1919, § 4977; Barnes Code, ch. 162, § 6.

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CROSS REFERENCES.

See the title BAILMENTS, vol. 2, p. 223, and references there given. In addition, see ante, AGENCY; AUTOMOBILES; post, CARRIERS; CONTRACTS; DEPOSIT; DETINUE AND REPLEVIN; FACTORS AND COMMISSION MERCHANTS; INNS AND INNKEEPERS; LARCENY; LIVERY STABLE KEEPERS; LOST PROPERTY; MASTER AND SERVANT; PLEDGE AND COLLATERAL SECURITY; SALES; WAREHOUSES AND WARHOUSEMEN. As to nature of deposit in bank, see post, BANKS AND BANKING.

I. DEFINITIONS AND DISTINCTIONS.

A. GENERAL DEFINITIONS.

"A bailment is the delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust." Trigg Co. v. Bucyrus Co., 104 Va. 79, 84, 51 S. E. 174, citing Story on Bailments, § 2.

The word bailment is one of comprehensive signification, and includes cases in which personal property is intrusted by one person to another by engagement, express or implied, to keep, to carry, to improve, to mend, to repair, or for the purpose of having any special service performed in re-

spect to it, and when this special service shall have been accomplished, to return to the owner or deliver it to another, according to the bailor's directions, or to conform to the object or purpose of the trust whatever it may be. Norfolk, etc., R. Co. v. Young, 10 Va. Law Reg. 913.

"A bailment signifies a contract, express or implied, resulting from delivery. The definition of Sir William Jones, as given by Story, is: 'A delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purposes for which they are bailed shall be answered;' or 'a delivery of goods in trust, on a contract expressed or implied, that the trust shall be duly exe-

cuted, and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed, or be performed.' That of Blackstone is: 'A delivery of goods in trust upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee;' or as stated in another form: 'Delivery of goods to another person for a particular use.' Story on Bailments, § 2; 5 Cyc. 165. Mr. Kent, blending those two definitions, says: 'Bailment is the delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered.' 2 Kent Com. (14th ed.) 759. Our case of *Coal Co. v. Richter*, 31 W. Va. 858, 8 S. E. 609, says: 'Bailments for the benefit of the bailor depositum or mandatum are founded upon express contract and require the assent of the bailee to make him responsible.' In 5 Cyc. 165, it is said: 'Since the duties and responsibilities of a bailee can not be thrust upon a person without his knowledge and against his consent, it is essential to a bailment that there be an acceptance of the subject matter.' It is also said in the same connection: 'It is not requisite that the acceptance be actual—one that is constructive being sufficient, as where a person comes into actual possession and control of a chattel fortuitously or by mistake, or takes possession of goods left rightfully by their owner and removes them to another place.'" *Walker v. Norfolk, etc., R. Co.*, 67 W. Va. 273, 275, 67 S. E. 722.

Involuntary Bailments. — Involuntary bailments arise whenever the goods of one person have by an unavoidable casualty or accident been lodged upon another's land, as where lumber floating in a river is cast upon a neighbor's land by a sudden freshet and left there, or where goods are blown upon another's land by a tem-

pest. The rights and liabilities of the parties in this class of cases are not very well settled. But it would seem that the owner of the land is a quasi bailee with liabilities similar to those of a finder of lost property. If he should refuse to deliver the goods to their owner or to permit him to remove them, he might be held liable for conversion. *Walker v. Norfolk, etc., R. Co.*, 67 W. Va. 273, 277, 67 S. E. 722.

B. DISTINGUISHED FROM OTHER TRANSACTIONS.

1. Sale.

See post, SALES.

3. Trust.

Bailment Involves Trust. — "While the applicant was a bailee, and not technically a trustee, a bailment involves a trust in the broad sense of the term. The bailee is a custodian of property which clearly embraces a trust." *Hannis Distilling Co. v. County Court*, 69 W. Va. 426, 431, 71 S. E. 576.

4. Custody of Public Money.

For reasons of public policy, the custodian of public money is held liable and must account therefor as a debtor or insurer, notwithstanding the relation, subsisting between him and the state or municipality, is substantially that of bailment for hire, and no loss of the fund, otherwise than by an act of God or the public enemy, will relieve him from the obligation to pay it. Loss by fire, theft, burglary, bank failure or the like does not relieve him, however careful and prudent he may have been. *Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832. See post, PUBLIC OFFICERS.

5. Finding Lost Goods.

"In *Hale on Bailments* 43, it is said: 'No man can be made a bailee of another's property without his consent. The finder of goods lost is under no obligation to take them into custody; but if he voluntarily assumes the care

of them, he is burdened with the liabilities of a depository." *Walker v. Norfolk, etc., R. Co.*, 67 W. Va. 273, 276, 67 S. E. 722.

III. RIGHTS AND LIABILITIES OF PARTIES.

A. BAILOK.

In an agreement between a contractor and his subcontractor for the rental by the former to the latter of machinery and appliances already on the ground at the date of the contract, for use in execution of the work, sublet, there is no implied warranty of the fitness of the machinery for such work, nor any implied undertaking on the part of the principal contractor to repair defects therein. *Garrettson & Co. v. Rinehart, etc., Co.*, 75 W. Va. 700, 84 S. E. 929.

Defendant Not Liable for Use of Machinery to Owner Who Had Leased It to One Using It in Work for Defendant.—Where the owner of machinery leases it to a contractor for the purpose of being used in the execution of certain work which such contractor has undertaken to perform, he can not hold the party for whom the work is being done liable for the use of such machinery, upon the ground that payments were made to the contractor for such work in advance of the time provided in the contract. *Patterson v. New River, etc., Coal Co.*, 87 W. Va. 177, 104 S. E. 491.

One who enters into a contract with another for the doing of certain work can not be held liable in an action at law by the owner thereof for the rental value of machinery used by such other in the doing of such work, even though it appears that he had knowledge that such machinery belonged to a third party who had leased it to the contractor for the doing of the particular work. *Patterson v. New River, etc., Coal Co.*, 87 W. Va. 177, 104 S. E. 491.

One Knowingly Using Another's Property Liable for Reasonable Value of Use.—One who, without the consent of the owner, knowingly uses for his

own benefit the property of another, will be liable in an action of assumpsit to such other for the reasonable value of the use so made of such property. *Patterson v. New River, etc., Coal Co.*, 87 W. Va. 177, 104 S. E. 491.

B. BAILEE.

1. In General.

A bailee having the actual possession of animals may maintain an action to recover damages for wrongfully killing or injuring them. *Jones v. Hines*, 85 W. Va. 496, 102 S. E. 143.

Limitation of Amount Recoverable against Laundries and Dyeing Companies.—*Pollard's Code*, 1920, p. 793.

3. Right to Compensation—Lien.

A bailee of personal property for care and preservation, under an agreement which does not fix the amount of his compensation, is entitled to the reasonable value of his services and may retain possession of the property as security therefor. *Caroway v. Cochran*, 71 W. Va. 698, 77 S. E. 278.

Lien of Mechanics for Repairs—Enforcement Appeal.—*Va. Code* 1919, §§ 6443, 6449-6451; *W. Va. Code*, ch. 75, §§ 2-5.

By the common law a lien is given to every mechanic, artisan or other workman for the value of the labor bestowed by him in the manufacture, or betterment of goods and chattels delivered to him therefor; but such lien continues only while the goods are retained in the possession of such bailee. *Keystone Mfg. Co. v. Close*, 81 W. Va. 205, 94 S. E. 132.

While at common law such lienor was given no right to enforce his lien except by retaining possession of the property until paid, our statute, § 12a, chapter 75, of the Code, enacted in 1909, enlarged this right by giving him the remedy by distress, prescribed thereby. *Keystone Mfg. Co. v. Close*, 81 W. Va. 205, 94 S. E. 132.

The owners of a saw mill employed by the owner of timber to go upon the land where the timber was located

and to occupy a mill site and yard provided for in the deed to him for said timber, and manufacture the same into lumber, had a common law lien on the lumber for the price of their work stipulated in the contract, and under the facts and circumstances in this case, the same was not lost or waived by permitting or suffering a representative of the owner to take the lumber from the dock where it was placed as sawed and putting it upon stick in said yard, even as against purchasers thereof from the owner of the lumber. *Key-stone Mfg. Co. v. Close*, 81 W. Va. 205, 94 S. E. 132.

4. Liability for Loss of Property.

a. In General.

Where goods in bailment are lost in an unprecedented flood, if the exercise of ordinary care on the part of the bailee would have saved them, not the act of God but a failure to use such care is the proximate cause of the loss. *Powell Music Co. v. Parkersburg Transfer, etc., Co.*, 75 W. Va. 659, 84 S. E. 563.

Bailment by Hiring—Loss of Animal.—If a horse hired to work in a wagon while at work becomes exhausted and sick, the hirer, knowing its condition, must desist from so working it, else if it die, he will be liable for its value. *Carney v. Rease*, 60 W. Va. 676, 55 S. E. 729.

Deviation from Contract.—When a horse is hired, for a particular trip, and is used for a further trip, such deviation from the contract alone will not render the hirer liable for the horse dying during the use by the hirer without proof that its death came from its use for the further trip. *Carney v. Rease*, 60 W. Va. 676, 55 S. E. 729.

Negligence of Bailee as Imputable to Bailor.—The negligence of a bailee of property, over whom the bailor is exercising no control at the time of the injury, is not imputable to the bailor. *Virginia R., etc., Co. v. Gorsuch*, 120 Va. 655, 91 S. E. 632.

Measure of Damages.—Where the property has been totally lost by the negligence of the bailee, a proper measure of the damages is the fair value of the property to the bailor at the time and place of the loss. *Powell Music Co. v. Parkersburg Transfer, etc., Co.*, 75 W. Va. 659, 84 S. E. 563.

5. Diligence Required of Bailee.

The care which a bailee takes of his own property is not a standard of his legal duty toward the property of the bailor. *Powell Music Co. v. Parkersburg Transfer, etc., Co.*, 75 W. Va. 659, 84 S. E. 563.

A bailee for hire must exercise ordinary care for the protection of the property in his custody; that is, such care as prudent men would ordinarily use toward their own under similar circumstances. *Powell Music Co. v. Parkersburg Transfer, etc., Co.*, 75 W. Va. 659, 84 S. E. 563. See, generally, post, CARRIERS; PLEDGE AND COLLATERAL SECURITY.

Gratuitous Bailee—Liable Only for Gross Neglect.—An agent or a bailee, acting without compensation and solely for the accommodation of the principal or bailor, is liable only for gross neglect. This is the general rule; and it is the rule applicable to the instant case. There is nothing in the evidence to remove the defendant's alleged agency from the general rule and bring it within the qualification thereof relating to agents who hold themselves out as possessing special and peculiar skill in the subject matter of the agency. *Yates v. Ley*, 121 Va. 265, 92 S. E. 837.

IV. PROCEDURE.

A½. PREREQUISITES TO SUIT.

As the custody of public funds by municipal officers partakes of the nature of a bailment for hire, a demand for payment is a condition precedent to a right of action for the money, but, in the absence of a prescribed or stipulated form of demand, it suffices to aver any facts, showing authority in

th: defendant to pay, and a desire on the part of the plaintiff for payment, known to the defendant. *Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832.

D. QUESTIONS OF LAW AND FACT.

In an action for damages based on

the failure of a bailee to use ordinary care, the question whether such care was used is usually one for the jury under all the circumstances of the case. *Powell Music Co. v. Parkersburg Transfer, etc., Co.*, 75 W. Va. 659, 84 S. E. 563.

BAKERS.—See post, LICENSES.

BALLOTS.—See post, ELECTIONS.

BANK BOSS.—See *Virginia Iron, etc., Co. v. Munsey*, 110 Va. 156, 65 S. E. 478. See, also, post, MASTER AND SERVANT.

BANK CHECKS.—See post, BANKS AND BANKING; BILLS, NOTES AND CHECKS.

BANK DEPOSITS.—See post, BANKS AND BANKING.

BANK EXAMINERS.—See post, BANKS AND BANKING.

B. & O. R. R. COMPANY.—See *Stout v. Baltimore, etc., R. Co.*, 64 W. Va. 502, 63 S. E. 317. See, also, post, JUSTICES OF THE PEACE; NAMES; VARIANCE.

BANKRUPTCY AND INSOLVENCY.

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See the title **BANKRUPTCY AND INSOLVENCY**, vol. 2, p. 232, and references there given. In addition, see ante, **AGENCY; APPEAL AND ERROR; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**; post, **BILLS, NOTES AND CHECKS; COMPROMISE; CREDITORS' SUITS; CROPS; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; PARTNERSHIP; RECEIVERS; WORKING CONTRACTS**. As to rights, duties and liabilities of insolvent corporations, see post, **BANKS AND BANKING; CORPORATIONS; INSURANCE**. As to insolvency depriving owner of selling property, see post, **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

I. BANKRUPTCY.**A. GENERAL CONSIDERATION.**

Purpose of Bankrupt Act.—The bankrupt law was intended to afford relief where the common law and state statutes afforded none. Its purpose was to relieve the bankrupt from his debts and to secure an equal division of his assets among his creditors, and to this end to provide a remedy against every act by which a failing debtor seeks an unequal distribution of his assets among his creditors. Every such act is condemned as being against the spirit and purpose of the bankrupt law. *Webb v. Lynchburg Shoe Co.*, 107 Va. 807, 60 S. E. 130. See, also, *Ruhl-Koblegard Co. v. Gillespie*, 61 W. Va. 584, 590, 5 S. E. 898.

B. BANKRUPTCY PROCEEDINGS.**1. Jurisdiction.**

Federal Courts.—The federal courts of bankruptcy are not courts of limited but of general jurisdiction in respect to matters in bankruptcy. *Kilgore v. Barr*, 114 Va. 70, 75 S. E. 762.

Under the Federal Bankruptcy Act, the bankruptcy court has no jurisdiction to defend property which it has set aside to the bankrupt as exempt, from adverse claims or liens that may

or may not be extinguished by the bankruptcy proceedings, nor to order the sale of the bankrupt's homestead. It will not entertain a proceeding to enforce a lien on such property, nor has it jurisdiction to determine the effect of waiver notes and the rights of creditors holding such obligations. *Barker-Bond Lumber Co. v. Whaley*, 117 Va. 642, 86 S. E. 160.

Where a referee in bankruptcy decides that an assignment of debt by a bankrupt constitutes a voidable preference, and the adverse claimants, without questioning the jurisdiction of the referee, except to his finding on the merits, and petition the District Court of the United States to review and reverse his order, that court has jurisdiction to determine the issue thus voluntarily submitted to it for its adjudication, and its decision is final and conclusive upon the parties. *Kilgore v. Barr*, 114 Va. 70, 75 S. E. 762.

State Courts.—A state court of competent jurisdiction may enforce actionable rights under the federal bankruptcy law, as well as may a federal court that also has jurisdiction in the premises. *Maxwell v. Davis Trust Co.*, 69 W. Va. 276, 71 S. E. 270.

The decision of the rights of credi-

tors having claims against a bankrupt's exempt property belongs to the tribunals of the state under the laws of which they are claimed. *Barker-Bond Lumber Co. v. Whaley*, 117 Va. 642, 86 S. E. 160.

A trustee in bankruptcy may sue in the courts of this state to recover money preferentially paid by a bankrupt to creditors contrary to the federal bankruptcy law. *Maxwell v. Davis Trust Co.*, 69 W. Va. 276, 71 S. E. 270.

In a suit by a trustee in bankruptcy to set aside a voidable transfer of property made by the bankrupt, the state court may set aside the transfer and thus vindicate the right of the trustee to take the property into the bankruptcy court as assets, but it has no province to order a sale of the property and an application of the proceeds toward the payment of the debt of the bankrupt. *Douthat v. Roberts*, 73 W. Va. 358, 80 S. E. 819.

When a trustee in bankruptcy resorts to the state court to recover money preferentially paid contrary to the bankruptcy law, the jurisdiction and practice are governed by the law of the state. *Maxwell v. Davis Trust Co.*, 69 W. Va. 276, 71 S. E. 270.

Jurisdiction in Equity to Recover Preferences.—A bill in equity by a trustee in bankruptcy does not lie to recover payments constituting preferences, when no ground of general equity jurisdiction is alleged, and no necessity for equitable relief is shown. The case is one for any action at law as for money had and received. *Maxwell v. Davis Trust Co.*, 69 W. Va. 276, 71 S. E. 270.

Equity has jurisdiction at the suit of a trustee in bankruptcy of an insolvent corporation, by virtue of § 40, chapter 53 of the W. Va. Code to recover from a stockholder dividends unlawfully declared and paid him, and to recover from officers and directors of such corporation money paid them as creditor within four months of the adjudi-

cation in bankruptcy, in violation of the federal bankruptcy act, and to follow the funds so improperly paid into any property or rights into which the same have been invested and to charge the same therewith. *Arnold v. Knapp*, 75 W. Va. 604, 84 S. E. 895.

Independently of any question of substitution or subrogation, equity has jurisdiction in such suit by a trustee in bankruptcy, to follow the money so unlawfully paid officers and directors, and to charge them therewith and the property into which they may have invested the same, for the benefit of all the creditors. *Arnold v. Knapp*, 75 W. Va. 804, 84 S. E. 895.

Same—Remedy at Law Adequate.—

The remedy at law being adequate, equity is without jurisdiction to entertain a suit brought by a trustee in bankruptcy solely to recover back money unlawfully paid by the insolvent debtor to one of his creditors in preference to others, in violation of the federal bankruptcy act. Section 2, ch. 74, Code of W. Va. has no application in such case. *Irons v. Bias*, 85 W. Va. 493, 102 S. E. 126.

Equitable Jurisdiction to Preserve Assets Fraudulently Transferred.—

Where a husband is insolvent and sells a part of his property for cash, and gives the purchase price to his wife without any consideration, she having no other property, he then immediately applies for a discharge from his debts under the bankruptcy laws of the United States, the trustee in bankruptcy of such person may maintain a suit in equity in a state court, prohibiting the wife from disposing of the money, and for the appointment of a receiver to take charge of the money and preserve it for the benefit of the bankrupt's estate, and to require the wife to deliver the money to the trustee. *Petric v. Buffington*, 79 W. Va. 113, 90 S. E. 557.

Where it is alleged in a bill, that a husband being insolvent gives money, the proceeds of his property sold while

he was insolvent, to his wife, who has no other property, and then immediately (that is within a few days) thereafter applies for a discharge in bankruptcy, and it is alleged in the bill that the wife has the money in her possession and refuses to deliver it to the trustee, that the transfer to her was without consideration and void under the bankruptcy act, and that he has the right to avoid such transfer to receive the money and to hold and disburse it for the benefit of the bankrupt's estate, and the wife appears to the bill and admits that the allegations of the bill are true, a special receiver may be appointed to take charge of such money and keep the same until the further order of the court. *Petrie v. Buffington*, 79 W. Va. 113, 90 S. E. 557.

Referees.—In discussing the subject of jurisdiction of referees in bankruptcy, Professor Staples, in his excellent work, "A Suit in Bankruptcy," observes (page 102): "Except when otherwise provided in the statute, the word 'court' may include 'referee' and, subject to such limitation, the jurisdiction of the referee is commensurate with that of the court by which he is appointed." *Kilgore v. Parr*, 114 Va. 70, 72, 75 S. E. 862.

"The orders of the referee upon all questions are subject to review by the court." *Kilgore v. Barr*, 114 Va. 70, 75 S. E. 762.

By Consent. — The principle that consent can not give jurisdiction of the subject matter of litigation has no application to cases arising under § 23-b of the bankruptcy Act of 1898, which plainly implies that jurisdiction of certain classes of controversies may be given by consent. *Kilgore v. Barr*, 114 Va. 70, 75 S. E. 762.

4. Effect of Bankruptcy Proceedings.

a. On Proceedings in State Courts.

(9) Bankruptcy of Defendant.

(1) Suits to Enforce Liens Acquired before Bankruptcy.

A suit begun in a state court to fore-

close definitely described mortgage and deed of trust liens generally will not be stayed upon the petition of the debtor filed therein based upon the pendency of a proceeding in bankruptcy against him instituted in a federal court six months thereafter. *Abney-Barnes Co. v. Davy-Pocahontas Coal Co.*, 83 W. Va. 292, 98 S. E. 298.

b. On Liens, Preferences and Fraudulent Conveyances.

(1) Liens Acquired within Four Months of Bankruptcy.

A lien on property of a bankrupt, acquired within four months of the time he was adjudged a bankrupt is void if the bankrupt was insolvent at the time the lien was obtained, but no presumption arises from the adjudication in bankruptcy that he was insolvent at that time or at any other time, and in the absence of any evidence on the subject, the judgment will be upheld. *Newberry Shoe Co. v. Collier*, 111 Va. 288, 68 S. E. 974.

"Not all liens obtained against one afterwards and within four months adjudged bankrupt are deemed null and void. It must appear that the person whose property is subject to the lien was insolvent at the time of the creation of the lien. It is evident a lien might be obtained against one who is adjudged a bankrupt within four months thereafter, but who was not insolvent at the time the lien was obtained. The act of bankruptcy and the insolvency might have occurred at some period subsequent to the creation of the lien. If so, the adjudication of bankruptcy would in no way determine whether or not the party was insolvent at the time the lien was created." *Newberry Shoe Co. v. Collier*, 111 Va. 288, 290, 68 S. E. 974, quoting *Jackson v. Valley Tie, etc., Co.*, 108 Va. 714, 718, 62 S. E. 964.

In order to invalidate a lien on the property of a person who within four months thereafter is adjudged a bankrupt, it is essential that it appear that

such person was insolvent at the time the lien was obtained, and the burden of proving such insolvency is upon the party alleging it. If it does not so appear, the lien is valid. *Jackson v. Valley Tie, etc., Co.*, 108 Va. 714, 62 S. E. 964.

Under the express terms of Virginia Code, 1904, § 2971, an attachment is a lien on personal property from the time of levying the attachment, or serving a copy thereof as provided by § 2967 of the Code, although it may be necessary subsequently to enter a judgment or decree for its enforcement. The lien of the attachment is perfected by the levy thereof, and the subsequent judgment or decree is simply the enforcement of a valid pre-existing lien. It is the creation of the lien and not its enforcement which is denounced by the bankrupt act, and if the lien is valid it may be enforced although bankruptcy intervenes between the creation of the lien and the decree for its enforcement. The lien created by the levy is not "inchoate" or "imperfect." *Jackson v. Valley Tie, etc., Co.*, 108 Va. 714, 62 S. E. 964.

Where a *lis pendens* lien was acquired in a state court on certain lots, and the same lots were subsequently allowed in bankruptcy proceedings as part of the debtor's homestead, held, that the *lis pendens* lien was not affected. *Newberry Shoe Co. v. Collier*, 111 Va. 288, 68 S. E. 974.

(2) Preferences Given within Four Months of Bankruptcy.

At common law a debtor might lawfully prefer one or more of his creditors, in the absence of actual fraud, but equality is the policy of the bankrupt law, and it is declared that all transfers by the bankrupt within four months prior to the filing of his petition in bankruptcy, made with intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor except as

to purchasers in good faith and for a present fair consideration. The intent of the debtor need not be corrupt, under § 67 (e) of the act, nor is it necessary that the creditor preferred should share in the intent, but if any disposition of his property is made by the bankrupt within four months before the filing of his petition in bankruptcy, with the object of defeating his creditors of their right to share equally in the distribution of his assets, it should be considered as having been made with intent to hinder, delay and defraud. The conversion of practically the whole of the bankrupt's estate into money, and the payment of that money to some of the creditors to the exclusion of others a few days before the filing of a petition in bankruptcy, constitutes a transfer of property within the meaning of the bankrupt act, and whether the same was made with intent to hinder, delay and defraud the creditors of the bankrupt should be submitted to the jury under all the evidence in the cause. *Webb v. Lynchburg Shoe Co.*, 106 Va. 726, 56 S. E. 581.

Payments of money by a bankrupt to creditors, enabling them to obtain a greater percentage of their debts than other creditors of the same class, made within four months prior to the filing of the bankruptcy petition, constitute illegal and voidable preferences under the federal bankruptcy act, if the creditors receiving the payments have reasonable cause to believe that preferences are thereby intended. *Maxwell v. Davis Trust Co.*, 69 W. Va. 276, 71 S. E. 270.

Preferences by Corporate Officers.—

When a corporation becomes insolvent, or in failing condition, its officers and directors no longer represent the stockholders, but become trustees of the corporate property and assets for the benefit of all the creditors, and can not then prefer themselves or other creditors out of the money funds, funds or property of the corporation. And

all payments or preferences so made within four months of adjudication in bankruptcy are voidable and recoverable by the trustee in bankruptcy after adjudication on like principles of trusteeship. *Arnold v. Knapp*, 75 W. Va. 804, 84 S. E. 895.

Payments on notes executed to himself by such managing officer and charged to him in his account of money loaned or other obligation of his company, and endorsed by him to a third person, and subsequently paid by him or by his procurement out of the funds of his insolvent company, and within four months of the adjudication, will be treated as payments to him and voidable at the suit of the trustees in bankruptcy against him. *Arnold v. Knapp*, 75 W. Va. 804, 84 S. E. 895.

Same—Knowledge of Corporate Officers.—A managing officer and director of an insolvent corporation receiving such priority of payment and preference will not be heard to plead ignorance of the insolvency of his corporation existing at the time of such preference, so as to avoid recovery thereof by the trustee in bankruptcy. *Arnold v. Knapp*, 75 W. Va. 804, 84 S. E. 895.

Same—Necessary Allegations. — To entitle a trustee in bankruptcy to recover back money collected by a creditor of the bankrupt by means of a judgment recovered within four months of the filing of the petition in bankruptcy, on the ground that it created a preference voidable under § 60 of the Federal Bankruptcy Act, it is his duty to aver and prove that the bankrupt was insolvent at the time the judgment was obtained. *McNeel v. Folk*, 75 W. Va. 57, 83 S. E. 192.

(3) Fraudulent Conveyances Made within Four Months of Bankruptcy.

Under § 67e of the bankrupt act the debtor's intent and purpose alone governs in determining whether a conveyance was made with intent to hinder,

delay or defraud his creditors. The creditor preferred need not participate in this intent and purpose in order to render the preference void. *Webb v. Lynchburg Shoe Co.*, 107 Va. 807, 60 S. E. 130.

"In order to avoid a transfer under this provision three things must concur: First, the debtor must have been adjudicated a bankrupt under the provisions of this act; second, the transfer must have been made subsequent to the passage of the act and within four months prior to the filing of the petition; third, the existence of an intent and purpose on the part of the bankrupt to hinder, delay or defraud his creditors, or any of them. If any of these elements are wanting the transfer can not be avoided under this provision." *Webb v. Lynchburg Shoe Co.*, 106 Va. 726, 731, 56 S. E. 581.

Where an insolvent debtor conveys to one of his creditors a part of his estate in consideration of a debt which he owes to such creditor, and for a present consideration paid in money, and such debtor is subsequently, within four months, adjudicated a bankrupt, and such creditor at the time of such conveyance knew, or had reason to believe that such transfer would result in giving him a preference over other creditors of the bankrupt of the same class, such conveyance will be held void at the suit of the trustee in bankruptcy, except to the extent that there was a present consideration paid therefor. *Payne v. Sehon, etc., Co.*, 81 W. Va. 128, 94 S. E. 34.

Lien.—Where a preferential conveyance by an insolvent to a creditor is held void at the suit of the trustee in bankruptcy the conveyance will be held to create a lien upon the property to secure the present consideration paid therefor, and the property turned over to the bankruptcy court to be administered therein. *Payne v. Sehon, etc., Co.*, 81 W. Va. 128, 94 S. E. 34.

Right to Sue to Recover Property Fraudulently Transferred.—A creditor

of one discharged in bankruptcy can not maintain a suit to set aside an alleged fraudulent transfer of the property of the bankrupt, although such transfer may have been made more than four months prior to the filing of the petition in bankruptcy. The right to sue for and subject to the payment of the bankrupt's debts such property, is vested alone in the trustee, and the failure of the trustee to bring such suit within the time prescribed by law does not transfer the right to do so to the creditor. *Ruhl-Koblegard Co. v. Gillespie*, 61 W. Va. 584, 56 S. E. 898.

C. EXEMPTIONS.

See post, **HOMESTEAD EXEMPTIONS.**

Homestead Exemption. — When a bankrupt designates property as a homestead all the federal court of bankruptcy can do is to set it aside to him. A creditor desiring to subject such property to the payment of a debt paramount to the homestead, must pursue his remedy in the state court. Such exempted property constitutes no part of the assets in bankruptcy, the assignee in bankruptcy acquires no title thereto, and the refusal of the bankrupt court to take jurisdiction of such claims is no bar to their enforcement in the state court. *Newberry Shoe Co. v. Collier*, 111 Va. 288, 68 S. E. 974.

The salary of an officer and director is not the debt or claim of a wage earner protected by the bankruptcy act. *Arnold v. Knapp*, 75 W. Va. 804, 84 S. E. 895.

D. ASSIGNEES OR TRUSTEES IN BANKRUPTCY.

2. Title to Property of Bankrupt.

a. What Passes to Assignee or Trustee.

(1) In General.

"Title to all the property of a bankrupt vests in the trustee, and the trustee alone can sue to recover it." *Schnurman v. Biddle & Co.*, 109 Va. 702, 705, 64 S. E. 977.

If a material man fails to acquire a mechanic's lien on the building into which his materials are placed, the amount due him therefor by a subcontractor is a general unsecured debt due to the material man, and upon the bankruptcy of the subcontractor, the amount due him by the general contractor passes to his trustee as assets of the bankrupt. This result is not affected by the fact that in a suit by the material man to enforce a supposed lien on the building, the general contractor pays into court, the amount due by him to the sub-contractor and asks that it be so applied as to protect him. *Furst-Kerber Cut Stone Co. v. Wells*, 116 Va. 95, 81 S. E. 22.

Rights of Trustee Subject to Equity against Bankrupt.—The rights of a trustee in bankruptcy generally are not greater than those of the person whose estate he represents. He takes the property of the bankrupt, in cases unaffected by fraud, not as a bona fide purchaser, but in the same capacity and condition that the bankrupt himself held it, and subject to all equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the Bankruptcy Act. *Custard v. McNary*, 85 W. Va. 516, 102 S. E. 216.

Right of Trustee to Recover—Amount Paid by Owner under Contract with Bankrupt Construction Company to Sub-contractor.—Where a construction company, before bankruptcy, enters into a building contract whereby it engages to erect and complete a building on or before a specified date, with a provision authorizing the owner, upon failure or inability of the contractor to secure sufficient supplies, material or labor to prosecute the work continuously and diligently to completion, to secure the same and deduct the cost thereof from any amount then due the contractor or which may there-

after be due him, and a subcontractor, fearing the insolvency of his principal, refuses to proceed with his part of the work, but later completes it after receiving verbal assurance from the owner, in accordance with the provision of the contract, that the latter will pay him out of the balance due the contractor, and he does so pay him, the sum so paid constitutes no part of the assets of the bankrupt, and recovery thereof may not be had at the suit of the trustee. *Custard v. McNary*, 85 W. Va. 516, 102 S. E. 216.

3. Sales and Conveyances by Assignee. a. In General.

Deed from Assignee as Evidence.—

In suits pending prior to the passage of chapter 76, act of 1907, a deed from assignees in bankruptcy is not evidence of title, unless there is introduced in support of it enough of the record of the proceedings of the bankrupt court on which it is based to vouch authority for its execution and to show that the court had jurisdiction of the person whose property is directed to be conveyed and of the subject matter. *Despard v. Percy*, 65 W. Va. 140, 63 S. E. 871.

Oil and Gas Lease—Royalties.—

Where a tract of land, subject to an oil and gas lease, is subdivided in a proceeding in bankruptcy, and such sub-divisions sold separately by the trustee to different purchasers, the purchaser of each sub-division takes the same subject to such oil and gas lease; and should the lessee in such oil and gas lease thereafter produce oil or gas from such tract of land the royalties will be payable to the owner of the sub-division upon which the wells are drilled from which such production is had. *Pittsburg, etc., Gas Co. v. Ankrom*, 83 W. Va. 81, 97 S. E. 593.

d. Rights of Purchasers.

A purchase by the appellants from the trustee in bankruptcy of C. Fisher Collier's interest in his mother's estate

did not affect the right of the appellees, and judgment creditors of C. Fisher Collier, to subject the lands of which Robert W. Collier died seized and possessed to their judgment. At the time of the said purchase by the appellants they were parties to this suit and had full knowledge of its object, and they could not by any contract or agreement with the said trustee in bankruptcy to which S. and R. were not parties affect the latter's rights. *Collier v. Seward*, 116 Va. 377, 382, 82 S. E. 100.

Dower in Surplus.—In an involuntary bankruptcy proceeding the wife of the bankrupt, who had previously joined her husband in the execution of a trust deed lien on his land and who was also a creditor of the general class, appeared before the referee at a convention of the creditors and orally stated that she was willing for the land to be sold free of her dower right, "and that she receive a gross sum to be determined according to law out of the purchase price of said real estate in full payment and satisfaction for her said contingent right of dower"; and the land was ordered sold and was accordingly advertised and sold free of her dower right, but no provision was made for the payment of any gross sum in lieu of dower and none was in fact paid to her, and after discharging the lien, all the residue of the purchase money was applied on the bankrupt's debts. After the bankrupt's death his widow brought this suit to recover commuted dower in the surplus proceeds of sale, held: She is entitled to dower in said surplus, which may be enforced as a lien against the land in the hands of any subsequent holder. *Carver v. Ward*, 81 W. Va. 644, 95 S. E. 828.

Same—Consent to Bankruptcy Sale.

—Her conditional consent being a matter of record, it was incumbent on the purchaser to see that the condition, if possible of performance, was complied with, or that she was otherwise pro-

tected, before payment and distribution of the purchase money. *Carver v. Ward*, 81 W. Va. 644, 95 S. E. 828.

Her consent to a sale of the land free from her dower right being conditional and the condition never having been complied with, and no provision having been made for her protection, she is not estopped to assert her dower as a lien against the land. *Carver v. Ward*, 81 W. Va. 644, 95 S. E. 828.

Same—Decree of Bankruptcy Court.

—The decree of the bankruptcy court is not an adjudication of her dower right, the same not having been made an issue by any pleading. *Carver v. Ward*, 81 W. Va. 644, 95 S. E. 828.

4. Actions by and against Trustees.

See ante, "Jurisdiction," I, B, 1.

Personal Judgment against Bankrupt.—In a suit in a court of this state by a trustee in bankruptcy to set aside a voidable transfer of property made by the bankrupt, it is error of which the bankrupt may complain to decree a personal judgment against him in favor of the trustee for the aggregate of the debts allowed in the bankruptcy proceedings. *Douthat v. Roberts*, 73 W. Va. 358, 80 S. E. 819.

Evidence Insufficient to Sustain Decree.—In an action by a trustee to set aside a conveyance by a bankrupt to his wife, acknowledged and delivered within a month of his involuntary bankruptcy, evidence held insufficient to sustain a decree for the trustee. *Silling v. Todd*, 112 Va. 802, 72 S. E. 682.

Order of Referee Requiring Subscriber to Pay Balance to Trustee Does Not Prevent Setting up of Subscriber's Defense.—The order of a referee in bankruptcy upon a rule issued by him against a subscriber to the corporate stock of a corporation adjudged to be a bankrupt, requiring him to pay the balance ascertained to be due to the trustee in bankruptcy, is not conclusive of the rights of such subscriber in an action by the trustee against him to re-

cover the amount claimed on such subscription. In such suit the defendant may interpose any reasonable defense he may have thereto. *Martin v. Cushwa*, 86 W. Va. 615, 104 S. E. 97.

Objections for First Time on Appeal.—In an action by a trustee in bankruptcy to recover a debt which the referee in bankruptcy has decided belonged to the estate of the bankrupt, and not the assignee of the debt, objection can not be made in this court for the first time that the referee was without authority to act in the premises, where it appears that his jurisdiction was not questioned at the time he acted, but was in fact admitted by filing a petition in the district court to have his decision reversed on the merits. *Kilgore v. Barr*, 114 Va. 70, 75 S. E. 762.

Intervention by Trustee. — "Under the bankrupt act of 1898, the trustee has the right to intervene and become a party to a suit prosecuted by or against a bankrupt at the time of his adjudication, but he is not bound to do so. Upon the failure of the trustee to apply to be substituted in place of the bankrupt, or to become a party to the suit, it seems that it may be prosecuted or defended by the bankrupt, whether the result of the litigation enures to his own benefit or the benefit of his creditors; and the trustee, although he does not become a party to the suit, will be bound by the judgment or decree entered in the cause. See 1 Remington on Bankruptcy, §§ 1640, 1644." *Heckscher v. Blanton*, 111 Va. 648, 661, 69 S. E. 1045.

A trustee in bankruptcy may obtain permission from the bankrupt court to intervene and prosecute a suit brought in the state court by the bankrupt before his adjudication. But his failure to intervene will not abate the suit. *Weaver Mercantile Co. v. Thurmond*, 68 W. Va. 530, 70 S. E. 126.

If the trustee fail to intervene in such suit in the lower court he can not do so by petition in the supreme court

after the case has been brought here on writ of error or appeal. Such petition presents original matter which does not belong to the jurisdiction of the supreme court. *Weaver Mercantile Co. v. Thurmond*, 68 W. Va. 530, 70 S. E. 126.

E. DISCHARGE.

1. Discharge as Release of Debts.

a. Provable Debts Discharged.

A discharge in bankruptcy releases the bankrupt from all debts and claims which are made provable against his estate and which existed on the day the petition was filed, except such debts as are by the bankruptcy act, 1898, excepted from a discharge in bankruptcy. *Ruhl-Koblegard Co. v. Gillespie*, 61 W. Va. 584, 56 S. E. 898.

b. Debts Not Discharged.

(5) Liens.

A discharge in bankruptcy does not necessarily affect a specific lien on the bankrupt's property, but only releases him from personal liability. *Newberry Shoe Co. v. Collier*, 111 Va. 288, 68 S. E. 974.

"The effect of a discharge is to release the personal liability only. It does not affect liens upon his property. If they are valid, under the laws of the state and the bankrupt act, they may be enforced after a discharge is granted. Thus a judgment which has become a lien on property will continue to be so, but if the judgment is merely a personal liability, it is released by a discharge. In an action to enforce a mechanic's lien or mortgage the discharge will not bar the proceedings except as to a personal judgment for a deficiency. A vendor's lien for the purchase price of property sold may be enforced after a discharge, provided such lien is recognized by the state laws.' *Loveland on Bankruptcy*, § 285." *Ruhl-Koblegard Co. v. Gillespie*, 61 W. Va. 584, 56 S. E. 898.

(6) Liability for Negligence.

A claim for damages for negligently permitting plaintiff's house to be destroyed while in the possession of the defendant as tenant is not a provable debt under the acts of congress relating to bankruptcy, and hence a discharge in bankruptcy is no answer to an action to recover such damages. Liabilities arising purely ex delicto are not provable under said acts. *Winfree v. Jones*, 104 Va. 39, 51 S. E. 155.

2. Pleading Discharge.

To avail as a defense to a pending suit in a state court, a subsequent discharge in bankruptcy must be pleaded. The discharge does not ipso facto oust the state court of jurisdiction to render judgment. *First Nat. Bank v. Cootes*, 74 W. Va. 112, 81 S. E. 844; *Union Bank v. Ferguson*, 2 Va. Law Reg. N. S. 338.

II. INSOLVENCY.

A. DEFINITION AND GENERAL CONSIDERATION.

"A person or corporation is insolvent within the meaning of the bankruptcy act, 'whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.' *Collier on Bankruptcy* (10th ed. 1914) page 2. The statute says 'fair valuation.' This has been interpreted to mean present market value, and the value which the debtor might realize thereon if permitted to continue in business." *Arnold v. Knapp*, 75 W. Va. 804, 84 S. E. 895.

Adjudication.—No presumption arises from the adjudication in bankruptcy that the debtor was insolvent at the time the judgment was obtained. *McNeel v. Folk*, 75 W. Va. 57, 83 S. E. 192.

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CROSS REFERENCES.

See the title BANKS AND BANKING, vol. 2, p. 254, and references there given. In addition, see ante, AGENCY; ATTACHMENT AND GARNISHMENT; post, LIMITATION OF ACTIONS. As to whether an employee of a bank, in the perpetration of a fraud upon a depositor is an agent of the bank, see ante, AGENCY. As to agent's knowledge as notice to bank, see ante, AGENCY; post, OFFICERS AND AGENTS OF PRIVATE CORPORATIONS. As to garnishment of bank deposits, see ante, ATTACHMENT AND GARNISHMENT. As to a certificate of deposit being a negotiable instrument, see post, BILLS, NOTES AND CHECKS. As to whether knowledge of the infirmities of commercial paper acquired by an officer or director of the bank outside of his official duties who is officially interested in having the paper discounted is attributable to the bank, see post, BILLS, NOTES AND CHECKS. As to the liability of a county treasurer for loss of funds through the insolvency of the bank in which deposited, see post, COUNTIES. As to the criminal prosecution of a person who draws a check upon a bank in which he has no funds, see post, FALSE PRETENSES AND CHEATS. As to whether an agreement by a bank to discount notes with certain collateral, and to carry the loan until a third person can sell the collateral at a stated price

and pay the notes with the proceeds, is an original undertaking on the part of the bank, see post, **FRAUDS, STATUTE OF**. As to gift of bank stock, see post, **HUSBAND AND WIFE**. As to payment of a rental of an oil lease by depositing the money in a bank to the credit of the lessor, see post, **MINES AND MINERALS**. As to conflict between Acts 1915, p. 209, and Code 1904, § 1040a, as to taxation of bank stock, see post, **STATUTES**. As to recovery of money paid on forged indorsement on check, see 2 Va. Law Reg., N. S., 63. As to liability of bank for misappropriation of trust funds, see 2 Va. Law Reg., N. S., 69. As to double liability of stockholders, see 2 Va. Law Reg., N. S., 73. As to negligence of bank in making collections, see 3 Va. Law Reg., N. S., 213. As to duty and liability of bank to make remittance, see 2 Va. Law Reg., N. S., 231. As to national banks as executors, administrators and trustees, see 2 Va. Law Reg., N. S., 241. As to national banks as fiduciaries, see 3 Va. Law Reg., N. S., 481. As to power of national banks to contract to loan moneys, measures of damages for breach, and application of statute of frauds to such contract, see 3 Va. Law Reg., N. S., 705.

½I. IN GENERAL.

Code Provisions Applicable to Banks.

—Barnes Code, ch. 54, § 76; Va. Code 1919, § 4098.

Incorporation.—Va. Code 1919, § 4098; Barnes Code, ch. 54, § 78; W. Va. Const. Art. XI, § 1.

Co-Operative Banking Associations.

—Barnes Code, ch. 54, § 78a (5).

Name.—Va. Code 1919, § 4145.

By-Laws.—Va. Code 1919, § 4106; Barnes Code, ch. 54, § 81b (5).

Weights and Measures.—Va. Code 1919, § 1484.

Weights Not Sealed.—Va. Code 1919, § 1485.

Property in Banking Scheme.—Where one originated an idea or scheme of banking, he could not have a property right in such a method or idea for conducting business without any physical means or devices for carrying it out, since he could not put such an idea into operation without it at once escaping his own grasp and becoming the property of mankind. *Stein v. Morris*, 120 Va. 390, 91 S. E. 177. See post, **PATENTS AND TRADEMARKS**.

II. DEFINITIONS.

A. IN GENERAL.

Definition of Bank, etc.—Va. Code 1919, §§ 4123, 5752, amended by Va. Acts 1920, p. 825; Barnes Code, ch. 54, § 79a (6), p. 1036, ch. 98A, § 191.

Institutions Included under Laws

Relating to Banks.—Va. Code 1919, § 4129.

When Word "Bank" Includes Savings Bank, etc.—Va. Code 1919, § 4123, amended by Va. Acts 1920, p. 825.

III. BRANCH BANKS.

See post, "Taxation," X.

½A. IN GENERAL.

Va. Code 1919, § 4101.

Contracts with Successor—Authority of President—Instruction.—It was held that the instruction in question was not prejudicial to the parent bank. *Mumford Banking Co. v. Farmers, etc., Co.*, 116 Va. 449, 82 S. E. 112.

Same—Question for Jury.—*Mumford Banking Co. v. Farmers, etc., Co.*, 116 Va. 449, 82 S. E. 112.

Same—Ratification.—*Mumford Banking Co. v. Farmers, etc., Co.*, 116 Va. 449, 82 S. E. 112.

IV. RIGHT TO EXERCISE BANKING FUNCTIONS.

See post, "Statutes Applicable to Savings Banks," XVI, ½A.

½A. IN GENERAL.

Authority for Incorporation.—Barnes Code, ch. 54, §§ 2, 9.

Necessity for Incorporation.—Barnes Code, ch. 54, § 776.

Certificate of Authority.—Barnes Code, ch. 54, § 81a (10), p. 777; ch. 54, § 78a (2); Va. Code 1919, § 4105, amended by Va. Acts 1920, p. 819.

See post, "Certain Offenses by, against or Relating to Banks," XXI.

Business of Banking out of State Prohibited.—Va. Code 1919, § 4130.

Who Prohibited from Engaging in Business of Banking.—Va. Code 1919, §§ 4130, 4240.

Limited Partnerships for Operating Banks Are Unlawful.—Barnes Code, ch. 100, § 1.

Amount of Reserve Fund of Bank, etc.—Barnes Code, ch. 54, § 80; Va. Code 1919, § 4119.

Holidays—Right to Transact Business.—Va. Laws 1918, p. 121.

A. CHARTER.

½. Issue of Charter.

Discretion of Commissioner of Banking.—That part of § 78, ch. 54, Code, as amended in 1919, which provides that "hereafter no charter shall be issued to any bank to do business in this state until the application therefor has been approved in writing by the commissioner of banking," vests in such commissioner discretionary power to approve or reject such application. *State v. Hill*, 84 W. Va. 468, 100 S. E. 286.

The refusal of the commissioner of banking to approve an application for a charter in a proper exercise of such discretionary power is not subject to judicial review on the ground that a different decision should have been made, unless it clearly appears that he has wilfully and arbitrarily disregarded his duty, or that his decision was due to caprice, passion, partiality or corruption. *State v. Hill*, 84 W. Va. 468, 100 S. E. 286.

1. Power of Legislature to Repeal, Alter or Modify.

Repeal or Modification.—Va. Code 1919, § 4134.

V. RIGHTS, POWERS, DUTIES AND LIABILITIES.

A. OF AUTHORIZED BANKS.

½. In General.

Powers of Banks.—Va. Code 1919, §§ 4098; 4103, 4111, amended by Va.

Acts 1920, p. 820; Barnes Code, ch. 54, § 78, amended by W. Va. Acts 1919, ch. 60.

Same—Acceptances and Letters of Credit.—Va. Code 1919, § 4112.

Modification of Powers and Duties.—Va. Code 1919, § 4129.

1. With Respect to Deposits.

As to the offense of a bank in receiving deposits when insolvent, see post, "Certain Offenses by, against or Relating to Banks," XXI.

½a. In General.

See post, "Depositors' Accounts and Passbooks," V, A, 1, e.

Authority to Receive Deposits.—Barnes Code, ch. 54, §§ 78, 81a (10), amended by W. Va. Acts 1919, c. 61; Va. Code 1919, § 4111.

Authority to Sell Foreign Exchange.—Barnes Code, ch. 54, § 78, amended by W. Va. Acts 1919, ch. 60.

Safety Deposit Box Hired by Two or More Persons—Right of Access to.—Va. Code 1919, § 4128.

Deposits—Limitation of Action to Recover.—Va. Code 1919, § 5810.

Care Required of Bank.—In their relations with depositor, banks are held, as they ought to be, to rigid responsibility. But the principles governing those relations ought not to be so extended as to invite or encourage such negligence by depositors in their examination of their bank accounts as is inconsistent with the relations of the parties or with those established rules and usages sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors. *First Nat. Bank v. Richmond Elect. Co.*, 106 Va. 347, 56 S. E. 152.

a. General Deposits.

Deposits by Minors — Payment.—Barnes Code, ch. 54, § 81a (21).

Payment of Deposits to Married Women.—Barnes Code, ch. 66, § 8.

(1) Relation between Bank and Depositor.

See post, "With Respect to Collections," V, A, 2.

Use of Deposits by Bank.—Va. Code 1919, § 4113.

Relation of Debtor and Creditor.—Where there is a general deposit of money in a bank, the title to and beneficial ownership of the money is vested in the bank, and the relation between it and the depositor is that of debtor and creditor. So likewise where a check drawn on a particular bank is presented to that bank for general deposit and the bank gives the depositor credit therefor, the relation between the bank and the depositor is that of debtor and creditor, since the giving of credit under such circumstances is practically and legally the same as if the bank had paid the money to the depositor and had received it again on deposit. *Miller v. Norton*, 114 Va. 609, 77 S. E. 452, citing *Robinson v. Gardiner*, 18 Gratt. (59 Va.) 509, 510, and cases cited; *Pendleton v. Commonwealth*, 110 Va. 229, 234, 65 S. E. 536; *Tiffany on Banks and Banking*, pp. 12, 13; 2 *Morse on Banks and Banking* (4th ed.) sec. 568; *Fayette Nat. Bank v. Summers*, 105 Va. 689, 54 S. E. 862.

Same—Bailment.—"It is well settled that a general deposit in a bank creates the relation of debtor and creditor between the bank and the depositor, and that although it is called a deposit it is a loan and not a bailment. *Robinson v. Gardiner*, 18 Gratt. (59 Va.) 509, 510, and cases cited." *Pendleton v. Commonwealth*, 110 Va. 229, 234, 65 S. E. 536. See also, *Brown v. Lynchburg Nat. Bank*, 109 Va. 530, 537, 64 S. E. 950.

Same—Checking Privilege.—The relation between a bank and a depositor is that of debtor and creditor. The deposit creates an ordinary debt, not a privilege or right of a fiduciary character. It is a loan with the superadded obligation that the money is to be paid when demanded by check. *Deal v. Merchants, etc., Bank*, 120 Va. 297, 91 S. E. 135.

"The relationship of banker and depositor is that of debtor and creditor,

and the contract of the bank is to safely keep the money and to pay it out on check or order of the depositor. *United States Fidelity, etc., Co. v. Home Bank*, 77 W. Va. 665, 669, 88 S. E. 109.

The collection of a draft by a bank for a customer in the ordinary course of business and placed to the customer's credit amounts to a general deposit by the latter, and creates the relation of debtor and creditor between them. In such case, the customer or depositor has the right to demand of the bank an equivalent amount of money, but not the specific coins or other currency deposited. *Pennington v. Third Nat. Bank*, 114 Va. 674, 77 S. E. 455; *Miller v. Norton*, 114 Va. 609, 77 S. E. 452.

(2) Nature of a Deposit.

See ante, "Relation between Bank and Depositor," V, A, 1, a, (1).

(3) Title to Deposit.

See ante, "Relation between Bank and Depositor," V, A, 1, a, (1); post, "Ownership of Paper Placed for Collection," V, A, 2, a.

(5) Deposits by Agents and Fiduciaries.

(b) Rights of Principal or Other Person Represented.

Deposit by Agent—Misappropriation—Liability of Bank.—The mere fact that a check payable to an agent as such is offered for deposit in a bank, and, by direction of the agent, credited to his individual account, is not sufficient to charge the bank with notice of fraudulent intent of the agent to misappropriate the trust fund and to render it liable for the default of the fiduciary. *Life Ins. Co. v. American Nat. Bank*, 6 Va. Law Reg., N. S. 106.

Same—Deposit by Administrator.—The mere fact that checks payable to an administrator in his fiduciary character are offered for deposit in a bank, and, by direction of the fiduciary, credited to his individual account, is not sufficient to charge the bank with no-

tice of fraudulent intent of the fiduciary to misappropriate the trust fund, or to require the bank to supervise the subsequent distribution of the funds, and to render it liable for the default of the fiduciary. *United States Fidelity, etc., Co. v. Home Bank*, 77 W. Va. 665, 88 S. E. 109.

To render a bank liable for the default or misappropriation of funds by an administrator deposited to his individual or fiduciary account, the bank must have participated in the fraud or misappropriation, as by appropriating the funds, or receiving payment out of such fund on the individual indebtedness of the fiduciary to it, or by otherwise co-operating in the fraud of the fiduciary. *United States Fidelity, etc., Co. v. Home Bank*, 77 W. Va. 665, 88 S. E. 109.

Unless there is something in the character of the account of an administrator to individualize it, a bank has ordinarily no right to exercise a supervisory control over the funds on deposit, nor to refuse payment of the administrators' checks drawn against his account. *United States Fidelity, etc., Co. v. Home Bank*, 77 W. Va. 665, 88 S. E. 109.

Deposit of Checks Payable to "B., Adm'r" as Notice to Bank of Trust Fund.—"The checks deposited were payable to Boring, Adm'r; he had absolute dominion over them, and of the proceeds thereof. He was authorized to collect the money from the bank on which they were drawn, and deposit it according to his pleasure in any other bank, or he could deposit the checks to his credit individually, or in any other way without thereby rendering himself liable as for a breach of trust, and the "descriptio personae" in the checks would not be sufficient to charge the bank of deposit with notice of a breach of trust nor render it liable to see to it that the funds were not withdrawn for misappropriation. *Dollar Sav., etc., Co. v. Crawford*, 69 W. Va. 109, 70 S. E. 1089; 2 Michie on

Banks and Banking, 925, § 129; *Id.* 944, § 130 (1cb)." *United States Fidelity, etc., Co. v. Home Bank*, 77 W. Va. 665, 88 S. E. 109.

(8) Checks.

See ante, "Relation between Bank and Depositor," V, A, 1, a, (1); post; "State Depositories," V, A, 1, g.

(7½a) In General.

See generally, post, **BILLS, NOTES AND CHECKS.**

Presentment for Payment—Delay.—Va. Code 1919, § 5748; Barnes Code, ch. 98A, § 186.

Effect of Certification.—Va. Code 1919, §§ 5749, 5750; Barnes Code, ch. 98A, § 188.

Payment of Check, etc., between Saturday Noon and Midnight.—W. Va. Acts 1919, ch. 60.

Bank Not Liable until Acceptance or Certification.—Va. Code 1919, § 5751; Barnes Code, ch. 98A, § 189.

Death of Drawer—Payment.—Va. Code 1919, § 5748.

Not an Assignment.—Va. Code 1919, § 5751; Barnes Code, ch. 98A, § 189.

Duty to Pay.—"Ordinarily a bank can not refuse to honor a check drawn on an account of its customer; to do so would be a violation of its contract. 2 Michie on Banks and Banking, 925, § 129 (2); *Id.* 936; *Id.* 941." *United States Fidelity, etc., Co. v. Home Bank*, 77 W. Va. 665, 88 S. E. 109.

Effect of Payment.—Checks lose the quality of negotiability by reason of their having been paid by the drawee bank, but they may still be used as evidence of indebtedness on the part of the drawer to the bank resulting from overdrafts. *Lutz v. Williams*, 79 W. Va. 609, 614, 91 S. E. 460.

(a) Payment of Forged or Altered Check.

See post, "Depositors' Accounts and Passbooks," V, A, 1, c; "With Respect to Collections," V, A, 2.

Liability of Bank on Account of Forged or Raised Check.—W. Va. Acts 1919, ch. 60.

If before paying an altered check drawn upon it, the officers of a bank could, by the exercise of proper care and skill, have detected the forgery, then the bank cannot receive credit for the amount of the check even if the depositor omitted all examination of his account returned to him by the bank. *First Nat. Bank v. Richmond Elect. Co.*, 106 Va. 347, 56 S. E. 152.

In the absence of negligence or misconduct on the part of the holder of forged paper, contributing to the fraud by which the person on whom it purports to be a check or acceptance is induced to part with money on the faith of it, such person must determine at his peril whether the signature is genuine. The immunity so accorded the holder being an exception from the general rule of law, allowing recovery of money paid under a mutual mistake of fact, does not extend to one who has omitted some precautionary act or duty, usual and customary among bankers. *Bank v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. 761. See post, MISTAKE AND ACCIDENT; PAYMENT.

(b) Payment of Check or Negotiable Coupon Not Drawn on Funds.

See post, MISTAKE AND ACCIDENT; PAYMENT.

"Morse, in his work on banking, says without qualification, that if a bank pays or accepts a check under the misconception that it has funds it can not recover from the holder, but it must look to the drawer alone for redress, except that under the clearing house rules a check paid through the clearing house may be returned within a certain time, if the funds are found insufficient. 2 Morse on Banking, § 455. See, also, generally, *Bantenck v. Dorian*, 6 East, 199; *Levy v. Bank of United States*, 4 Dall. (U. S.), 234, 1 L. Ed. 814; *First Nat. Bank v. Dimmick*, 15 Colo. 229, 22 Am. St. Rep. 394, 25 Pac. 177; *Riverside Bank v. First Nat. Bank (C. C. A.)*, 74 Fed. 276, 5 Cyc. 534-5." *Citizens Bank v. Schwarz-*

child, etc., Co., 109 Va. 539, 544, 64 S. E. 954.

If negotiable coupons payable to bearer and possessing all the qualities and incidents of commercial paper are paid by mistake by the bank at which they are payable, there can be no recovery by the bank against the former holder of such coupons as for money paid by mistake. *Citizens Bank v. Schwarzschild, etc., Co.*, 109 Va. 539, 64 S. E. 954.

Generally, money paid under a mistake of fact may be recovered back, but the payment of a check or note by a bank upon which it is drawn, or at which it is made payable, under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay the check or note seems to be an exception to the general rule. Such payments can not be recovered back. The payment is a finality, and the fact that the drawer or maker had no funds on deposit does not alter the situation. *Citizens Bank v. Schwarzschild, etc., Co.*, 109 Va. 539, 64 S. E. 954.

(9) Set-Off.

(a) Bank's Right of Set-Off.

See post, "Interest on Deposits," V, A, 1, a, (10).

General or Special Deposits.—A bank to which a depositor owes a matured debt may appropriate a general deposit of the debtor to payment of the debt; but it has no right so to appropriate or apply a deposit made by the debtor for a known special purpose, or under a special agreement that it may be checked out or withdrawn for specific purposes. *Lutz v. Williams*, 79 W. Va. 609, 91 S. E. 460; *Lutz v. Williams*, 84 W. Va. 216, 99 S. E. 440.

By its acceptance of a special deposit, a bank impliedly binds itself not to set-off against it, a debt due it from the depositor. *Lutz v. Williams*, 79 W. Va. 609, 91 S. E. 460.

Same—Evidence.—An agreement inhibiting such appropriation need not be proved in any particular manner. *Evi-*

dence of the quality and quantity required for proof of any other parol agreement suffices. *Lutz v. Williams*, 84 W. Va. 216, 99 S. E. 440.

Same—Question for Jury.—Direct and positive oral evidence of such an agreement, strongly sustained by admitted facts and circumstances, suffices to carry the issue as to its existence to the jury, notwithstanding slight contradictions and inconsistencies in the testimony of the depositor, relating to incidental transactions and attendant circumstances. *Lutz v. Williams*, 84 W. Va. 216, 99 S. E. 440.

Waiver of Right.—A bank has no right of set-off as to deposits as against its special contract waiving the benefit of the set-off statute. *Lutz v. Williams*, 79 W. Va. 609, 616, 91 S. E. 460.

Overdrafts—Estoppel.—Where an account between a bank and its customer has covered a series of years, and numerous deposits have been made by the latter without direction as to their application, and checks have also been drawn by him upon his account, but there has been no balancing of the account, with notice to him, the bank is not precluded from afterwards exercising its right to apply such deposits to the oldest overdrafts of its customer, by the fact that in a third column of its ledger account with such customer, and for its own convenience, the daily debit and credit balances of such customer are there noted. *Ryan v. Casto*, 76 W. Va. 314, 85 S. E. 553.

(b) Depositor's Right of Set-Off.

In an action by a receiver, upon a note due an insolvent bank, the maker has a right to set-off against the note money on deposit in the bank to his credit at the time the receiver was appointed, notwithstanding the note was not then due, and notwithstanding the bank had pledged it to secure the payment of a debt which it owed, and which was paid out of proceeds of other securities pledged at the same time, and the note returned to the receiver.

Williams v. Burgess, 74 W. Va. 623, 82 S. E. 507.

When the debt of an insolvent bank, thus secured, has been paid out of the proceeds of a portion of the securities, the remaining ones become assets of the bank to be administered by the receiver, and they are subject to the right of set-off in favor of the obligors thereon against the bank, existing at the date of the receiver's appointment. *Williams v. Burgess*, 74 W. Va. 623, 82 S. E. 507.

That the proceeds of a note, thus deposited as security, would have been consumed in payment of the debt, if the pledgee had collected and applied the securities as they became due, does not affect the right of set-off, after payment of the debt and return of the note to the receiver of the pledgor. *Williams v. Burgess*, 74 W. Va. 623, 82 S. E. 507.

"The sole question for decision is, were the *Burgesses* entitled to the defense of set-off? We think they were. The authorities are uniform in holding that a depositor may set-off his funds on deposit in an insolvent bank against a debt which he owes it, whether the debt is due at the time of insolvency or not. The relation of debtor and creditor exists between a bank and its depositor, and the fact that the bank becomes insolvent before the depositor's note is payable, does not destroy the relation nor affect the right of set-off. 1 *Morse on Banks & Banking* (4th ed.), Sec. 338; *Alderson on Receivers*, § 573; 34 *Cyc.* 194; 2 *Michie on Banks & Banking*, 1059 to 1063, and numerous cases cited." *Williams v. Burgess*, 74 W. Va. 623, 625, 82 S. E. 507.

A creditor of an insolvent bank, though an officer and held liable for losses, misappropriations and preferences, may set-off, against his deposits, liability on his individual debts and notes and on his joint and several notes, but not his liability as surety or endorser, nor as a joint debtor. Bene-

dum *v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

(10) Interest on Deposits.

See post, "State Depositories," V, A, 1, g.

An agreement to deposit public funds in bank without interest, in violation of a statute requiring the depositories to pay three per cent. interest on daily balances, is illegal and void, and affords no protection to and imposes no liability on the parties thereto. *Belcher v. First Nat. Bank*, 81 W. Va. 316, 216, 94 S. E. 380.

Appropriation of Special Deposit.—Wrongful appropriation by a bank of a special deposit, to payment of a debt due to it by the depositor, and its use of the money during the litigation over it, makes the bank liable for interest on the fund. *Lutz v. Williams*, 84 W. Va. 216, 99 S. E. 440.

b. Special Deposits.

See ante, "Bank's Right of Set-Off," V, A, 1, a, (9), (a).

c. Certificates of Deposit.

Unlawful to Issue in Order to Borrow.—*Barnes Code*, ch. 54, § 81a (19).

Effect of Renewal.—The renewal of bank deposit certificates does not operate as a novation of the original indebtedness. *Dunn v. Bank*, 74 W. Va. 594, 82 S. E. 758. See post, NOVATION.

d. Joint Deposits.

In Name of Two or More Persons, or Survivor, How Discharged.—*Va. Code* 1919, § 4127.

Survivorship.—Money of M. was deposited in a bank on savings account to the credit of M. or E. Held, that upon the death of M. the balance of such account belonged to E. *Deal v. Merchants, etc., Bank*, 120 Va. 297, 91 S. E. 135.

e. Depositors' Accounts and Passbooks.

See ante, "Payment of Forged or Altered Check," V, A, 1, a, (8), (a).

Rights and Duties of Bank and Depositor—In General.—A bank depositor is under obligations to the bank to

examine within a reasonable time and with ordinary care the account rendered in the pass book and the vouchers returned by the bank to him, and to report any errors discovered without unreasonable delay. The examination need not be so minute as to exclude any possibility of error, but it should be made in good faith and with ordinary diligence, and such care should be used as is required by the circumstances of the particular case. It need not be made by the depositor himself, but may be entrusted to any competent person. Whether reasonable care and diligence was used in any given case is a question for the jury, under proper instructions from the court. *First Nat. Bank v. Richmond Elect. Co.*, 106 Va. 347, 56 S. E. 152; *Brown v. Lynchburg Nat. Bank*, 109 Va. 530, 533, 64 S. E. 950.

"But, on the other hand, it is to be remembered that the bank is the debtor of the depositor, and that it is under obligation to keep careful and faithful accounts with its depositors, to scrutinize checks, and to exercise proper care and skill to prevent or to discover fraud." *Brown v. Lynchburg Nat. Bank*, 109 Va. 530, 537, 64 S. E. 950.

Where a company keeps an active account with a bank and its president monthly, with the cashier of the company, examines the adjusted pass book and the returned checks, and the company's cashier has forged some of the checks, the company in the examination is charged with such knowledge as its cashier had in making this examination of the pass book and returned checks, and in comparing the same with the stubs of the company's check book. *First Nat. Bank v. Richmond Elect. Co.*, 106 Va. 347, 56 S. E. 152.

Same—Estoppel—Question for Jury.—The evidence in the case at bar makes out a case peculiarly for the determination of a jury under proper instructions from the court, and it was error for the trial court to have sustained the demurrer to the evidence tendered by the defendant. The plain-

tiff had been a depositor in the bank for many years and relied upon the bank to keep his account correctly, but, for three years, one or more of the employees of the bank had been engaged in systematically defrauding him, and had successfully concealed their frauds by making and rendering to him false accounts. Whether or not he was estopped to deny the correctness of the accounts as rendered by the bank from time to time should, under the circumstances, have been left to the jury. *Brown v. Lynchburg Nat. Bank*, 109 Va. 530, 64 S. E. 950.

The rule that an account rendered and retained for a long time without objection becomes an account stated is, as a general proposition, inapplicable in Virginia and West Virginia, except as between merchant and merchant, and principal and agent, with mutual accounts. Between banker and customer some superior equity must intervene in order to preclude the customer from objecting to an illegal and unauthorized charge against him. *McGraw v. Trader's Nat. Bank*, 64 W. Va. 509, 63 S. E. 398. See ante, ACCOUNTS AND ACCOUNTING.

Request for Statement of Checking Account — Construction.—A request made to a bank by a member of a partnership having a checking account therein, and also liable to it on a note discounted to it by the firm, for a statement of their business with it, coupled with notice of the purpose of the partners to dissolve the partnership and settle, is properly interpreted, in the light of the practice of banks called upon for statements, as a request for the status of the firm's checking account only. *Bank v. Lowry & Co.*, 81 W. Va. 578, 94 S. E. 985.

f. Disposition or Payment of Deposits of Persons Deceased, under Disabilities, or Unknown.

Deposits of Deceased Persons and Persons under Disabilities—Payment.—Va. Code 1919, § 4125, amended by Va.

Acts 1920, p. 21, § 4126; Barnes Code, ch. 54, §§ 81a (21), 81b (16); W. Va. Code Supp. 1918, § 3110a.

Disposition of Bank Accounts of Unknown Persons.—Va. Acts 1918, p. 430, amended by Va. Acts 1919, p. 129.

g. State Depositories.

Va. Code 1919, §§ 2155-2169, 2184, 2200, 4120, 5772, 5773; Barnes Code, ch. 17, §§ 1-7, 14.

h. Receiving Deposits with Notice or Knowledge of Insolvency.

Va. Code 1919, § 4132; Barnes Code, ch. 54, § 81a (8).

Recovery of Amount of Deposit.—When a bank, with knowledge of its insolvency, receives a deposit it perpetrates a fraud on the customer, and is held to be a constructive trustee of the deposit, and the depositor may recover of the receiver the deposit, if it can be identified, or its equivalent, if it can not be identified, when the customer's money has been mingled with the bank's funds, which, to an amount equal to the deposit, has gone into the hands of the receiver. *Pennington v. Third Nat. Bank*, 114 Va. 674, 77 S. E. 455.

Where an innocent third person has made a deposit in a bank, and throughout the transaction the cashier of the bank has acted for, and as the sole representative of, the bank, and in the line and within the scope of the powers and duties of his office, with respect to the matter in hand, the knowledge of the cashier of the insolvency of the bank (though brought about by the antecedent misconduct of the cashier) is the bank's knowledge. In other words, the insolvency of the bank was a condition within the knowledge of its executive officer, and it matters not, so far as the rights of innocent third persons dealing with the bank through him are concerned, how the knowledge of that condition was first acquired. *Pennington v. Third Nat. Bank*, 114 Va. 674, 77 S. E. 455.

Indictment.—Under the act of As-

sembly of February 12, 1894, making it a criminal offense for any private banker, or the employee of any private banker, to take and receive money from a depositor with actual knowledge that the said banker is at the time insolvent, an indictment is not sufficient which charges that the accused, being the cashier of a designated private bank, did with actual knowledge that the said bank was insolvent, receive the money of a depositor, without alleging who the owner or owners of the bank were, or that the accused was a private banker, or that he was the employee of a private banker. In order to bring the accused within the terms of the act, he must have been either a private banker himself, or the employee of a private banker at the time he received the deposit; and to charge him as a private banker it is necessary to charge that he was insolvent at the time he took and received the deposit, and to charge him as the employee of a private banker or bankers, it must be charged that said banker or bankers, or the owners of the private bank, were then insolvent. The allegation that the private bank designated was insolvent, without stating who its owner or owners were, is not a sufficient charge that the accused himself was insolvent if he was prosecuted as a private banker, nor that his principals were insolvent if he was being prosecuted as an employee. *Boyenton v. Commonwealth*, 114 Va. 841, 76 S. E. 945.

Under the above mentioned act of assembly, an indictment is not sufficient which charges that the accused and another were partners and carried on a private banking business under the style of the "Bank of Upperville," and in one count charges that the accused took and received money from X, a depositor, with actual knowledge that the firm doing business as the Bank of Upperville was insolvent, and in another count charges that the accused permitted X, a depositor, to de-

posit to his credit a named sum, with actual knowledge that the firm trading as the "Bank of Upperville" was insolvent. Neither count charges the accused, at the time the felonious act was alleged to have been committed, with actual knowledge that he and his partner, or either of them was insolvent. The insolvency of the partnership as such is not sufficient, if either the accused himself or his copartner was solvent. *Boyenton v. Commonwealth*, 114 Va. 841, 76 S. E. 945.

The repeal of statutes by implication is not favored by the courts, and a later statute will not be presumed to repeal a former statute on the same subject unless, from the repugnancy of their provisions, that inference be necessary and unavoidable. If the two statutes are not absolutely irreconcilable, and no purpose of repeal is clearly expressed or indicated, it is the duty of the court to give effect to both, if possible. Applying this rule to the case at bar, (the act of February 4, 1894, relating to deposits in insolvent banks, etc., is not repealed either by the act of January 4, 1904 § 1171 (§ 4132, Va. Code 1919), or the act approved March 17, 1910, amending § 1171 of Code of 1904 (§ 4124, Va. Code 1919). *Boyenton v. Commonwealth*, 114 Va. 841, 76 S. E. 945.

2. With Respect to Collections.

½a. In General.

Intoxicating Liquors — Collecting Drafts in Payment for Unlawful.—Va. Code 1919, § 4610.

Rights and Duties of Collecting Bank and Its Principal.—If the holder of a check indorses it, and deposits it for credit and collection in another bank, the collecting bank, if the check is not paid, and it is without fault in forwarding it for payment, has the right, on its return, to charge it back to its customer or recover the amount if he has in the meantime withdrawn the money. *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012.

The general rule is that if a collecting bank forwards a check directly to the drawee bank, and by custom or agreement it is authorized to credit the collecting bank and remit, or settle at stated periods, its receipt of the check, debiting it to drawer and crediting it to the collecting bank constitutes payment, and renders the forwarding bank liable to its principal for the amount thereof. Such would be the effect of the transaction whether there was sufficient cash in the bank at the moment to pay the check, or it be afterwards discovered that the check was an overdraft, and the drawee insolvent. *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012.

A collecting bank, knowing of the depressed financial condition of the debtor, is delinquent in its duty if it neglects to inform its customer of such vital condition, and fails to take vigorous measures under the circumstances to secure payment, and if loss occurs by its negligence to exercise that degree of skill, care and diligence which the nature of its undertaking calls for, with reference to the time, place and circumstances surrounding the undertaking, it will incur liability to its principal for the loss sustained. *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012.

The general rule to which there are few, if any, exceptions, is that it is negligence for a collecting bank to send checks direct to a drawee bank. The drawee bank who is to pay the check is not a suitable agent for its collection. And the fact that the drawee bank is the only bank at the place where it is located constitutes no exception to the general rule. Nor will the custom of the banks at the place where the collecting bank is located, of sending checks to a drawee bank, justify the sending of a check directly to a drawee. Custom can not justify negligence. *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012.

Where a collecting bank is negligent in transmitting a check for collection, and in forwarding it to the drawee bank, whereby such drawee, though in disregard of a special agreement, is enabled to debit the drawer of the check and credit the collecting bank, and control of the check is lost by the collecting bank and it is never returned to the customer, the latter may in an action of assumpsit, upon the common counts as for money had and received, recover the full amount of the check. *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012.

Time for Forwarding Paper for Presentment.—See post, **BILLS, NOTES AND CHECKS.**

Rights as between Collecting Bank and Its Correspondent Where Check Forged.—In taking a forged check from an unknown person, for collection, without inquiry as to his identity, and forwarding it for collection, after having taken the endorsement thereon of the reputed payee and placed its own unrestricted endorsement on the same, a bank omits a precautionary duty which the law merchant devolves upon it for the protection of the drawee, and makes a warranty of the genuineness of the signature of the payee, which it can not afterwards deny; wherefore, it is liable to the drawee for the money paid on the check by the latter in ignorance of the forgery, unless the latter, by omitting some duty, resting upon it, is likewise in fault. If, in such case, both parties have been guilty of negligence, the drawee, in failing to have in its possession any means of testing the genuineness of the signature of the drawer, and the paying bank, in failing to have the payee identified, when he is unknown, the former can not recover of the latter. *Bank v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. 761.

The immunity so accorded the holder being an exception from the general rule of law, allowing recovery of money

paid under a mutual mistake of fact, does not extend to one who has omitted some precautionary act or duty, usual and customary among bankers. *Bank v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. 761. See generally, ante, "Payment of Forged or Altered Check," V, A, 1, a, (8), (a).

Necessity of Collection of Note to Create Debtor and Creditor Relation Where Bank Insolvent.—"It is held by the great weight of authority, that the relation of debtor and creditor is not effected until the deposited check, draft or note has been collected, and if the collection was not made before the bank was closed, the relation at the date of the insolvency, was that of principal and agent for collection." *Alleman v. Sayre*, 79 W. Va. 763, 769, 91 S. E. 805, citing *Michie*, *Banks and Banking*, pp. 1417, 1420. See generally, post, "Insolvency, Assignment and Receivership," XI.

Same—Effect of Bank Entries.—Entries made by a bank officer, on the deposit of a check, draft or other similar paper, importing creation of the relation of debtor and creditor between the bank and the depositor, prove, in the absence of evidence to the contrary, an assignment of the instrument deposited, to the bank; but they are provisional, and such assignment is subject to the right of rescission, in the absence of circumstances precluding exercise thereof, and the relation of debtor and creditor is not irrevocably established until the money for which the deposited paper calls has been actually collected. *Alleman v. Sayre*, 79 W. Va. 763, 91 S. E. 805.

Same—Preference as to Amount Collected.—Where a check, draft or other paper has been deposited for collection, and, before such collection has been made, the bank fails and closes its doors to business, it is deemed in law to have been the agent of the depositor for collection of the money evidenced by the deposited paper, in the absence of circumstances preclud-

ing restoration of the status quo by the depositor, and the latter, on making such restoration, is entitled to have the paper returned to him, on demand therefor before collection by the receiver, and to have the full amount collected thereon, if the receiver has collected it before such demand is made. *Alleman v. Sayre*, 79 W. Va. 763, 91 S. E. 805.

Same—Necessity of Tracing Money.—In an action to recover money collected by an insolvent bank, before it closed, it is sometimes impossible for the depositor to prove the presence of his money in the bank at the date of the failure, but, in order to recover, he must do that. *Alleman v. Sayre*, 79 W. Va. 763, 769, 91 S. E. 805, citing *Michie*, *Banks and Banking*, p. 1428.

Same — Acceptance of Dividends from Receiver—Waiver and Estoppel.—Acceptance of a dividend from the receiver of an insolvent bank by one who had deposited paper therein for collection before the failure after a demand for the return of the paper has been made and while the depositor is insisting upon payment of the claim as one entitled to preference, is not a waiver of the right of preference, nor does it estop the latter from assertion thereof. *Alleman v. Sayre*, 79 W. Va. 763, 91 S. E. 805.

a. Ownership of Paper Placed for Collection.

As to the ownership of goods subject to draft paid by bank, see post, **CARRIERS**.

(1) In General.

Conflict of Laws—Deposit of Draft.—As between the drawer and the holder of a draft, the law of the place in which it was made determines the question of title to the proceeds, unless it appears that the parties had in contemplation the law of some other place as the proper law. *Fourth Nat. Bank v. Bragg*, 127 Va. 47, 102 S. E. 649.

Crediting Depositor's Account.—A deposit in a bank of a bill, check, or

other evidence of debt in the ordinary course of business, whereby the depositor receives a credit against which he may draw, operates to transfer the title to the bank, in the absence of usage, custom, or any oral or other agreement that the effect of the transaction shall be otherwise, etc. This is the rule, although the bank has the right to charge dishonored paper to the depositor, instead of proceeding against the maker. *Fourth Nat. Bank v. Bragg*, 127 Va. 47, 102 S. E. 649.

Same—Intention as Governing Ownership.—Whether a bank receiving from a customer a check endorsed by him, which it places to his credit, becomes the owner of the check or a mere agent for collection, depends upon the intention of the parties; but ordinarily a check so deposited is taken for collection by the bank as agent of the depositor, and although the bank, as a matter of favor or convenience, may permit the depositor to draw against the check so deposited before payment—the depositor in the event of nonpayment being responsible for the sums drawn—the bank does not thereby become a bona fide endorsee of the check, and in a suit by it on the check, the drawer may set up any equities he may have against the endorser. *Fayette Nat. Bank v. Summers*, 105 Va. 689, 54 S. E. 862.

If, when a draft is deposited in bank, it is the intention of both the depositor and the bank that it shall be treated as cash, title thereto passes to the bank; but if it was the intention of the parties that it should not be received as cash, but only for collection by the bank, then title does not pass to the bank. Checks or drafts deposited on credit, if intended to be for collection only, do not become the property of the bank, even if the depositor has been allowed to check against the deposit before the paper is collected. *Greensburg Nat. Bank v. Syer & Co*, 113 Va. 53, 73 S. E. 438.

Same—Presumption.—The presump-

tion that a bank becomes the owner of paper deposited as cash is *prima facie* only, and may be rebutted by proof showing that the parties contemplated a different relationship at the time of the deposit. But when nothing else appears than the mere fact of the deposit and the credit thereof as cash, which the depositor may withdraw at will, the law implies and establishes between the bank and the depositor the relationship of vendor and purchaser as to the paper, and of creditor and debtor as to the proceeds thereof. *Fourth Nat. Bank v. Bragg*, 127 Va. 47, 102 S. E. 649.

Same—Doctrine that Credit Must Be Drawn upon.—"In this country, though the rule seems to be different in England, it is settled that the mere giving of credit to a depositor's account of a check does not constitute the bank a holder for value, but in order to have that effect the credit must be drawn upon. *Tiffany on Banks and Banking*, pp. 39-40, and cases cited; 7 Cyc. 929, and cases cited." *Miller v. Norton*, 114 Va. 609, 617, 77 S. E. 452.

Where a check on one bank is deposited in another for collection, the ownership of the check is not transferred to the receiving bank, but it is the agent of the depositor until collection is made, and not until then does it become the debtor of the depositor. But if the check is deposited in exchange for credit given the depositor, then the transaction is in effect a sale of the check to the bank, and it becomes the beneficial owner of the check and the debtor of the depositor. *Miller v. Norton*, 114 Va. 609, 77 S. E. 452.

Where a customer deposited in a bank a check on an out of town bank, and the bank credited his account with the amount of the check, and the deposit slip delivered to the customer contained the statement that items on out of town banks are credited subject to payment, and there was neither general custom, course of dealing, nor special agreement from which to gather

the intention of the depositor and the bank when the check was deposited, and the sum credited was never drawn against by the depositor and he had no authority to draw against it until collected, unless crediting it as cash (the bank reserving the right to charge it back if not paid), gave him the right to check at once against it, the deposit was a mere bailment, and the title to the check did not pass to the bank when the deposit was made. *Miller v. Norton*, 114 Va. 609, 77 S. E. 452.

Draft Deposited as Cash—Recourse on Depositor.—The title of a bank to a draft deposited with it as cash is not affected by the fact that the bank would always have recourse on the depositor if the drawee failed to pay the draft. *Fourth Nat. Bank v. Bragg*, 127 Va. 47, 102 S. E. 649.

Same—Restricted Indorsement by Bank.—The title of a bank to a draft deposited with it as cash is not affected by the fact that the bank's indorsement of the draft stated that the bank indorsed it solely for the purpose of collecting it, and did not guarantee the title, possession, delivery, quantity, quality or other condition of the goods mentioned in the attached bill of lading. *Fourth Nat. Bank v. Bragg*, 127 Va. 47, 102 S. E. 649.

b. Failure to Fix Liability of Indorser.

Neglect of a bank to demand payment of notes entrusted to it for collection and bind the endorser by protest and notice, does not make it liable for the notes, as if it were surety, guarantor, maker or endorser, but only for such damages as have been sustained by the holder by reason of such negligence. *Farmers, etc., Bank v. Kingwood Nat. Bank*, 85 W. Va. 371, 101 S. E. 734.

Same—Pleading.—To make out a case against a bank for neglect to demand payment of notes entrusted to it for collection and to bind the endorser by protest, and notice, the declaration must allege such additional facts as will show the plaintiff has been injured and damaged thereby. *Farmers, etc.,*

Bank v. Kingwood Nat. Bank, 85 W. Va. 371, 101 S. E. 734.

A declaration founded upon failure of a bank to protest negotiable paper entrusted to it for collection need not negative the existence of facts or circumstances excusing such failure. *Farmers, etc., Bank v. Kingwood Nat. Bank*, 85 W. Va. 371, 101 S. E. 734.

3. With Respect to Loans and Discounts.

Amount of Overdrafts Permitted.—*Barnes Code*, ch. 54, § 80a.

½a. In General.

Powers as to Discounts.—*Va. Code* 1919, § 4111; *Barnes Code*, ch. 54, §§ 79, 79a (1).

Loans—Amount to One Person, etc.—*Va. Code* 1919, § 4115, amended by *Va. Acts* 1920, p. 820; *Barnes Code*, ch. 54, § 79a (1), amended by *W. Va. Acts* 1919, ch. 60.

Loan on Bank's Stock.—*Va. Code* 1919, § 4115, amended by *Va. Acts* 1920, p. 820; *Barnes Code*, ch. 54, § 79.

Discounts Not Considered as Money Borrowed.—*Va. Code* 1919, § 4115, amended by *Va. Acts* 1920, p. 820; *Barnes Code*, ch. 54, § 79a (1).

Payment of Forged Notes—Estoppel.—Where negotiable notes purporting to have been made by H. payable to A. T. B. and J. R. B. and discounted by A. T. B. at various banks and paid by H. and J. R. B., although claimed to have been forged by said A. T. B., they, having knowledge that other notes of the same character were made and endorsed in like manner in their names as maker and endorser and failing to warn such banks of such forgery and against taking or discounting such other notes, will be estopped from pleading, as against such banks, that such other notes were forged. *Bank v. Hannaman*, 63 W. Va. 358, 60 S. E. 242.

e. Security for Loan or Discount.

See post, "Bank's Lien," VII.

g. Usury.

See generally, post, **INTEREST; USURY.**

Rate of Interest.—Va. Code 1919, § 5563.

Banks Not Subject to Certain Statutory Provisions Concerning Loan Companies.—Va. Acts 1918, p. 662; 1920, p. 414.

4. With Respect to Ownership of Property.

Power of Bank to Hold and Convey Real Estate.—Barnes Code, ch. 54, § 78; Va. Code 1919, §§ 4104, 4114.

6. Circulating Bank Notes.

See post, "Certain Offenses by, against or Relating to Banks," **XXI.** As to whether bank notes are property subject to execution, see post, **EXECUTIONS.**

Issuing Currency Prohibited.—Va. Code 1919, §§ 4150-4153; Barnes Code, ch. 151, § 14 (unauthorized currency).

B. OF UNAUTHORIZED BANKS.**2. In Its Criminal Aspect.**

Barnes Code, ch. 151, §§ 13, 14, 16; Va. Code 1919, § 4105.

VI. BANK NOTES.**G. LEVY ON BANK NOTES.**

As to levy of execution on bank notes and matters relating thereto, see Va. Code 1919, §§ 6485, 6487, 6504, 6507, 6508. See generally, post, **EXECUTIONS.**

H. CRIMINAL LAW.**1. Forgery and Counterfeiting of Bank Notes, etc.**

See post, **FORGERY AND COUNTERFEITING.**

Barnes Code, ch. 146, § 3; Va. Code 1919, §§ 4487, 4488, 4490, 4820-4822.

2. False Pretenses and Cheats.

See generally, post, **FALSE PRETENSES AND CHEATS.**

3. Larceny of Bank Notes.

Va. Code 1919, §§ 4442, 4443.

VII. BANK'S LIEN.**B. LIEN ON STOCK.**

Loan on Capital Stock—Collateral—By-Law.—A bank organized under a law which impliedly sanctions loans by it on shares of its own capital stock, as collateral security, by providing that such loans shall not exceed fifty per cent. of such capital stock, can make and enforce a by-law providing that no stockholder will be permitted to sell, transfer or assign his or her stock, while indebted to the bank, and a loan made by it to one of its stockholders holding certificates of stock reciting such by-laws, are valid liens on the shares held by him. *Morris v. Westerman*, 79 W. Va. 502, 92 S. E. 567.

Same—Statute—Retroactive Effect.—A statute subsequently passed, prohibiting banks from making loans on shares of their capital stock, as collateral security, does not invalidate a lien on shares, so previously acquired. *Morris v. Westerman*, 79 W. Va. 502, 92 S. E. 567.

VIII. OFFICERS AND AGENTS.**½A. IN GENERAL.**

See post, "Directors of Insolvent Banks," **VIII, C, 5;** "Savings Banks," **XVI.**

Right of Notary Public Connected with Bank to Take Acknowledgments of Bank Officials, etc.—W. Va. Acts 1919, ch. 60. See generally, ante, **ACKNOWLEDGMENTS.**

De Facto Officer.—An officer of a bank who has sold his stock and tendered his resignation is nevertheless a de facto officer, if his resignation has not been accepted nor the vacancy in the office filled and his acts and the surrounding circumstances prove he continued to act for the bank and participate in the management and control of its affairs. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

Relationship of Officers and Directors and Stockholders and Creditors.

—The relationship of officers and directors of a corporation and stockholders and creditors is that of trustees and cestuis que trustent. This is especially true with regard to banking corporations, where they owe an earlier duty to depositors; and if by their gross mismanagement and neglect loss is incurred, they will be rendered liable therefor to creditors and stockholders. *Elliott v. Farmers' Bank*, 61 W. Va. 641, 57 S. E. 242.

Knowledge of Officer—Imputation to Bank.—The knowledge of an officer of a bank, acquired in a capacity other than as its representative, of an infirmity in commercial paper offered for discount, will not be imputed to the bank, when such official is also an officer of the corporation seeking the discount and has an interest in the transaction so adverse to the bank that there is a reasonable presumption that he will not communicate his knowledge to it. *Rusmisset v. White Oak Stave Co.*, 80 W. Va. 400, 92 S. E. 672.

Same—Note Given by Bank's Officers.—If three of the directors, including the president and cashier, of a bank having eighteen directors, make their note and have it discounted, and use the proceeds to make an overdraft of an insolvent depositor, and, by agreement between themselves, keep the whole matter secret from the other directors, from fear that the amount of the overdraft would get to the public and injure the credit of the bank, and agree among themselves that the bank shall make good the amount to them when they deem it safe to notify the other directors, and afterwards, at the instance of one of the makers, the bank becomes the owner of the note, and, after the claim against the depositor has become barred by the act of limitations, they disclose the whole transaction to the board of the bank, and ask that the bank charge off the note to profit

and loss, the bank is under no obligation to do so, and in an action on the note by the bank against the makers they can not defeat recovery on the ground that the note was made for the accommodation of the bank. It would be both unreasonable and unjust to impute notice to the bank of a transaction which was wholly unauthorized, and which all the parties connected with it expressly agreed to and did conceal from the bank. Such knowledge on the part of three directors was not notice to the bank. To apply the doctrine of constructive notice to such a case would make it an instrument of fraud. Traders, etc., *Bank v. Black*, 108 Va. 59, 60 S. E. 743.

Officer's Liability—Discharge.—An officer's liability to his bank for a misappropriation of its funds, which is unknown to, and purposely concealed from it, is not discharged by his inducing a third person to execute his note to the bank and applying the proceeds thereof to replace such funds, the note itself not being paid. *Citizens Nat. Bank v. Blizzard*, 80 W. Va. 511, 93 S. E. 338.

A. ACCOUNTANT AND ACCOUNTS.

See ante, "Depositors' Accounts and Passbooks," V, A, 1, e; post, "Certain Officers by, against, or Relating to Banks," XXI.

B. CASHIER.

As to powers of president with respect to the cashier, see post, "In General," VIII, D, 2, a; "Of Cashier," VIII, E, 2.

As to the exemption of bank cashiers and tellers from jury service, see Va. Code 1919, § 5985; post, JURY.

1. Definition.

"The court defines the cashier of the bank to be an executive officer by whom its debts are received and paid, and its securities taken and

transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties." *Bank v. Wetzel*, 58 W. Va. 1, 5, 50 S. E. 886.

2. Powers and Duties.

a. In General.

A cashier's ordinary duties are to keep all the funds of the bank, its notes, bills and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly or through subordinate officers, all moneys and notes of the bank, delivers up all discounted notes and securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and as the executive officer of the bank, transacts most of its business. 4 *Thompson on Corporations*, § 4741. He has full power within the just scope of his authority, according to the general usage, practice and course of business in such case. *Cook on Corp.*, § 718; *Clark & Marshall, Corp.*, § 705. *Bank v. Wetzel*, 58 W. Va. 1, 5, 50 S. E. 886.

"The business of borrowing money on a bank's account is so far beyond the usual scope of the cashier's duties as to require special authority therefor, and the person or bank making the loan is bound to take notice of the cashier's authority in that respect. *Western National Bank v. Armstrong*, 152 U. S. 347." *First Nat. Bank v. Clark Nat. Bank*, 79 W. Va. 105, 109, 90 S. E. 534.

Individual Loan.—In the absence of special authority, a cashier can not obligate his bank for a loan made to him individually. *First Nat. Bank v. Clark Nat. Bank*, 79 W. Va. 105, 90 S. E. 534.

Agency.—Where the trustee in a deed of trust upon a coal corporation's property securing its bonds, is at the same time one of the directors of

such coal corporation and also cashier of the bank holding a majority of the bonds and acts in conjunction with the president of such bank, who is also president of such company, acting in good faith in doing what he believes to be for the best interest of the bank, acquiesces in a lease of such property, he will be treated as the bank's agent, duly authorized to act on its behalf in the premises, and, by his acquiescence, estops himself and his principal from denying his agency. *Oberman v. Red Rock Fuel Co.*, 83 W. Va. 531, 99 S. E. 66.

c. Release of Debtors of Bank.

A cashier has no authority, simply by virtue of his office, to bind his bank by an agreement made with the indorsers on a promissory note, and unknown to the directors, to the effect that each of said indorsers shall be liable only for a certain proportion of the debt; and it matters not whether such contract relates to original notes presented for discount, or to notes taken either in payment, or in renewal, or pre-existing notes. *Bank v. Lowther-Kaufman Oil, etc., Co.*, 66 W. Va. 505, 66 S. E. 713.

Power to Receive Interest in Advance and Extend Time of Payment.

A cashier of a bank has no implied power, merely by virtue of his office, to receive money for interest in advance on a note owned by the bank and agree to extend time of payment and thus discharge an endorser from liability. *Bank v. Wetzel*, 58 W. Va. 1, 50 S. E. 886.

g. Estoppel.

See ante, "In General," VIII, B, 2, a.

C. DIRECTORS.

See post, "Election," VIII, D, 1.

1/2. In General.

Va. Code 1919, §§ 4106, 4111, 4115,

4116, 1119; Barnes Code, ch. 54, §§ 78a (4) 79a (2) 79a (3), 80a (2).

Settlement of Cashier's Account. — Va. Code 1919, § 4110, amended by Va. Acts 1920, p. 820.

Imputable Knowledge.—A copy of a letter written by the cashier of one bank to the cashier of another, attempting to obligate the bank of the former for a loan previously made to him, by the latter, for his own use, and filed with the bank's correspondence, is not constructive notice to the directors of its contents. *First Nat. Bank v. Clark Nat. Bank*, 79 W. Va. 105, 90 S. E. 534.

Knowledge by a director of a matter affecting his bank, which his personal interest would prompt him to conceal, can not be imputed to the bank. *Citizens Nat. Bank v. Blizzard*, 80 W. Va. 511, 93 S. E. 338; *Bank v. Lowther-Kaufman Oil, etc., Co.*, 66 W. Va. 505, 66 S. E. 713. See generally, post, NOTICE.

1. Appointment, Resignation, etc.

Vacancies in Board of Directors.—Barnes Code, ch. 54, § 78a (4).

Directors Must Be Stockholders.—Va. Code 1919, § 4116.

Election, Term and Vacancy.—Va. Code 1919, § 4118.

Directors of Savings Bank—Number — Election—Removal — Vacancy — Appointment of President and Officers by—Powers and Duties.—Va. Code 1919, §§ 4139, 4140, 4141.

Oath of Director.—Va. Code 1919, § 4117.

Penalties for Failure to File Oath of Director with State Corporation Commission.—Va. Code 1919, § 4117.

Directors—Number and Residence of.—Va. Code 1919, § 4107.

Meetings of Directors.—Va. Code 1919, § 4109.

Acceptance of Office.—Acceptance of office by one who is elected director is necessary to constitute him a director. *Terry v. Daniel*, 19 Va. Law Reg. 648.

Directors—Resignation — Estoppel.

—The director of a bank who hands a written resignation to the bank official who customarily receives such resignations is not liable as a director for misconduct of the bank after such resignation, if he did not act as a director after such time, notwithstanding the fact that his name as a director continued in the bank's advertisement, if such advertisement was over his protest and if he never held himself out to the public as a director. In a suit by the bank against a former director, the former director is not estopped by the representations made to the public by the bank. *Terry v. Daniel*, 19 Va. Law Reg. 648.

5. Directors of Insolvent Banks.

See generally, post, "Insolvency, Assignment and Receivership," XI.

Preferences.—A director or other bank officer is liable for withdrawal from an insolvent bank, after knowledge of its insolvency, of deposits made and controlled by him, though he is not sole owner thereof. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

Transformation, by a director or other officer of a failing bank, of its certificates of deposit held by him into a well secured debt held by the bank, by surrender of the certificates in part payment of the debt and taking a new note from the debtor, secured and payable to himself, constitutes a preference, the benefit of which must be surrendered in the settlement of the affairs of the bank. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

6. Liability for Mismanagement and Negligence of Duties.

See ante, "In General," VIII, ½A; "Directors of Insolvent Banks," VIII, C, 5.

In General—Defalcation of Cashier.

—Directors of a bank are not insurers of the fidelity of their agents

whom they have appointed and are not responsible for losses resulting from the wrongful acts of such agents unless the loss is a consequence of their own neglect of duty. The directors are not trustees in a technical sense, the relation being rather one of agency. Knowledge of all the affairs of a bank, or of what its books and papers would show to an expert accountant, can not be imputed to directors for the purpose of charging them with liability. Directors of a bank are entitled to commit the banking business to their duly authorized officers and they are not guilty of such gross negligence as to render themselves liable for losses to the bank when they commit the management of the entire banking business to a cashier whose character and financial standing are good, and exercise ordinary care in supervising the affairs of a bank. *Terry v. Daniel*, 19 Va. Law Reg. 648.

Whether Trustees.—"In Words and Phrases, volume 8, at page 7822, it is said: 'Directors of a bank are, in a certain sense, undoubtedly to be considered trustees, but only in that sense in which an agent or bailee intrusted with the care and management of property is considered a trustee. A director more nearly resembles a managing partner.'" *Winston v. Gordon*, 115 Va. 899, 912, 80 S. E. 756.

"As the officers of a bank are virtually its trustees, or, at least, may be treated as such, losses occasioned by their negligence and certainly funds misappropriated are proper charges in the settlement of their accounts. Personal representatives of deceased persons are chargeable with such items. *Pinckard v. Woods*, 8 Gratt. (49 Va.) 140; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937; *Anderson v. Piercy*, 20 W. Va. 282, 324; *Evans v. Shroyer*, 22 W. Va. 581; *Reitz & Co. v. Bennett*, 6 W. Va. 417. Guardians are chargeable

with such items. *Hunter v. Lawrence*, 11 Gratt. (52 Va.) 111; *Truss v. Old*, 6 Rand. (27 Va.) 556; *Roush v. Griffith*, 65 W. Va. 752, 65 S. E. 168." *Benedum v. First Citizens Bank*, 72 W. Va. 124, 130, 78 S. E. 656.

Same—Limitations and Laches.—Directors of a bank, which is a going concern, are not trustees of an express trust, with respect to the property or funds of the bank, but of an implied or resulting trust created by operation of the law upon their official relation to the bank, and the statute of limitations and the doctrine of laches may be invoked in their defense when sued for a breach of such trust. *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756.

The cause of action against the directors of a bank for neglect of duty as such directors does not grow out of contract but out of their breach of duty, and hence the statute of limitations of three years does not apply, but the wrongs which constitute the cause of action are damages to property revivable upon the death of either party, and the limitation applicable thereto is five years, as provided by § 2927 (§ 5818 Va. Code 1919), of the Code. Where fraud is neither alleged nor proved, and no concealment of liability on the part of the defendants is shown, the act of limitations begins to run from the time the alleged wrongs, if any, were committed. *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756.

Joint and Several Liability.—Officers of a bank, participating in misappropriations and transactions occasioning losses, are jointly and severally liable for such misappropriations and losses, and there may be a separate decree against any of them. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

Same — Compared to Partnership.—On the principle of mutual agency between partners, all are

liable to third persons for the tort of a co-partner, committed in due course, and in the interest of the partnership. Hence, a director of a bank, who is jointly interested with its president in a corporation to which he directs the bank's funds to be paid without security, is jointly liable with him, as well as severally, for the bank's loss. *Citizens Nat. Bank v. Blizzard*, 80 W. Va. 511, 93 S. E. 338.

Ignorance as Defense. — Directors and officers of a banking corporation will not be relieved from liability on account of ignorance or want of knowledge of those matters which it is their duty to know; and if they negligently entrust such matters to others, the loss incurred thereby should fall on them, and not upon their confiding depositors and stockholders. *Elliott v. Farmer's Bank*, 61 W. Va. 641, 57 S. E. 242.

D. PRESIDENT.

1. Election.

Va. Code 1919, § 4109.

2. Powers, Duties and Liabilities.

a. In General.

As to the joint liability of president and directors, see ante, "In General," VIII, D, 2, a.

Liability — Worthless Paper Discounted.—In the settlement of the affairs of an insolvent bank, its president is properly chargeable with the amounts of worthless notes and overdrafts of corporations, promoted and controlled by him and his associates, discounted by the bank with his knowledge, under his direction and with notice on his part of the financial ability of the makers, inferable from his relation with them and participation in the management and control thereof. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

Same—Payment of Checks. — The president of a bank, in general charge

and practical control of its business, having the cashier under his authority, who directs payment of the checks of a corporation which has no money on deposit in the bank, in which he is interested and to which he has obligated himself to lend his credit by endorsement or otherwise to enable it to pay certain debts, knowing that its indebtedness is equal to the full value of its property and franchise, is personally liable to the bank for the money thus paid out. *Citizens Nat. Bank v. Blizzard*, 80 W. Va. 511, 93 S. E. 338.

Same—Ratification.—If, under the direction of the president, no record is made of such overdraft on the bank's books, but the checks of such corporation are simply carried as cash, and after parting with his interest in the corporation, the president causes the bank to discount its note and applies the proceeds to the discharge of the overdraft, without the knowledge by the directors of the purpose for which the note was discounted, he thereby conceals the real nature of the transaction, which prevents the subsequent approval by the directors of his act in discounting such note from becoming an implied ratification of his wrongful application of the bank's funds in paying the worthless checks. Knowledge of an act is essential to its ratification. *Citizens Nat. Bank v. Blizzard*, 80 W. Va. 511, 93 S. E. 338.

c. Power to Surrender or Release Claims of Bank.

See ante, "In General," VIII, ½A.

Where a customer of a bank has been permitted to overdraw his account by the direction of the president, who was actively managing its affairs, and subsequently the customer gives his note for the amount, which is accepted by the bank in the usual course of business, without any knowledge of the fact that the over-

draft was for the purpose of paying a debt due to the customer by the president, the debt thus created is the debt of the customer, and he is not released from its payment, though the president promised him to pay the note, and was ultimately liable to the bank for its payment. *Culpeper Nat. Bank v. Walter*, 114 Va. 522, 77 S. E. 484.

h. Ratification of Unauthorized Acts of President.

Before a bank should be held to have ratified an unauthorized verbal agreement of its president to relieve the maker of a note held by it from its payment, both knowledge and specific acts of ratification should be alleged and proved. *Baker v. Berry Hill, etc., Co.*, 112 Va. 280, 71 S. E. 626.

E. OFFICIAL BONDS.

1. Of Accountant.

Barnes Code, ch. 54, § 80a (2).

2. Of Cashier.

Barnes Code, ch. 54, § 80a (2).

Form and Sufficiency of Bond.—A bond executed by a bank cashier, reciting his previous election as such, and stating the condition to be that he "shall well and faithfully apply and account for all monies which may come into his hands as such cashier," is, when properly construed, an indemnity to the bank against loss by his default, although its officers are therein named as obligees as president and as directors of the bank in its corporate name. *Clark v. Nickell*, 73 W. Va. 69, 79 S. E. 1020.

Liability of Sureties.—A cashier's bond was conditioned that the cashier should well and truly serve the bank, and should not "during his incumbency" embezzle, make away or lend any of the funds of the bank without authority, but should deport himself honestly with all the funds that should pass through his hands "during his term of service." Held: That the

liability of the sureties on the bond was not limited as to duration to any particular year or other period of the cashier, but was a continuing liability during the whole term of service of the cashier from the time when the bond was given until the end of such service. *Conner v. West*, 129 Va. 85, 105 S. E. 762.

In an action against sureties on a cashier's bond, where the liability of the sureties was a continuing one during the whole term of service of the cashier, the refusal of the trial court to admit oral evidence to show that the cashier's resignation was tendered and accepted, if error, was harmless, where if the resignation was tendered and accepted, another contract of employment, either express or implied, was, eo instante, made between the bank and the cashier, in such a way that his services as cashier were not for a moment interrupted, but were continuous from the time the bond was given until the liability in judgment was incurred. *Conner v. West*, 129 Va. 85, 105 S. E. 762.

Same—Release of Debtor.—The release by the receiver of a bank, without the consent of the sureties on the cashier's bond, of the mere personal liability of a third party to the bank for an overdraft for which the cashier was also liable to the bank, did not release the sureties of the cashier from such liability. *Conner v. West*, 129 Va. 85, 105 S. E. 762.

5. Pleading and Practice, etc.

Equity is the only sufficient and appropriate source of relief to enforce the liability upon the bond of the cashier of a bank where it appears that the obligation is not directly payable to the bank, but is payable to its officers as president and as directors, three of whom are also obligors on the bond. *Clark v. Nickell*, 73 W. Va. 69, 79 S. E. 1020.

Same—Defendants. — A suit in

equity, by the bank, to enforce the obligation of such bond, should be brought jointly against the surviving, and the personal representatives of the deceased, obligors. *Clark v. Nickell*, 73 W. Va. 69, 79 S. E. 1020.

Same—Parties.—In a suit in equity to enforce the liability upon the bond of the cashier of the bank where it was shown that all the obligors of the bond were not joined as parties, a demurrer on the ground of defective parties should be sustained. *Clark v. Nickell*, 73 W. Va. 69, 79 S. E. 1020.

IX. STOCK AND STOCKHOLDERS.

See post, "Stock," XVII, C. See generally, post, STOCK AND STOCKHOLDERS.

½A. CAPITAL STOCK IN GENERAL.

See post, "Liability of Stockholders," IX, I.

Va. Code 1919, § 4099, amended by Va. Acts 1920, p. 819, §§ 4100, 4144; Barnes Code, ch. 54, 78a (1), 78a (2), 79, 79a (3), 79a (5), W. Va. Acts 1919, amending Barnes Code § 77.

Capital and Capital Stock Distinguished. — "Capital" and "capital stock" of a bank, while sometimes used interchangeably, are not one and the same thing. "Capital" includes the entire assets of the bank whether represented by money paid in for stock, surplus, undivided profits or other property of the bank while "capital stock" represents only the total amount derived from the issuance of the shares of stock. *West v. Newport News*, 104 Va. 21, 51 S. E. 206.

A. SALES AND CONVEYANCES.

4. Purchasers of Stock.

Right to Rescind. — A fraudulent sale by an insolvent bank of shares of its capital stock may be rescinded by the purchaser though action in that behalf is not taken until after a re-

ceiver for the bank has been appointed, where no great length of time elapsed between the sale and the receivership, the purchaser did not actively participate in the management of the bank, no want of diligence on the part of the purchaser in discovering the fraud or in taking steps to rescind appears, and no considerable amount of indebtedness, remaining unpaid, accrued against the bank subsequent to the sale. *Morrissey v. Williams*, 74 W. Va. 636, 82 S. E. 509.

The general rule that a subscription or purchase of the stock of a corporation will not be rescinded even for fraud when no action to that end is taken until after the declared insolvency of the corporation by a receivership, is not without qualification. If proper equities of creditors will not be affected, the rule should not apply. And particularly where no debts of the corporation have accrued subsequent to the subscription or purchase, rescission may be had. *Morrissey v. Williams*, 74 W. Va. 636, 82 S. E. 509.

B. TRANSFER OF STOCK.

Barnes Code, ch. 54, § 77.

To Foreign Personal Representative.

—Va. Code 1919, § 5348, Barnes Code, ch. 54, § 77.

D. DIVIDENDS.

Va. Code 1919, § 4119; Barnes Code, ch. 54, § 79a (2).

H. TAXATION OF BANK STOCK.

See post, "Bank Stock," X, B.

I. LIABILITY OF STOCKHOLDERS.

See post, "Assignments for Benefit of Creditors," XI, A; "Creditors' Suits," XI, D, 1; "Receivers," XI, D, 2.

W. Va. Const. Art. XI, § 6; Barnes Code ch. 54, § 78a (3); Va. Code 1919, § 3788.

In the settlement of the affairs of an insolvent bank, the unpaid subscriptions of stockholders constitute

a part of the assets and stockholders may be required to restore dividends unlawfully and improperly declared out of funds and assets other than profits, and paid in cash or applied in satisfaction of unpaid subscriptions. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

"Section 78a III (W. Va. Code 1913, ch. 54) imparts express legislative force and vigor to the constitutional requirement, and provides, in the identical language of the latter, that the stockholders of every bank organized under the provisions of that chapter 'shall be personally liable to the creditors thereof, over and above the amount of stock held by them respectively, to an amount equal to their respective shares so held, for all liabilities accruing while they are such stockholders.' Both constitution and statute impose a personal liability on stockholders for debts accruing while they are such share-holders in a banking corporation — a liability thereby made personal; not as sureties but as principals, for double the amount of the shares so held by each of them at the date the liability accrues. *Hobart v. Johnson*, Fed. 493." *Dunn v. Bank*, 74 W. Va. 594, 599, 82 S. E. 758.

The double liability of stockholders of an insolvent bank are assets in the hands of the trustees to be administered for the benefit of its creditors. *Clark v. Bank*, 72 W. Va. 491, 78 S. E. 785.

A stockholder in a bank is subject to the statutory double liability only with respect to liabilities incurred by the bank during the period of his ownership of the stock. *Heater v. Lloyd*, 85 W. Va. 570, 102 S. E. 228.

Amount of Liability of Stockholders of Insolvent Bank. — No stockholder of an insolvent bank, nor any number of holders, at different times, of the same shares of stock are liable individually or in the aggregate for more than 100 per cent. of the par

value thereof; and in case any holder of such shares of stock has paid the full amount of the liability on account thereof, the receiver has no right to demand any further payment from any other holder of such stock. *Pyles v. Carney*, 85 W. Va. 159, 101 S. E. 174.

Liability of Assignor after Transfer. — Under § 6, Art. XI, constitution, and § 78a, III, Ch. 54, Code 1913, an assignor of bank stock remains liable, after transfer thereof, to the extent prescribed by said sections, for an indebtedness incurred by the bank while he was owner of such shares. *Dunn v. Bank*, 74 W. Va. 594, 82 S. E. 758.

Liquidation of Stockholder's Liability—Interest. — Such liability is unliquidated until the amount thereof is ascertained in some manner provided by law, and the stockholder required to pay the same; and from that time it became a liquidated demand and bears interest. *Pyles v. Carney*, 85 W. Va. 159, 101 S. E. 174.

X. TAXATION.

See generally, post, TAXATION.

½A. IN GENERAL.

Va. Code 1919, §§ 2223, 2309, 2544, 4102, 6310; Va. Acts 1918, p. 624, 1920, p. 552; Va. Acts 1918, p. 392; 1919, p. 69; Va. Acts 1918, p. 624; 1920, p. 487; Barnes Code, ch. 29, §§ 55, 79; ch. 32, § 4.

Deposits. — "It is also clear from the provisions of §§ 487, 489, Va. Code, 1904 (§§ 2300, 2304, Va. Code 1919), that money deposited in bank, as this was, was not treated as 'tangible personal estate' and made taxable on that ground, but was subject to taxation because the depositor was a person residing within this state, within the meaning of the tax laws. In the case of such resident, money belonging to him, whether deposited in a bank in or out of the state, is taxable, but where he is not such resident his general deposits of his own

money in a bank of this state are not taxable here. See *Commonwealth v. Williams*, 102 Va. 778, 47 S. E. 867; *Selden v. Brooke*, 104 Va. 832, 52 S. E. 632." *Pendleton v. Commonwealth*, 110 Va. 229, 234, 65 S. E. 536.

A. CONFLICT BETWEEN STATE AND NATIONAL GOVERNMENT.

Taxation of National Bank. — As held in *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, "A state is wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets and franchises, except when permitted so to do by the legislation of Congress." *Bank v. State*, 58 W. Va. 559, 560, 52 S. E. 494.

B. BANK STOCK.

See generally, post, TAXATION. Va. Const. § 182; Va. Acts 1918, pp. 535, 569; Va. Acts 1919, p. 38; Barnes Code ch. 29, § 79.

Bank Stock as Personal Property. — That bank stock is personal property would seem to be settled by 1173a, subsection 7, Va. Code 1904, wherein it is declared to be personal property, and by § 5, subsection 10, Va. Code 1904, which defines personal estate to include chattels, real and such other estate as, upon the death of the owner intestate, would devolve upon his personal representative. *West v. Newport News*, 104 Va. 21, 26, 51 S. E. 206.

Distinction between Shares of Stock and Capital. — The shares of stock of a bank are distinct and different from its capital and may be taxed, though the capital itself be invested in non-taxable securities. *Sussex v. Jarratt*, 129 Va. 672, 106 S. E. 627.

Constitutionality of Statutes—Title of Act. — The act of February 28, 1890 (Acts 1889-90, p. 111), amended by Acts 1902-3-4, p. 431 (§ 1040-a of Code, 1904 [§ 4102, Va. Code 1919]), providing for the taxation of shares

of stock issued by banks located in counties and cities is not unconstitutional as embracing more than one object, which is not expressed in its title. *Tresnon v. Board*, 120 Va. 203, 90 S. E. 615.

Construction of Statutes—Place of Taxation. — The bank act, Acts 1915, p. 209, and section 1040-a, Code 1904 (§ 4102, Va. Code 1919), are harmonious, and, when read together, constitute the law of the state touching the assessment and taxation of shares of bank stock. Under these acts shares of stock in city banks owned by residents of a county are properly taxable in the county. *Tresnon v. Board*, 120 Va. 203, 90 S. E. 615.

Uniformity — City and County Taxes. — The uniformity requirement of § 168 of the constitution is not violated by the fact that a statute permits stock in a city bank to be taxed by the city against resident holders thereof at a higher rate than it is taxed by an adjacent county against residents of such county. *Tresnon v. Board*, 120 Va. 203, 90 S. E. 615.

Discrimination against National Bank Stock. — Before a state statute denying right in taxation to deduct debts from stock in national banks assessed with taxes but allowing such deduction from other investments can be held as in violation of § 5219, Rev. Stat. of the United States, prohibiting a state from taxing such stock at a greater rate than is assessed on other moneyed capital in the hands of individual citizens, it must appear that such other moneyed capital exists and in such amount as to operate as a discrimination against such banks, and that it is of such character as to come in competition with national banks. *West Va. Nat. Bank v. Dunkle*, 65 W. Va. 210, 64 S. E. 531.

Value for Taxation. — In ascertaining the value of the shares of bank stock for taxation under Acts 1906, p. 325,

the value of the real estate otherwise taxed, which is to be deducted from the aggregate of the bank's capital, surplus and undivided profits, is the assessed value of such real estate, and not its actual value. Any other construction would render the act of doubtful constitutionality under the provisions of § 182 of the constitution. *Commonwealth v. Virginia Bank, etc., Co.*, 110 Va. 552, 66 S. E. 853.

Bank stock being assessed for taxation by the state, and cities being compelled by statute to follow that assessment, a city ordinance imposing a tax of so much on the assessed value of the "capital stock" of banks located in the city is a sufficient compliance with the statute requiring bank stock to be assessed at its market value. The term "assessed value" has reference to the assessed value for state taxation, which the city has to follow. When the state has assessed the value of bank stock for the purpose of taxation and no objection is made to that assessment, none can be made to a city ordinance which adopts it. *West v. Newport News*, 104 Va. 21, 51 S. E. 206.

Deductions.—A bank, owning shares of the capital stock of a corporation which has caused itself to be assessed with its property in the manner prescribed by § 77 of chapter 29 of the Code, as amended by chapter 35 of the Acts of 1905, and having elected to have its capital stock, surplus and undivided profits assessed to it, in conformity with the provision of § 79 of said chapter of the Code, as so amended, is entitled to have the value of such shares deducted, along with the value of its real estate and property exempt from taxation, in the ascertainment of the taxable value of its capital stock, surplus and undivided profits. *State v. Graybeal*, 60 W. Va. 357, 55 S. E. 398.

The value of real estate, owned by the banks and trust companies, to be

deducted in ascertaining the taxable value of their capital stock, surplus and undivided profits, under the provisions of § 79 of chapter 29 of the Code, as amended by chapter 35 of the Acts of 1905, is the assessed value, not the actual value thereof at the time of the assessment. *State v. Graybeal*, 60 W. Va. 357, 55 S. E. 398.

Section 1040-a (Va. Code 1919, § 4102) of the Code of Virginia, authorizes a holder of bank stock living in a county or city other than in which is the principal office of the bank to list his stock for taxation with the commissioner of the revenue of the county or city in which he lives and provides that thereupon the commissioner of the revenue of the city or county of the bank's principal office shall deduct from the aggregate value of the bank's shares the aggregate value of the shares returned for taxation in the county or city in which the stockholder lives. Held, that the entire local tax upon the shares so deducted must be returned by the bank to the shareholder and not merely the amount of the tax paid by him upon his stock to the county or city in which he lives. *Hawse v. American Bank, etc., Co.*, 4 Va. Law Reg. 251.

Exemption of Bank's Capital.—

All legislative acts are presumed to be lawful, and are to be so construed unless the contrary plainly appears; and as the capital of banks is exempt from taxation, a city ordinance imposing a tax on the "capital stock" of banks will be construed to refer to the totality of shares of the individual stockholders which the city has the right to tax. *West v. Newport News*, 104 Va. 21, 51 S. E. 206.

Application of Ordinance.—A city ordinance imposing a tax on "all personal property of every description, including the capital stock of banks," is broad enough to cover a tax levied on shares of stock of a

bank in the hands of a stockholder even if the use of the words "capital stock" showed an intention to tax the capital of banks. The added words "including the capital stock of banks" give no further meaning or force to the comprehensive words which precede them. *West v. Newport News*, 104 Va. 21, 51 S. E. 206.

XI. INSOLVENCY, ASSIGNMENT AND RECEIVERSHIP.

See ante, "State Depositories," V, A, 1, g; "In General," V, A, 2, ½a; "Directors of Insolvent Banks," VIII, C, 5; "Liability of Stockholders," IX, I.

A. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

See generally, ante, **ASSIGNMENTS FOR BENEFIT OF CREDITORS.**

Power to Execute Deed.—Although a bank is hopelessly insolvent, directors have not power to execute a general deed of assignment of all its property for the equal benefit of all of its creditors. Such a deed can only be lawfully executed by the stockholders. If executed by the directors, however, though in excess of their authority, it is not wholly void, but is capable of being rendered valid by ratification or acquiescence, and, in the case in judgment, the whole course of dealing upon the subject and the conduct of the litigation shows that the deed executed by the directors has been ratified and acquiesced in by the stockholders and the conduct of directors has been such as to estop them to deny its due execution. *Winston v. Gordon*, 115 Va. 899, 80 S. E. 756.

Effect of Description of Particular Items.—The assignment by a bank of all of its assets of every kind, character and description, where-soever situate, will pass to the assignee therein all of the assignable assets of such bank, notwithstanding such assignment after the terms above mentioned may describe certain par-

ticular items, which do not include the whole of such bank's assets, as being included within the terms of the assignment. Such particular mention of specific items will not limit the effect of the assignment thereto. *First Nat. Bank v. Smith*, 85 W. Va. 624, 103 S. E. 318.

Liability of Directors—Misappropriation of Funds.—An assignment by a bank of all of its assets of every kind, character and description, where-soever situate, will transfer to the assignee therein the liability of the directors to such assignor bank for mis-application or misappropriation of its funds due to mismanagement or misconduct. *First Nat. Bank v. Smith*, 85 W. Va. 624, 103 S. E. 318.

Officers' and Stockholder's Liability as Assets.—The liability of a bank's officers for gross neglect of duty and wilful mismanagement of its affairs, and the double liability of stockholders, are both assets in the hands of the trustee of an insolvent bank, to be administered for the benefit of its creditors. *Clark v. Bank*, 72 W. Va. 491, 78 S. E. 785.

It is proper to administer both of said assets in a suit brought by the trustee against the bank, its stockholders and creditors. *Clark v. Bank*, 72 W. Va. 491, 78 S. E. 785.

Suit by Transferee Bank—Recovery of Assets—Parties Plaintiff.—A suit in equity to recover a particular claim should be prosecuted in the name of the beneficial owner thereof and where a bank has transferred all of its assets to another bank, and by the contract of assignment has created a liquidating committee, with powers to prosecute suits for the recovery of said assets, and there is further provision made that when certain indebtedness mentioned in the contract has been paid the transferee bank will re-transfer any remaining assets to the original owner thereof, a suit in equity brought to recover any of such

assets so transferred should be brought in the name of the transferee bank, and in such cause it is proper to join as parties plaintiffs the said liquidating committee for the purpose of showing their assent to the prosecution of such suit, as well as the transferor bank because of its contingent interest in the recovery in case there should be realized an amount in excess of the debts to be paid out of such assets. *First Nat. Bank v. Smith*, 85 W. Va. 624, 103 S. E. 318.

D. WINDING UP.

$\frac{1}{2}$. In General.

Voluntary Liquidation. — *Barnes Code*, ch. 54, § 80a (1).

Involuntary Liquidation. — *Barnes Code*, ch. 54, § 81a (7); *Va. Code* 1919, § 4120.

1. Creditors' Suits.

May Require Collection of Assets.

—In a creditor's suit to wind up the business of an insolvent bank, the assets of the bank, including rights of action against its officers and stockholders for losses occasioned by their misconduct and misappropriation of funds, constitute a trust fund for the benefit of creditors and they may come in, not only to share in the distribution thereof, but also to require collection of the assets. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

Joinder of Plaintiffs.—"While it appears that plaintiffs are not jointly, but are separately, interested in the several items of indebtedness against the bank, they do have a sufficient interest in common to warrant the maintenance of this proceeding. Having interest in the questions at issue and the relief sought, they did not join as plaintiffs. To the extent of the individual indebtedness severally claimed, they had the right alone, or jointly with other creditors, to demand payment out of the assets the collec-

tion and appropriation thereof to the liquidation of the insolvent bank's debt as sought by the two causes so heard together. *Pom. Eq. Jur.* § 269; *Bosher v. R. & H. Land Co.*, 89 Va. 455, 16 S. E. 360; *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241." *Dunn v. Bank*, 74 W. Va. 594, 596, 82 S. E. 758.

The general creditors of an insolvent bank are not necessary parties to a suit against the receiver thereof, having for its purpose establishment of a right of preference in payment out of the assets of the bank in his hands. *Alleman v. Sayre*, 79 W. Va. 763, 91 S. E. 805.

Leave of the Commissioner of Banking, to sue a receiver of an insolvent bank, appointed by him, is not essential to the institution or maintenance of a suit against him by the bank's creditors. *Alleman v. Sayre*, 79 W. Va. 763, 91 S. E. 805.

Enforcement of Liability of Officers and Stockholders.—If the trustee of an insolvent bank, by his bill, does not seek to enforce the officers' liability, the defendant stockholders may do so by answers in the nature of cross-bills. *Clark v. Bank*, 72 W. Va. 491, 78 S. E. 785.

In such suit to which all the parties interested are parties, in order that the court may do complete equity, the extent of the officers' liability should be ascertained before assessing any portion of the double liability upon the stockholders. *Clark v. Bank*, 72 W. Va. 491, 78 S. E. 785.

Same — Stockholders' Liability. — In a creditor's suit against an insolvent bank, the statutory liability of stockholders for amounts equal to their subscriptions in addition thereto may be invoked and such amounts brought in for distribution with the assets of the bank. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

In such suit, a transfer of stock, made with intent to avoid the statutory

liability and defraud creditors of the bank may be assailed by cross-bill, if it has not been attached by the plaintiff of the receiver. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

Same—Limitation of Actions.—The individual liability of a stockholder of an insolvent bank is not a primary but a secondary liability, in the nature of a guaranty, and the statute of limitations does not begin to run against the enforcement thereof until the necessity for payment of the same is ascertained and the stockholder so notified, which must be done within a reasonable time; section 12, chapter 104 W. Va. Code 1913, then applies the five year limitation to the right of action. *Pyles v. Carney*, 85 W. Va. 159, 101 S. E. 174.

Cross-Bill—Omission of Grounds of Relief from Bill.—If, in a suit to wind up the business of an insolvent bank, grounds of relief against officers and stockholders have been omitted from the bill and the receiver has not instituted any suit or other proceeding to enforce such claims, cross-bills by creditors, not seeking to withdraw such assets from the suit, nor to interfere with the custody or possession of the receiver, may be filed. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

Same—Effect of Appointment of Receiver.—The appointment of a receiver in a creditor's suit, brought to wind up the business of an insolvent bank and distribute its assets does not preclude creditors other than the plaintiff in the bill from setting up in the same suit, by cross-bill, grounds of relief against the plaintiff, the officers, stockholders and other creditors, not set forth or admitted in the bill. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

Decree of Distribution of Assets.—It is error to postpone, in a decree of distribution of the assets of an insol-

vent bank, the assignee of deposit accounts therein, though he is an officer held liable for losses and misappropriations and preferences. In this respect, such claims should be treated as if they had been his originally, unless there is an equity against them in favor of the bank. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

An officer of an insolvent bank, held liable in such a suit for all of his indebtedness to the bank and losses occasioned by his misconduct or neglect of duty, required to restore all of his misappropriations and deprived of the benefit of all preferences he has obtained, so far as claims against him on such accounts are passed upon in the decree, can not properly be denied participation in the distribution of the assets on account of his deposits and other claims against the bank. In such case, his entire liability should be ascertained and decreed against him and then he should be allowed to participate in the distribution, on payment or collection of a sufficient amount to insure ratable distribution among all creditors including himself. *Benedum v. First Citizens Bank*, 72 W. Va. 124, 78 S. E. 656.

Same — Delinquent Officers Postponed as Creditors.—In a suit by creditors, who are also directors and officers, of an insolvent banking corporation, to marshal and distribute the assets, and to charge the stockholders with their statutory liabilities to creditors for deficiency of assets, where it appears that the insolvency of the bank is due to the gross mismanagement and neglect of such directors and officers rendering them liable to creditors and stockholders for losses incurred thereby, they may, in a proper case, be postponed as creditors until the debts of all other creditors have been fully paid. *Elliott v. Farmers' Bank*, 61 W. Va. 641, 57 S. E. 242.

Same—Off-Sets.—In a suit by credi-

tors, who are also directors and officers, of an insolvent banking corporation, to marshal and distribute the assets, and to charge the stockholders with their statutory liabilities to creditors for deficiency of assets, where it appears that the insolvency of the bank is due to the gross mismanagement and neglect of such directors and officers rendering them liable to creditors and stockholders for losses incurred thereby, neither the bank nor its creditors or stockholders are estopped from offsetting against the debts of other claimants or their assignees, whether by judgment or otherwise (no superior equities intervening), the indebtedness of such claimants to the bank not involved or adjudicated in a former suit between the same parties or their privies. *Elliott v. Farmers' Bank*, 61 W. Va. 641, 57 S. E. 242.

2. Receivers.

See ante, "Creditors' Suits," XI, D, 1.

Appointment. — Va. Code 1919, § 4120; Barnes Code, ch. 54, § 81a (7).

Suit to Secure Appointment of Receiver.—As the directors of a banking corporation occupy towards its stockholders and creditors the relation of trustees, bound to the exercise of due care in the management of its affairs, and are liable for any negligence on their part resulting in an inadequacy of its assets to discharge its liabilities, they may, upon the threatened insolvency of the company, apply to a court of equity to take charge of its assets and so administer them as to diminish as far as possible the injury to all concerned, including creditors, depositors and stockholders. *Camden v. Virginia Safe Deposit, etc., Corp.*, 115 Va. 20, 78 S. E. 596.

A bill filed by directors of a corporation, who are also stockholders, for the sole purpose of collecting its assets and distributing them equitably

amongst those entitled, is in no sense a bill to wind up the corporation. The result may be the application of all the assets of the corporation of the discharge of its liabilities, and its consequent inability to continue business, but neither insolvency nor the appointment of a receiver operates a dissolution of the corporation. A corporation may exist as a legal entity without any property or assets. *Camden v. Virginia Safe Deposit, etc., Corp.*, 115 Va. 20, 78 S. E. 596.

"The receiver holds the title to the assets as fully and completely as an administrator holds that of the personal estate of a deceased person." *Alleman v. Sayre*, 79 W. Va. 763, 767, 91 S. E. 805.

It is the duty of the receiver to find the creditors and their duty to present claims to him. He must resist all invalid claims of preference, attack all fraudulent conveyances and transfers and protect the assets in the interest of the general creditors. *Alleman v. Sayre*, 79 W. Va. 763, 767, 91 S. E. 805.

Receiver's Suit against Stockholders.—A receiver of an insolvent bank, appointed by the banking commissioner with the advice and consent of the governor, may maintain a suit in his own name against stockholders of the bank to enforce their individual liability for the benefit of creditors, when ordered so to do by the banking commissioner. *Pyles v. Carney*, 85 W. Va. 159, 101 S. E. 174.

"The liability upon holders of bank stock, created by § 78, chapter 54, Code 1906, serial number 2394 (Barnes Code, ch. 54, § 78a [3]), commonly called their double liability, is not an asset in the hands of a solvent, going bank. So long as a bank is doing business, and is able to pay its debts, there is no double liability upon the stockholders in favor of the bank. The bank can not enforce it for its own purpose or benefit. But when a bank

becomes insolvent, the double liability of stockholders becomes an asset, in the hands of the receiver, or trustee, and he may enforce it for the benefit of the bank's creditors. Bolles, in his recent valuable work on *Modern Law of Banking*, vol. 2, page 821-2, classifies both the liability of the directors for gross mismanagement, and the double liability of stockholders, as assets in the hands of an insolvent bank for the benefit of its creditors." *Clark v. Bank*, 72 W. Va. 491, 495, 78 S. E. 785.

Unpaid Stock Subscriptions as Assets of Insolvent Bank. — See ante, "Liability of Stockholders," IX, I.

XV. EVIDENCE.

F. SUFFICIENCY OF EVIDENCE.

Receipt of Proceeds of Note. — A check for the proceeds of a note, made by a stranger and indorsed, as an individual, by one who is the cashier of a bank, and discounted for his personal accommodation, although drawn to his order as cashier, is not proof that his bank received such proceeds, when it is shown by the bank's books and his own admissions that the funds were placed to his individual account and used by him. *First Nat. Bank v. Clark Nat. Bank*, 79 W. Va. 105, 90 S. E. 534.

Agreement to Place Proceeds of Note to Maker's Credit. — Where the treasurer of plaintiff corporation discounted a note made by it with the defendant bank of which he was president and had the proceeds placed to his individual credit, it was held, in an action by the corporation against the bank to recover the proceeds of such note, that the evidence was insufficient to show any agreement by the bank to deposit the proceeds to the credit of the plaintiff, maker of the note, or that the transaction was other than the ordinary case of a note discounted by the holder and the proceeds placed to his

credit. *Culpeper Nat. Bank v. Tidewater Improv. Co.*, 119 Va. 73, 89 S. E. 118.

XVI. SAVINGS BANKS.

See ante, "In General," II, A; "Certificates of Deposit," V, A, 1, c; "Officers and Agents," VIII; "Directors," VIII, C; "Stock and Stockholders," IX.

1/2A. STATUTES APPLICABLE TO SAVINGS BANKS.

Barnes Code, ch. 54, §§ 81a (4)—(7), § 81b (1)—(23), (29)—(33), (39), (40); W. Va. Code Supp. 1918, § 3110; Va. Code 1919, §§ 4098, 4100, 4104, 4105, 4120, 4124, 4129, 4138, 4143, 4145.

B. DEPOSITS GENERAL AND SPECIAL, ETC.

Paying Deposits, etc. — Va. Code 1919, §§ 4142, 4147; Barnes Code, ch. §§ 81a (21), § 81b (3)—(14)—(19)—(22)—(34)—(36); W. Va. Code, Supp. 1918, §§ 3088, 3093, 4167a.

Liability of Bank—Binding Effect of Rules and Regulations.—The liability of a bank to its depositors in its savings departments differs very considerably from its liability to its depositors in other branches of its business. Generally banks adopt rules and regulations relating to receiving and paying out money on deposits in its savings department. * * * It is important to know to what extent and under what circumstances these rules are binding upon the depositor. Deposits of this kind are not subject to check, and most of the depositors are seen but occasionally at the bank. These are usually quite numerous, rendering identification more difficult than in cases of ordinary banks. Hence by agreement between the bank and its depositors, reasonable rules and regulations may be adopted for the protection of both the depositors and the bank. Such rules, when reasonable and assented to by the depositor, are

upheld by the courts, where there is no negligence on the part of the bank. *Zuplkoff v. Charleston Nat. Bank*, 77 W. Va. 621, 627, 88 S. E. 116.

Same — Presentation of Passbook and Notice of Loss as Condition to Payment.—"The adjudicated cases uniformly hold that in case of a savings bank, or a bank having a savings department, by-laws requiring presentation of the pass book and notice to the bank in case of loss as conditions precedent to payment, are reasonable, and when brought to the notice of the depositor, become part of the contract between the bank and the depositor." *Zuplkoff v. Charleston Nat. Bank*, 77 W. Va. 621, 627, 88 S. E. 116.

Same—Duty of Bank to Exercise Care in Paying Deposit. — "'One of these by-laws or rules that is commonly printed in the passbook provides that all payments to persons producing the passbook shall be valid payments to discharge the bank. It has been held that such a by-law or rule, or one of similar import, will not prevent a recovery by a depositor whose passbook has been stolen, or obtained from him by fraud, and the deposit is wholly or in part withdrawn, unless the bank used ordinary care in making the payment.' 3 *Michie on Banks and Banking*, § 301 (4)." *Zuplkoff v. Charleston Nat. Bank*, 77 W. Va. 621, 629, 88 S. E. 116.

Same — Liability for Payment to Wrong Person.—The defendant bank adopted the following rules and regulations, applicable to its saving department: "4. Deposits and the interest thereon may be withdrawn by the depositor in person or by written order; but in either case the passbook must be presented, that such payments may be entered therein. As officers of the bank may be unable to identify every depositor, the bank will not be responsible for loss sustained where a depositor has not given notice of his or her book being lost or stolen, if

such book be paid in whole or part on presentation. In all cases a payment upon presentation of a deposit book shall be a discharge to the bank for the amount so paid. 5. The amounts that may be due upon accounts shall be payable only to the depositor, his or her order or to his or her legal representatives, and in case of minors or married women, without regard to parents, guardians or husbands, as provided by law. 6. Depositors, on signing the signature card thereby agree and assent to these rules and regulations which may be altered and amended at any time by the board of directors, and all such altered or amended rules shall be obligatory and binding on depositors after due notice of the same." These rules were assented to and signed by the plaintiff, who was a depositor. Held, that notwithstanding these rules and the contract relations created thereby, the bank is bound to exercise reasonable care in making payment so that payment shall be made to the person entitled to receive the money, and if the bank pay the money to the wrong person, without exercising reasonable care, this will not be a discharge to the bank as against the depositor. *Zuplkoff v. Charleston Nat. Bank*, 77 W. Va. 621, 88 S. E. 116.

Same — Action by Depositor — Reasonable Care as Question for Jury.—Where a depositor in a savings bank which has adopted the rules stated in the preceding paragraph, seeks to recover money on a deposit made by him in such bank, and the bank defends on the ground that the money had been paid to a person holding the depositor's pass book, and that no notice had been given the bank before such payment that the book had been stolen or lost, and the evidence is conflicting and contradictory as to whether the bank used reasonable care in ascertaining whether or not the person who presented the book was the

owner or entitled to receive the money, before paying the same, this would make a proper case for a jury to determine whether or not under all the circumstances the bank had exercised reasonable care. Such questions should be decided by the jury and not by the court. *Zuplkoff v. Charleston Nat. Bank*, 77 W. Va. 621, 88 S. E. 116.

Joint Savings Account—Right of Survivorship.—If a husband and wife by joint account open in a savings bank stipulate in the pass book that the amount deposited by them as joint owners is to be "payable to the order of either, or the survivor," they thereby and by contract create a joint estate in the money deposited subject to the right of survivorship as provided thereby, unaffected by section 1, or section 18, of chapter 71, of the Code, relating to gifts inter vivos, joint tenancy, survivorship, etc., and the survivor will be entitled to the fund remaining on deposit as stipulated. *Wisner v. Wisner*, 82 W. Va. 9, 95 S. E. 802.

D. DIRECTORS AND OTHER OFFICERS.

See ante, "Officers and Agents," VIII.

Va. Code 1919, §§ 4139, 4140; Barnes Code, ch. 54, §§ 81b (5)—(14); W. Va. Code Supp. 1918, §§ 3077, 3083, 3102.

E. WINDING UP AND DISSOLUTION.

See ante, "Winding Up," XI, D.

Va. Code 1919, § 4120; Barnes Code, ch. 54, § 81b (37); W. Va. Code 1918, § 3107.

XVII. NATIONAL BANKS.

A. POWER OF STATE TO CONTROL.

See ante, "Conflict between State and National Government," X, A.

A national bank has been held frequently to be an agency or instrumentality created for public national

purpose, and as such, necessarily subject to the paramount authority of the nation, and beyond the power or control or regulation of any state, save only so far as Congress may confer upon the state that power. *Davis v. Elmira Savings Bank*, 161 U. S. 283, cited in *Bank v. State*, 85 W. Va. 559, 560, 52 S. E. 494.

B. POWERS, DUTIES AND LIABILITIES.

1. In General.

As Fiduciaries.—Va. Code 1919, § 4149.

Change of State Bank into National Bank.—Barnes Code, ch. 54, § 80a (1).

Guaranty of Another's Obligation—

Ultra Vires.—An agreement of a national bank to guarantee an obligation of another person for his sole benefit, though founded upon a valuable consideration, is ultra vires and does not bind the bank, unless the circumstances are such as work an estoppel. *Farmers, etc., Bank v. Kingwood Nat. Bank*, 85 W. Va. 371, 101 S. E. 734.

Same—Pleading. — Counts in a declaration purporting to charge a national bank upon a guaranty of notes of a third person and being uncertain and indefinite as to whether the bank acted as the mere agent of the parties to the notes or was the owner thereof or otherwise beneficially interested therein, are insufficient. *Farmers, etc., Bank v. Kingwood Nat. Bank*, 85 W. Va. 371, 101 S. E. 734.

C. STOCK.

See generally, ante, "Stock and Stockholders," IX; "Bank Stock," X, B.

Transfer of Stock to Foreign Personal Representative.—Va. Code 1919, §§ 5348, 5349.

Right to Hold Stock—Collateral Attack.—The defendants in a suit brought by a national bank to enforce its rights as the equitable owner of an interest in a corporation, because of the im-

proper conversion of the assets of such corporation, will not be permitted to question the right of such bank to hold such stock. *Tierney v. United Pocahontas Coal Co.*, 85 W. Va. 545, 102 S. E. 249.

"If in holding this stock it is acting in excess of its powers, only the United States Government or, perhaps, some of its own stockholders, can raise that question. *Bank v. Whitney*, 103 U. S. 99." *Tierney v. United Pocahontas Coal Co.*, 85 W. Va. 545, 566, 102 S. E. 249.

D. INTEREST AND USURY.

See generally, ante, "Usury," V, A, 3, g; post, INTEREST; USURY.

Requiring Payment of Debt of Insolvent as Bonus for Loan.—Plaintiff, a national bank, discounted a note of one of defendants for \$6,730, indorsed by three other of defendants, upon condition that in addition to the legal rate of interest thereon the bank should be paid a debt of an insolvent concern to it, the assets of which concern defendant wanted to raise money by this loan to buy, but for which debt neither he nor any of defendants were in any way liable prior to the making of such condition by the bank. This debt of such insolvent concern proved to be \$930.11, and was accordingly paid to the bank by defendants. Defendants paid only the legal rate of interest or discount on the face of the \$6,730 note and on all renewal notes for portions of this debt, but the agreement and payment of the \$930.11 bonus made the charge of the bank of interest on said loan evidenced by the note for \$6,730 at a rate greater than that allowed by law and hence such \$6,730 note was usurious. *Baker v. Lynchburg Nat. Bank*, 120 Va. 208, 91 S. E. 157.

Same—Payments on Renewal Notes Not Usurious.—Where a national bank exacted a bonus as a condition of discounting a note, in an action by one of

the defendants against a national bank to recover from it the penalty provided by § 5198 of the U. S. Rev. Stats., of double the amount of interest at the legal rate paid by it to such bank on renewal notes covering portions of the \$6,730 debt, within two years next preceding the institution of the action, it was held that the payments of interests at the legal rate on the face of the renewal notes were not usurious transactions. *Baker v. Lynchburg Nat. Bank*, 120 Va. 208, 91 S. E. 157.

Same—Statutory Remedy Exclusive.

—Usurious interest paid to a national bank can not be deducted from, or—what is the same thing—applied to the principal of the debt in an action by the creditor against the debtor; the remedy for recovery of usurious interest actually paid being an action under § 5198, Rev. Stats., U. S., to recover the penalty provided for thereby, and only that action, such remedy being made an exclusive remedy by such statute, and where a bonus to secure a loan was really a payment to the bank and not a shift or device to conceal a reservation of that sum by the bank out of the original loan, which was, therefore, in fact, a payment of interest at a rate greater than that allowed by law, it was held that the sum thus paid was not carried with or promised to be paid by the renewal obligations. *Baker v. Lynchburg Nat. Bank*, 120 Va. 208, 91 S. E. 157.

Off-Set.—In an action by a national bank against the maker of a note, defendant has the right, by §§ 5197, 5198, Rev. Stat. of the United States, to reduce the amount of the recovery by the amount of usurious interest which the note bears on its face, or which is included and carried therein; but he can not offset usurious interest actually paid; his remedy for illegal interest actually paid being by action under said § 5198, to recover back

twice the amount actually paid. *National Bank v. Lynch*, 69 W. Va. 333, 71 S. E. 389.

Amount of Recovery—Double Entire Interest Paid.—In the case of actual payment of interest to a national bank which is a "usurious transaction" under U. S. Rev., St., § 5198, i. e., where the payment is at a rate greater than allowed by law, double the whole amount paid, legal as well as illegal interest, may be recovered. *Baker v. Lynchburg Nat. Bank*, 120 Va. 208, 91 S. E. 157.

Same—Sufficiency of "Payment" of Interest.—The reserving of a discount by a bank is not a payment by the debtor of interest on the loan within U. S. Rev. Stat., § 5198, authorizing a suit to recover double the amount of usurious interest paid to a national bank. *Baker v. Lynchburg Nat. Bank*, 120 Va. 208, 91 S. E. 157.

Same—Time from Which Limitations Run—Payment of Interest.—In actions by the debtor under § 5198 of United States Revised Statutes, to recover the penalty of double the interest paid to a national bank, the two-year period of limitation begins to run from each actual payment of usurious interest; each such payment is "the usurious transaction" referred to in that part of the statute which gives such remedy; and the statute runs upon each separate payment of such interest, so that no penalty for any payment of interest made more than two years next before the commencement of the action can be recovered under the statute. *Baker v. Lynchburg Nat. Bank*, 120 Va. 208, 91 S. E. 157.

Same—Payment of Whole Debt.—The period of limitation upon the time within which suit must be brought to recover the penalty of double the amount of usurious interest paid to a national bank in violation of § 5198 of U. S. Rev. Stats., begins to run from the date of each payment of interest and not from the payment of the

whole debt. *Baker v. Lynchburg Nat. Bank*, 120 Va. 208, 91 S. E. 157.

Defense to Action by Bank — No Statutory Limitation.—In an action instituted by a national bank on an obligation which is usurious under § 5198, U. S. Revised Statutes, there is no limitation of time within which the defense, given by the statute may be made by the debtor. If he pleads and proves that the debt agreed to be paid is usurious, all interest on such debt, legal as well as illegal, is forfeited, and there can be no judgment rendered except for the principal only. *Baker v. Lynchburg Nat. Bank*, 120 Va. 208, 91 S. E. 157.

XVIII. TRUST COMPANIES.

For statutory provisions applicable to trust companies when carrying on banking operations, see preceding divisions of this title.

Va. Code 1919, §§ 4145-4149; Barnes Code, ch. 546, §§ 1-21.

XIX. BANK EXAMINERS AND THEIR EXAMINATIONS, STATEMENTS OF BANKS' FINANCIAL CONDITION, ETC.

Va. Code 1919, §§ 4120-4124-4133; Va. Acts 1918, p. 662; Va. Acts 1920, p. 414; Va. Acts 1920, p. 820, amending Va. Code 1919, § 4120; Va. Acts 1920, p. 823, amending Va. Code 1919, § 4121; Va. Acts 1920, p. 823, amending Va. Code 1919, § 4122; Barnes Code, ch. 54, §§ 81a (4), (5), (6), (7); W. Va. Acts 1919, ch. 60, amending Barnes Code, § 78a (7).

Agreement by Examiner for Protection of Customer.—An agreement between a national bank examiner and a customer of the bank that a part of a fund deposited with the bank by its president to secure his indebtedness shall be applied to a debt due the bank by the customer, for which the president of the bank was ultimately liable, is not binding on the bank, in the absence of any evidence that the exam-

iner had authority to make the agreement, or that it was ratified by the bank, or that it was informed that it had been made. *Culpeper Nat. Bank v. Walter*, 114 Va. 522, 77 S. E. 484.

XX. FEDERAL RESERVE BANK SYSTEM.

Permitted to Become Members. — Va. Code 1919, § 4135.

Definitions of Federal Reserve Act, etc.—W. Va. Acts 1919, ch. 60.

XXI. CERTAIN OFFENSES BY, AGAINST OR RELATING TO BANKS.

See ante, "In General," III, $\frac{1}{2}$ A; "Receiving Deposits with Notice or Knowledge of Banks Insolvency," V, A, 1, h; "In Its Criminal Aspect," V, B, 2.

Penalty for Violation of Any Provision of Barnes Code, ch. 54.—Barnes Code, ch. 54, § 81a (20).

Unlawful Use of Terms "Bank," etc.—Va. Code 1919, § 4131.

Unlawfully Engaging in Banking.—Va. Code 1919, §§ 4131, 4136.

Certifying Check Falsely. — Barnes Code, ch. 54, § 81a (18).

Embezzlement or Fraud by Bank's Officers or Employees.—Barnes Code, ch. 54, § 81a (17), W. Va. Code Supp. 1918, § 3068.

Fraudulent Entry in Account by Banks Officer or Clerk. — Va. Code 1919, § 4457; Barnes Code, ch. 54, § 81a (17), ch. 145, § 21.

Banking House—Burning or Destroying.—Va. Code 1919, § 4430.

Same—Entry with Intent to Commit Crime.—Va. Code 1919, §§ 4438, 4439.

Circulation of False Rumor as to Financial Standing of Bank, etc. — W. Va. Acts 1919, ch. 60; W. Va. Acts 1920, ch. 97.

Giving Worthless Check—Larceny—Defenses.—Pollard's Code 1920, p. 778, Va. Acts 1920, p. 561; Barnes Code, ch. 145, § 34.

Giving Worthless Check—Defenses.

—The provision in the statute permitting one who has given a check, without funds in the bank upon which it is drawn, to successfully defend an indictment against him by showing that he has paid off said check within twenty days after demand being made upon him, is a declaration that such payment of the check after demand, and within twenty days, is evidence of fraudulent intent on his part. *State v. Price*, 83 W. Va. 71, 97 S. E. 582.

Where one, without sufficient funds in the bank to meet a check which he has given in payment for property delivered to him at the time of the check, subsequently, and before the presentation of such check deposits in the bank sufficient funds to meet the same, with the agreement that such funds are deposited for the express purpose of paying said check, and the bank, before the presentation of the check for payment, diverts such funds to another purpose, the drawer thereof can not be held guilty under section 34 of ch. 145 of the Code. Such deposit of funds in the bank for the express purpose of paying the particular check negatives any fraudulent purpose upon his part as fully as though he had paid off the check after it had been dishonored, and within twenty days after demand upon him therefor. *State v. Price*, 83 W. Va. 71, 97 S. E. 582.

The failure of the payee in a check to present it within a reasonable time will not affect the liability of the drawer of such check to indictment, under § 34 of ch. 145 of the Code 1913 (Barnes Code, ch. 145, § 34) for obtaining goods or other property by giving a check therefor without having sufficient funds to meet the same, where it appears that the drawer of the check did not lose anything by reason of the failure to present the same earlier than it was actually presented. *State v. Price*, 83 W. Va. 71, 97 S. E. 582.

In a prosecution under § 34 of ch.

145 of the Code against one for obtaining property by means of such a check, without funds in the bank upon which it is drawn, it is not error to refuse to permit the defendant to show that shortly after the check was dis-

honored and demand made upon him for its payment he was forced into bankruptcy, and his property taken away from him by an officer of bankruptcy court. *State v. Price*, 83 W. Va. 71, 97 S. E. 582.

BAR.—See ante, ABATEMENT, REVIVAL AND SURVIVAL; AUTRE-FOIS, ACQUIT AND CONVICT; post, BREACH OF PROMISE OF MARRIAGE; FORMER ADJUDICATION OR RES ADJUDICATA; LIMITATION OF ACTIONS; PLEADING.

BARGAIN AND SALE OF LANDS.—See post, DEEDS.

BARREL.—"The term barrel as used in a contract for the sale of one thousand barrels of petroleum oil may mean either a quantity or vessel, and parol evidence is admissible to show in what sense the parties used it." *Miller v. Stevens* (Mass.), 97 Am. Dec. 123." *Belcher v. Big Four Coal, etc., Co.*, 68 W. Va. 716, 720, 70 S. E. 712.

BASTARDY.

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CROSS REFERENCES.

See the title BASTARDY, vol. 2, p. 334, and references there given. In addition, see post, HUSBAND AND WIFE; SLAVES; WILLS. As to statutory legitimacy of children of former slaves, see post, SLAVES.

I. WHO ARE BASTARDS.

B. ISSUE OF VOID MARRIAGES.

Issue Legitimate Though Marriage

Null.—Va. Code 1919, § 5270; W. Va. Code, ch. 78, § 7.

The statute does not apply to cases where the cohabitation is a purely mere-

tricious connection. There must have been a bona fide agreement, express or implied, between the parties to live together as man and wife. *Francis v. Tazewell*, 120 Va. 319, 91 S. E. 202.

Effect of Annulment of Marriage on Issue.—Neither husband nor wife, nor indeed both acting in concert, can by abandonment or other act dissolve the bond of a pre-existing marriage. But if that were possible, or even if the marriage had been dissolved by a decree of a court of competent jurisdiction in a suit brought for that purpose, it could in no wise have affected the legitimacy of the children, under the Virginia Code. *Francis v. Tazewell*, 120 Va. 319, 91 S. E. 202.

C. LEGITIMATION BY SUBSEQUENT INTERMARRIAGE.

Legitimation may be defined to be the investment of an illegitimate, or one supposed to be the issue of an illegal marriage, with the rights of one born in lawful wedlock. Legitimation of bastards, either by subsequent marriage or by an act of the government, is nothing but a legal equalization of certain children illegitimately begotten with legitimate children. *Bond v. Bond*, 16 Va. Law Reg. 411, 414.

When Marriage Legitimizes Children.—Va. Code 1919, § 5269; Barnes Code, p. 974, ch. 78, § 6. See *Bond v. Bond*, 16 Va. Law Reg. 411.

The requirement of the statute for the legitimating of a child born out of wedlock is that the father shall intermarry—enter into the marriage status—with the mother of the child. There is but one marriage status known to the law, and from it flows the legal obligation of the husband to maintain and support the wife and child. The benefit of the statute can not be obtained without the payment of the price therefor therein fixed. *Cumming v. Cumming*, 127 Va. 16, 102 S. E. 572.

D. LEGITIMATION BY ACT LEGALIZING MARRIAGE OF NEGROES.

When Colored Persons Not Married to Be Deemed Husband and Wife—Their Children Legitimated.—Va. Code 1919, § 5091; Barnes Code, p. 916, ch. 63, § 8.

Where a man and woman, both slaves, agreed to occupy the relation to each other of husband and wife and in pursuance of the agreement cohabited together prior to February 27, 1866, the subsequent abandonment after the passage of the act, of the woman by the man for unfaithfulness could neither dissolve the marriage nor affect the legitimacy of the children of the marriage. *Francis v. Tazewell*, 120 Va. 319, 91 S. E. 202.

IV. CAPACITY TO INHERIT AND TRANSMIT INHERITANCE.

Statutory Provisions.—Va. Code 1919, § 5268; Barnes Code, p. 974, ch. 78, § 5.

"Under the common law a bastard was of kin to no one (*filius nullius*) or, as sometimes called, *filius populi*, and was, therefore, incapable of being the heir of any person." *Bond v. Bond*, 16 Va. Law Reg. 411.

V. BASTARDY PROCEEDINGS.

A. NATURE AND OBJECT OF PROCEEDINGS.

Nature of Proceeding.—A bastardy proceeding is a civil proceeding. *Bratt v. Cornwell*, 68 W. Va. 541, 70 S. E. 271; *Waters v. Riley*, 87 W. Va. 250, 104 S. E. 559.

A bastardy proceeding is not subject to the constitutional inhibition against cruel and unusual punishment. *Waters v. Riley*, 87 W. Va. 250, 104 S. E. 559.

The object of bastardy proceedings is neither compensation to the mother nor punishment to the father. It is mere indemnity against a possible charge for maintenance of the child. *Bowen v. Parsons*, 78 W. Va. 791, 90 S. E. 336; *Burr v. Phares*, 81 W. Va.

160, 94 S. E. 30; *Bratt v. Cornwell*, 68 W. Va. 541, 70 S. E. 271; *Waters v. Riley*, 87 W. Va. 250, 104 S. E. 559.

B. WHO MAY INSTITUTE.

Unmarried Mother—Married Woman Separated from Husband.—Barnes Code, p. 977, ch. 80, § 1. See *Burr v. Phares*, 81 W. Va. 160, 162, 94 S. E. 30.

Elements of Liability in Case of Married Women.—No recovery can be had where the prosecutrix is a married woman, in the absence of proof that she had lived separate and apart from her husband, for one year or more, and had not cohabited with him, at any time within such period of separation, and that she was delivered of a child after the expiration of such period and while the separation continued. *Bowen v. Parsons*, 78 W. Va. 791, 90 S. E. 336.

Same—Proof Required.—To warrant recovery in a bastardy proceeding by a married woman, it is absolutely necessary to prove the existence of all conditions prescribed by the statute, as prerequisite to the right of a married woman to institute and maintain such a proceeding, the right being a purely statutory one. *Bowen v. Parsons*, 78 W. Va. 791, 90 S. E. 336.

C. JURISDICTION.

See post, "Compromise," VI.

The fact that the mother went to another county for the purpose of staying for the birth of the child and during recuperation therefrom, did not prevent her maintaining bastardy proceedings in the county where she had resided several years, under statutes requiring one year's residence in the county essential for that purpose. *Bowen v. Parsons*, 78 W. Va. 791, 90 S. E. 336.

C½. PRELIMINARY PROCEEDINGS IN GENERAL.

Where the complainant attempted to dismiss bastardy proceedings an order directing a proceeding in the name of the county court is purely preliminary in character and does not affect the

merits of the proceeding. *Dent v. McDougle*, 75 W. Va. 588, 84 S. E. 382.

D. WARRANT ON COMPLAINT.

Statutory Provisions.—Barnes Code, p. 977, ch. 80, § 1.

Amendment of Complaint. — The complaint in bastardy proceedings is amendable if defective, and the defects therein are waived by failure to move to quash it or otherwise question its sufficiency; the proceeding being civil in its nature. *Bowen v. Parsons*, 78 W. Va. 791, 793, 90 S. E. 336.

E. PARTIES.

Proceedings in Name of Woman or of County Court.—Barnes Code, p. 977, ch. 80, § 3.

F. CONTINUANCE.

A failure, at any term, to enter a formal order of continuance in a bastardy case does not operate as a discharge of the accused or the release of his recognizance. *Bratt v. Cornwell*, 68 W. Va. 541, 70 S. E. 271; *Kimes v. Showalter*, 68 W. Va. 545, 70 S. E. 273.

The last clause of point 2 of the syllabus published in *Billingsley v. Cleland*, 41 W. Va. 234, 23 S. E. 812, "Failure to regularly continue such suit (bastardy proceedings) from term to term, or require a renewal of his recognizance, operates as a discharge of the accused, and such proceeding can only be renewed by the mother in the manner provided by law," is not the law of this state, since decision in that case was by an equally divided court. *Bratt v. Cornwell*, 68 W. Va. 541, 70 S. E. 271. See ante, BAIL AND RECOGNIZANCE, p. 108.

G. RECOGNIZANCE BOND.

See ante, "Continuance," V, F.

Statutory Provisions.—Barnes Code, p. 977, ch. 80, §§ 1, 2.

Effect of Forfeiture of Recognizance.

—When an accused in a bastardy case defaults the recognizance for his appearance to answer the charge, he may again be taken into custody by capias or other process of the court.

Kimes v. Showalter, 68 W. Va. 545, 70 S. E. 273.

H½. APPEARANCE BY PROSECUTING ATTORNEY.

Statutory Provision. — Barnes Code, p. 977, ch. 80, § 6.

I. JUDGMENT OR ORDER.

Bond for Maintenance of Child.—Barnes Code, p. 978, ch. 80 §§ 4, 5.

Payments and Bonds to Guarantee Performance Held Not Unreasonable.

—An order of the circuit court in a bastardy proceeding, requiring the putative father to contribute to the maintenance and support of the child the sum of \$360 annually, payable in equal monthly installments at the end of each calendar month, for a period of 10 years, should the child live that long, and to execute a \$2,500 bond with securities deemed sufficient to guarantee performance of the obligation so imposed, held not unreasonable or excessive, in the absence of evidence to the contrary. *Waters v. Riley*, 87 W. Va. 250, 104 S. E. 559.

Provisions for Support Not Interfered with, in the Absence of Abuse of Discretion.—In a bastardy proceeding pursuant to the provisions of chapter 80, Code 1918 (Code 1913, §§ 3927-3932), the amount and frequency of the payments which the putative father, if found guilty, must make for the maintenance and support of the child, the period of time during which they are to continue, and the amount of the bond required to be executed by him to guarantee due performance of the order, are matters largely intrusted by the statute to the sound discretion of the circuit court, to be exercised in the light of all the facts and circumstances of the case; and, unless the ruling thereon manifestly appears to be improper, this court cannot disturb it. *Waters v. Riley*, 87 W. Va. 250, 104 S. E. 559.

J. COSTS.

Statutory Provision.—Barnes Code, p. 978, ch. 80, § 6.

K. APPELLATE PRACTICE.

A bastardy proceeding is a civil case, from its very nature involving in matter in controversy of greater value or amount than one hundred dollars, and may be appealed by the prosecutrix when dismissed erroneously. *Bratt v. Cornwell*, 68 W. Va. 541, 70 S. E. 271.

VI. COMPROMISE.

Right to Compromise.—In this state and in states with like or similar statutes the mother of a bastard child may compromise and settle with the reputed father her claim for damages against him. *Burr v. Phares*, 81 W. Va. 160, 94 S. E. 30.

Elements of Valid Compromise. — To preclude the mother of a bastard child from instituting and prosecuting bastardy proceedings against her seducer a contract of compromise must be fair, free from fraud and deceit, and founded upon a good and sufficient consideration. *Burr v. Phares*, 81 W. Va. 160, 94 S. E. 30.

Upon the facts and circumstances shown in this case the consideration of twenty-five dollars for a complete release held not to constitute a sufficient consideration therefor, and that it was error to set aside the verdict of guilty found by the jury. *Burr v. Phares*, 81 W. Va. 160, 94 S. E. 30.

Effect of Compromise on Jurisdiction of County Court.—Although the complainant in a bastardy proceeding has signed and acknowledged a paper, avowing misapprehension under which she made the complaint and lack of intention to make it, releasing the accused from all claims of every kind and character that she might or could allege against him, on account of his paternity of her child, and directing the warrant to be returned, and caused the same to be filed in the

circuit court, with the warrant and complaint, that court has jurisdiction, by virtue of § 3 of chapter 80 of the W. Va. Code to order the proceedings to be had in the name of the county. *Dent v. McDougale*, 75 W. Va. 588, 84 S. E. 382.

Jurisdiction to Pass upon Compromise.—The jurisdiction of a justice, in such proceeding, is purely initiative and does not extend to any matter affecting the merits, wherefore he can not, in the course thereof, either expressly or impliedly, pass upon a question of compromise or satisfaction of the claims or demands of the complainant, and the circuit court is not bound to do so, until after it has determined preliminary questions relating to the form and status of the

case. *Dent v. McDougale*, 75 W. Va. 588, 84 S. E. 382.

Contract to Make Will in Consideration of Forbearance to Prosecute for Bastardy.—A parol contract between an unmarried woman and her seducer, a man of large property, shortly after the birth of her child, upon consideration that if she would not prosecute him for bastardy he would 'provide for her and her child by will and that he would make the same provision for them as if he were married' to her, considered in the surrounding facts and circumstances, is supported by a sufficient consideration and is sufficiently definite and certain in terms, to be binding on his estate and enforceable. *Davidson v. Davidson*, 72 W. Va. 747, 79 S. E. 998.

BATTERY.—See ante, ASSAULT AND BATTERY.

BAWDY HOUSES.—See post, DISORDERLY HOUSES.

BAY.—As meaning "brown" see *Green v. Commonwealth*, 122 Va. 862, 867, 94 S. E. 940.

BEER.—See *State v. Durr*, 69 W. Va. 251, 71 S. E. 767. See, also, post, INTOXICATING LIQUORS.

BEING THE SAME LAND.—See *South Penn Oil Co. v. Knox*, 68 W. Va. 562, 371, 69 S. E. 1020.

BENEFICIAL AND BENEVOLENT ASSOCIATIONS.

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CROSS REFERENCES.

See the title **BENEFICIAL AND BENEVOLENT ASSOCIATIONS**, vol. 2, p. 344, and references there given. In addition, see ante, **ACCIDENT INSURANCE**; post, **INJUNCTIONS**; **INSURANCE**; **RAILROADS**; **RECEIVERS**.

I. DEFINITIONS, NATURE AND OBJECT.

Fraternal Benefit Society Defined.—

Va. Code 1919, § 4273; Barnes Code, ch. 55 A, § 1.

Fraternal benefit societies, in so far as they provide indemnity in case of disability or death of their members, legally are deemed mutual insurance companies, and their beneficiary certificates insurance contracts. *Robinson v. Brotherhood*, 80 W. Va. 567, 92 S. E. 730. See post, **MUTUAL INSURANCE**.

"Society," "Domestic Society" and "Foreign Society," as Used in West Virginia Act, Defined.—Barnes Code ch. 55 A, § 32.

An unincorporated association paying no death benefits nor any disability benefits in excess of \$500 in one year to any person is not a fraternal benefit society, within the meaning of chapter 55A of Barnes Code (Code 1913, c. 55A [§§ 3226-3263]). *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580.

Nor is such an association identical

with an incorporated life and accident insurance association, or an incorporated building association, or an unincorporated pension association, composed of members of the general association to which they are related, in such sense as to make it amenable to judicial process as a corporation, or to bring it within the statute authorizing judicial procedure against fraternal benefit societies, by name. *Simpson v. Grand International Brotherhood*, 83 W. Va. 355, 98 S. E. 580. See ante, **ASSOCIATIONS**.

Purpose for Which Beneficial and Benevolent Associations Are Organized.—

Beneficial and benevolent associations are not organized for the purpose of making money, but for fraternal and benevolent objects. *United Moderns v. Rathbun*, 104 Va. 736, 742, 52 S. E. 552.

I ¼. FORM OF GOVERNMENT.

When Deemed to Be Operating on Lodge System.—Va. Code 1919, § 4274; Barnes W. Va. Code, ch. 55 A, § 2.

When Deemed to Have a Repre-

sentative Form of Government.—Va. Code 1919, § 4275; Barnes W. Va. Code, ch. 55 A, § 3.

I ½. INCORPORATION.

Va. Code 1919, §§ 3872-3875, 4281, 4284, 4285; Barnes Code, ch. 55 A, §§ 12, 13.

Charter of No Effect until Approved in Writing by Insurance Commissioner.—Barnes Code, ch. 55, § 10.

Amendment or Alteration of Charter.—Va. Code 1919, § 3875.

Designation of Possible Beneficiaries in Charter—Effect of Subsequent Statute Designating Larger Class.—Where the charter of a benefit society designates the classes of persons who may be beneficiaries, and a subsequent statute designates a larger class of persons who may be made beneficiaries of benefit associations, the statute is not intended to alter, modify, or repeal the charter, but merely to enumerate the objects for which a benefit association may be organized. *Pettus v. Hendricks*, 113 Va. 326, 74 S. E. 191.

II. CONSTITUTION AND BY-LAWS.

Power to Make, Alter, Amend or Repeal.—Va. Code 1919, §§ 3878, 4284.

Fraternal benefit societies may establish and enforce reasonable rules and regulations for their government and for the settlement of internal disputes as to property rights; and members must submit to and comply with such regulations, and exhaust their remedies within the order, before resorting to the civil courts for redress. *Robinson v. Brotherhood*, 80 W. Va. 567, 92 S. E. 730.

Duty to File Certified Copy of Amendments to Constitution and By-Laws.—Va. Code 1919, § 4293; Barnes Code, ch. 55 A, § 23.

Policy of the Law to Uphold Rules and Regulations.—The schemes of benevolence, by which beneficial and

benevolent associations aim to provide benefits for their members in time of sickness, and indemnity to their families upon their death, cannot be maintained, unless the rules and regulations prescribed by their constitution and by-laws for the attainment of these objects are substantially upheld. This it should be the policy of the law and the aim of the courts to do. *United Moderns v. Rathbun*, 104 Va. 736, 742, 52 S. E. 552.

Effect of Declaration in By-Law of Object of Organization.—The mere declaration in a by-law of a fraternal life insurance association of the object of the organization, without more, constitutes no restriction on the rights of a member in naming a beneficiary in his policy or certificate of membership. *Pleasants v. Locomotive, etc., Ins. Ass'n.*, 70 W. Va. 389, 73 S. E. 976.

Authority to Prohibit Waiver of Constitution or By-Laws.—Va. Code 1919, § 4291; Barnes Code, ch. 55 A, § 21.

II 1/6. MEMBERSHIP AND VOTING POWERS.

Va. Code 1919, §§ 3879, 4275, 4279; Barnes Code, ch. 55 A, § 7.

Membership and Institution Not Required of Children—Power to Organize Local Branches for.—Acts 1918, ch. 420, § 1; Pollard's Code Biennial, p. 667.

Obligations of Membership — Bound by By-Laws.—The members of a benevolent association are bound by the provisions of its by-laws; such by-laws enter into and form a part of the contract as between the member and the company, whether formally incorporated into the contract or not. *Fraternities Acci. Order v. Armstrong*, 106 Va. 746, 749, 56 S. E. 565.

A person who takes out a policy in a mutual benefit society becomes a member of the society, and is bound

by the rules and provisions of its charter and the by-laws lawfully made in pursuance thereof, and is conclusively presumed to have knowledge of them all, and hence is charged with knowledge of the limitation upon the powers of the agent of such company found in its by-laws. *Bixler v. Modern Woodmen*, 112 Va. 678, 72 S. E. 704. See post, "Presumptions and Burden of Proof," X, A.

If a person, in becoming a member of a beneficial order, agrees to comply with all the laws, rules and regulations, then governing the order, or that may be enacted in the future, a subsequent by-law, providing for a forfeiture of contract rights in the event of suicide while sane, will be valid as to him—first, because it invades no vested rights of his, and secondly, because it is a fundamental, though unexpressed, part of the original contract that he will not intentionally cause his own death. *Quaere*, as to suicide of insane. *Plunkett v. Supreme Conclave*, 11 Va. Law Reg. 42.

II 2/6. LOCATION OF PRINCIPAL OFFICE.

Va. Code 1919, § 4289; Barnes Code, ch. 55 A, § 19.

Change of Location.—Va. Code 1919, § 3875.

II 3/6. GOVERNING BODY, GRAND LODGES, OFFICERS AND TRUSTEES.

A. GOVERNING BODY AND GRAND LODGES.

Meetings of Governing Body and Where They May Be Held.—Va. Code 1919, § 4289; Barnes Code, ch. 55 A, § 19.

The Word "Communication" Is the Masonic Equivalent of the Word "Meeting."—*Hundley v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

Power to Postpone or Annual Communication of Masonic Grand Lodge.

—A grand master of Masons within his jurisdiction has not authority to postpone, either temporarily or indefinitely, an annual communication of the Masonic grand lodge that elected him, where the constitution of the order designates the time and the last preceding annual communication selected the place therefor. *State v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

In the event of an emergency rendering undesirable or inadvisable the holding of an annual communication of a Masonic grand lodge at the time and place regularly appointed and selected therefor, the grand master may convoke a special communication of the Masonic grand lodge at such time and place as he may select, and, when so convoked, it alone may determine the feasibility and necessity for such postponement. *State v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

Quorum at Annual Grand Communication of Masonic Grand Lodge.—

Where an association, as an incorporated Masonic grand lodge of colored masons, within its jurisdiction, is composed of an indefinite number of members, and subject to change from death, suspension, or expulsion, revocation of the charters of subordinate lodges and the grant of additional charters, and the constitution of such grand lodge, by-laws, edicts, rules, and regulations do not, nor does any rule of law or legislative provision, prescribe a constitutional quorum, the members present at the time and place regularly appointed and selected for such annual grand communication, and qualified and competent to transact the business thereof, constitute a "quorum" for that purpose, though less than a numerical majority of such body. *State v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

Grand Lodges to Be Treated as a Federation—Reports by Officers of

Supreme Governing Body. — Barnes W. Va. Code, ch. 55 A, § 22.

Mandamus to Compel Officers of Masonic Grand Lodge to Surrender Their Offices. — Mandamus lies to compel the retiring grand master of Masons, the grand secretary, and grand treasurer of a grand lodge of Masons to surrender their offices and deliver the books, papers, and other documents, funds, and other things in their possession and under their control pertaining to such official positions, to their successors in office, when their right thereto is established by clear and competent proof, and the property is within the jurisdiction of the court awarding the writ. *State v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

B. BOARD OF DIRECTORS, TRUSTEES, REGENTS AND COMMISSIONERS.

Barnes Code, ch. 55 A, § 32b. (3).

Trustees of Land Conveyed to Benevolent Association — Appointed Name and Powers — Limitation upon Amount and Use of Land.—Va. Code 1919, §§ 39, 42, 46, 47; Barnes Code, ch. 57, §§ 5, 6, 7, 10.

Trustees holding real estate for the use of a society of Independent Order of Odd Fellows, are constituted a corporation by § 6, ch. 57, Code, and may contract, sue and be sued as such. *Board v. Board*, 78 W. Va. 445, 88 S. E. 1099.

Power to Acquire and Hold Books or Furniture through Trustees.—Va. Code 1919, § 49.

II 4/8. ANNUAL REPORTS.

Va. Code 1919, § 4294, 4296; Barnes Code, ch. 55 A, § 24.

Separate Financial Statement Required in Relation to Insurance of Children.—Va. Acts 1918, ch. 420, § 4; Pollard's Code Biennial, p. 668.

II 5/6. INSPECTION AND SUPERVISION.

Va. Code 1919, §§ 4169, 4297, 4299,

4300; Barnes Code ch. 55 A, §§ 25, 26, 27, 28, 29.

III. FOREIGN ASSOCIATIONS.

A. RIGHT OF STATE TO EXCLUDE.

The exclusive right to organize subordinate bodies to raise funds for a benevolent purpose does or may involve rights of property within the protection of a court of equity, and it does not follow that a state may not prohibit a foreign corporation from coming within its borders for this purpose. *National Council v. State Council*, 104 Va. 197, 51 S. E. 166.

B. CONDITIONS PRECEDENT TO TRANSACTION OF BUSINESS—REVOCATION OF LICENSE.

Va. Code 1919, §§ 4281, 4288, 4295, 4301; Barnes Code, ch. 55 A, §§ 17, 18, 28.

Revocation or Suspension of Authority of Foreign Association to Write New Business.—Va. Code 1919, § 4299; Barnes Code, ch. 55 A, § 26.

III 1/2. EXEMPTION FROM INSURANCE LAWS.

Va. Code 1919, §§ 4276, 4321; Barnes Code, ch. 55 A, § 4.

IV. EXEMPTION FROM TAXATION.

Va. Code 1919, §§ 2272, 2301, 4303; Barnes Code, ch. 55 A, § 30.

Agents of Sick Benefit Companies Not Exempt.—While the act of March 16, 1910, exempts sick benefit companies and associations from all local taxation, it does not exempt the agents of such companies from such taxation. By the terms of the act they are subject to the laws governing agents of insurance companies, and the latter are plainly taxable. Such a license tax is not a tax on the companies; at least the agents are not plainly exempt from taxation. *Tabb v. Richmond*, 116 Va. 227, 81 S. E. 34.

IV $\frac{1}{4}$. VALUATION OF BONDS AND OTHER EVIDENCES OF DEBT HELD BY.

Va. Acts 1920, ch. 499, § 1; Pol-
lard's Code Biennial, p. 749; W. Va.
Acts 1921, p. 475, ch. 128.

IV $\frac{1}{2}$. MERGER OR TRANSFER OF MEMBERSHIP OR FUNDS.

Va. Code 1919, § 4286; Barnes W.
Va. Code, ch. 55 A, § 14.

V. DISSOLUTION.

Va. Code 1919, §§ 3880, 4295, 4297,
4298; Barnes Code, ch. 55 A, § 25.

**Disposition of Property of Subordi-
nate Lodge of Odd Fellows Upon its
Dissolution.**—Barnes Code, ch. 55 A,
§ 32a.

V $\frac{1}{4}$. POWERS AND LIABILI- TIES IN GENERAL.

Of Incorporated Association.—Va.
Code 1919, §§ 3874, 4284.

Power to Borrow Money.—Va.
Code 1919, § 3876; Barnes Code, ch.
57, § 8.

V $\frac{1}{2}$. APPLICATION FOR INSUR- ANCE AND EFFECT OF FALSE ANSWERS THEREIN.

If an answer in the application for
insurance is such as must have been
made, not on the personal knowledge
of the applicant but upon his best
judgment and belief, and it be untrue,
it will not forfeit the policy issued
thereon, if the answer was made in
perfect good faith, the applicant be-
lieving it to be true. *Marshall v. Lo-
comotive Engineers Mut., etc., Ins.
Ass'n*, 79 W. Va. 121, 90 S. E. 847.

But though the policy be construed
as not warranting the truth of the an-
swers of the insured, yet if these an-
swers to specific questions are misrep-
resentations, the policy will be avoided,
whether the court or jury regard the
answers as material or not; for the
parties by putting and answering such
questions have declared that they re-

gard them as material. *Marshall v.
Locomotive Engineers Mut., etc., Ins.
Ass'n*, 79 W. Va. 121, 90 S. E. 847.

A false answer to a question, in or-
der to be such a misrepresentation as
will forfeit a policy, must be fraudu-
lently false, that is, in making the
answer, the insured must be guilty of
actual fraud or legal fraud. By actual
fraud is meant an intent to deceive;
but legal fraud may exist where there
is no intention to deceive, as where
the insured in his answer makes a
statement which from its nature the
insurer must necessarily regard as
made on the personal knowledge of
the insured, which statement is false;
in such case the insured is guilty of a
legal fraud, which will forfeit the pol-
icy, though the false statement was
made without any intent to deceive but
as the result of carelessness or for-
getfulness. *Marshall v. Locomotive
Engineers Mut., etc., Ins. Ass'n*, 79 W.
Va. 121, 90 S. E. 847.

If the answers of the insured to the
questions propounded to him in the
application, which are made part of
the policy, are by the policy war-
ranted to be true, and if any of the
answers are false in fact, the policy
is thereby forfeited, though the answers
were made in perfect good faith. *Mar-
shall v. Locomotive Engineers Mut.,
etc., Ins. Ass'n*, 79 W. Va. 121, 90 S.
E. 847.

"It is said in *Schwarzbach v. Ohio
Valley Protective Union*, 25 W. Va.
622, that in determining whether the
answers by the assured are warranties
or representations, courts lean in fa-
vor of construing the policy as mak-
ing them representations rather than
covenants." *Marshall v. Locomotive
Engineers Mut., etc., Ins. Ass'n*, 79 W.
Va. 121, 127, 90 S. E. 847.

Where it is provided in the by-laws
of the association that "if any fraudu-
lent or untrue statements were made
concerning the bodily health or con-
dition of the insured at the time the

application was written, or if any material facts which should have been stated or given were suppressed or withheld, by the applicant or examining physician, then and in every case the certificate issued thereon shall be null and void and all obligations of this association to the insured, his beneficiary or beneficiaries shall cease," and the insured in his application consents and agrees that "any untrue or fraudulent statement made herein or to the medical examiner, or any concealment of facts by me in this application * * * shall forfeit the rights of myself and my beneficiaries to all benefits and privileges thereon. * * *. This application shall form the basis of the contract between the association and the insured," and the insured in his application, or in his statement to such medical examiner, makes a statement which constitutes a fraud either absolute or legal, he will forfeit the policy. *Marshall v. Locomotive Engineers Mut., etc., Ins. Ass'n*, 79 W. Va. 121, 90 S. E. 847.

Estoppel of Society to Deny Liability.—An applicant for membership in a mutual benefit society does not become a member until the delivery of the certificate of membership and until then is not presumed to know the constitution and by-laws of the society, and if he is induced to join by false and misleading representations by the officers and agents of the society as to the purport and effect of certain questions in the application for membership, and in consequence thereof makes, or assents to, answers to such questions which both he and they know to be false, and he is accepted as a member and pays his dues, the society can not, after loss, set up the falsity of the answers to such question as a ground for avoiding liability on its certificate. *Modern Woodmen v. Lawson*, 110 Va. 81, 65 S. E. 509.

V³4. BENEFIT CERTIFICATES.

A. POWER TO ISSUE.

Va. Code 1919, § 4277; Barnes Code ch. 55 A, §§ 5, 12.

As to Children.—Va. Acts 1918, ch. 420, § 2; Pollard's Code Biennial, p. 668; W. Va. Acts 1919, p. 206, ch. 47, § 33, 34.

Exchange of Certificate When Child Reaches Minimum Age for Initiation.—Va. Acts 1918, ch. 420, § 3; Pollard's Code Biennial, p. 668.

B. CONTENTS OF CERTIFICATE—BINDING EFFECT OF PROVISIONS.

Va. Code 1919, § 4280; Barnes Code ch. 55 A, § 8.

Section 3252 of the Virginia Code (omitted from Code 1919) requiring the conditions and restrictive provisions of insurance policies to be printed in type as large as or larger than long primer type, or written with pen and ink in or on the policy, has no application to the conditions and restrictive provisions contained in the by-laws of an ordinary mutual benefit society made a part of the certificate of membership, which is the contract between it and the member. The law conclusively presumes that those who become members of such a society have acquainted themselves with its by-laws. *Fraternities Acci. Order v. Armstrong*, 106 Va. 746, 56 S. E. 565.

A person who applies for and receives a certificate of membership in a benefit society, by which the applicant promises and agrees to be bound by the law of the society then in force and those to be thereafter adopted by the society, is bound by a subsequent law, duly passed, which provides for a forfeiture of said certificate, of a lessening of the value thereof, in case the member shall, while sane, commit suicide, although no such law existed when the certificate was issued and upon a demurrer to a plea alleging that, in the benefit certificate sued on

and also in the application therefor, the assured promised to conform in all respects to the laws, rules and usages of the defendant which issued the certificate, in force at the time of said application and certificate, and those to be thereafter adopted, and that the defendant did subsequently and while the certificate was in force adopt a law declaring that no benefit should be paid to the beneficiary of any member committing suicide (sane or insane); and further averring that the member to whom the certificate in suit was issued committed suicide, and died from the effect of a pistol wound inflicted by himself with suicidal intent, the demurrer admits that the law was regularly and duly enacted, that the member committed suicide, and that he was sane when he did it. *Plunkett v. Supreme Conclave*, 105 Va. 643, 55 S. E. 9.

C. CONSTRUCTION OF CERTIFICATE AND CONTRACT OF INSURANCE.

The beneficiary certificates of a fraternal benefit society, together with the provisions of the constitution of the society applicable thereto, in general are to be interpreted as other insurance contracts, and the rights and obligations of the parties measured accordingly. They are to be given their plain, natural, and obvious meaning and effect, when free from ambiguity. But the contract will be liberally construed to promote the benevolent objects of the society, and any doubt will be resolved in favor of the assured. *Robinson v. Brotherhood*, 80 W. Va. 567, 92 S. E. 730; *Greenwood v. Royal Neighbors*, 118 Va. 329, 87 S. E. 581.

In construing contracts of life insurance made by a fraternal life insurance association, that construction must be put upon the laws of the order, taken as a whole, which is most favorable to the insured, and will

most protect the beneficiary. *Pleasants v. Locomotive, etc., Ins. Ass'n*, 70 W. Va. 389, 73 S. E. 976.

In a certificate of membership and policy of life insurance issued by a fraternal, beneficial association, where the basis of the contract of insurance between the association and the insured, is the application signed by the insured, the policy issued thereon, and the by-laws will be considered in construing the contract. *Marshall v. Locomotive Engineers Mut., etc., Ins. Ass'n*, 79 W. Va. 121, 90 S. E. 847.

D. DISPOSITION OF CERTIFICATE ON LIFE OF CHILD UPON TERMINATION OF MEMBERSHIP OF PERSON RESPONSIBLE FOR CHILD'S SUPPORT.

Va. Acts 1918, ch. 420, § 6; Pollard's Code Biennial, p. 669.

VI. ASSESSMENTS OR CONTRIBUTIONS AND FORFEITURE OF MEMBERSHIP FOR NON-PAYMENT.

Basis for Determining Contributions to Be Paid By Members.—Va. Code 1919, § 4296.

Basis of Assessment upon Insurance Funds Collected to Be Kept Separate.—Va. Acts 1918, ch. 420, §§ 2, 3; Pollard's Code Biennial, p. 668; W. Va. Acts 1919, p. 207, ch. 47, § 35.

Extra Assessments to Meet Deficiencies.—Va. Code 1919, § 4294. Va. Acts 1918, ch. 420, § 2; Pollard's Code Biennial, p. 668; Barnes Code, ch. 55A, § 24.

Mode of Payment of Periodical Contributions.—Va. Code, § 4277.

Forfeiture of Membership for Non-payment.—The nonpayment of dues and assessments in a beneficial association organized for the purpose of fraternal insurance, and not for gain or profit, tends to the destruction of the association, and is a violation of the member's duty as corporator. Not only has the association an in-

herent right to expel members for nonpayment of dues and assessments, but, from its nature and necessities, it has a right to provide in its laws that such nonpayment, within a specified time after notice, shall, without personal or other notice to the delinquent member, ipso facto, work a forfeiture of all the member's rights of membership. *Knights of Columbus v. Burroughs*, 107 Va. 671, 60 S. E. 40.

"In *Bacon on Ben. Soc. & L. Ins.*, Vol. 2, § 385, after a full consideration of the subject and the citation of numerous authorities upon the one part and the other, the conclusion is reached, that 'If, by the laws of the society, nonpayment of an assessment operates as a forfeiture, time is of the essence of the contract, and the members must elect, every time they are called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and its benefits by neglecting or refusing to pay within that time.'" *Knights of Columbus v. Burroughs*, 107 Va. 671, 683, 60 S. E. 40.

Reinstatement after Forfeiture of Membership — Waiver of Forfeiture.—Where an insurance policy in a beneficial association provides a particular mode of application for reinstatement subject to the approval of the board of directors, that method must be pursued, in the absence of a definite practice or of specific authority given an agent to waive the forfeiture. *Cummings v. Masonic Protective Ass'n*, 87 W. Va. 198, 104 S. E. 494.

Where in such case the insurer has by the terms of the policy an election whether it will reinstate a delinquent member after forfeiture, it can not be regarded as having waived the forfeiture by giving notice to the delinquent of his delinquency, if ignorant of the bad condition of his health occurring after the forfeiture. *Cum-*

mings v. Masonic Protective Ass'n, 87 W. Va. 198, 104 S. E. 494.

A notice by a clerk of a beneficial association to a delinquent member, calling attention to his delinquency and expressing the hope that he will give the matter his attention, does not amount to demand of payment nor to an unconditional waiver of the forfeiture. *Cummings v. Masonic Protective Ass'n*, 87 W. Va. 198, 104 S. E. 494.

If upon receipt of such a notice the delinquent member, after forfeiture, remits the amount of such delinquency, and with his remittance gives notice of his bad condition of health, and the insurer promptly declines the offer, such remittance does not reinstate the delinquent nor bind the insurer to an unconditional waiver of the forfeiture. *Cummings v. Masonic Protective Ass'n*, 87 W. Va. 198, 104 S. E. 494.

In the case at bar, a suspended member of a benefit society was entitled to reinstatement within sixty days from the date of his suspension upon payment to the clerk of the local camp of all fines, dues and assessments, provided he was, at the time of such payment, in good health. He made the payment within the sixty days, but both he and the clerk knew that he was not then in good health, and that he had no right to make such payment, nor the clerk to receive it, and that the clerk had no power to remit or waive any provision of the policy. The defendant company received the arrearages in ignorance of the facts. The member died within two weeks. Held: Upon the facts of the case the payment of his arrearages to the clerk of the local camp, and its reception by the clerk did not have the effect of reinstating the assured as a member of the society, and the receipt by the society of said arrearages in ignorance of the facts did not waive the for-

feiture, nor estop the society from setting it up as a defense to an action on the policy. *Bixler v. Modern Woodmen*, 112 Va. 678, 72 S. E. 704.

The by-laws of a benefit society provided that any member should ipso facto forfeit his membership who failed, neglected, or refused to pay his assessments within a time specified in the by-law. They also provided that no money should be paid or transferred from the treasury of any council except upon a two-thirds vote of the members present and voting at a regular meeting held after notice at a previous meeting of an intention to pay or transfer such money. A local or subordinate council kept alive the membership of all its members by paying their dues by checks drawn by the financial secretary on the treasurer against the insurance fund, but not in accordance with the by-law last above mentioned. A member of a local council, whose dues and assessments had been thus paid, had failed to pay his assessment for six months, though notified, on an average, twice a month. Some time afterwards he became ill, and four days before his death there was paid to the financial secretary of the local council the full amount of all dues and assessments theretofore advanced for him by the local council. Upon his death, the society refused to pay the amount of his policy on the ground that his policy was forfeited by reason of his failure to pay his dues and assessments within the time required by the by-laws. Held, there can be no recovery on the policy; the society having received the money in ignorance of the facts, has not waived the forfeiture, and is not by its conduct estopped to set it up in defense to this action. *Knights of Columbus v. Burroughs*, 107 Va. 671, 672, 60 S. E. 40.

The evidence in this case shows that at the time of the death of an assured he was in arrears for premiums

due on his policy, which by the express terms of the policy worked a forfeiture and there is no sufficient proof of a waiver on the part of the company issuing the policy. *United Modern v. Rathbun*, 104 Va. 736, 52 S. E. 552.

VII. BENEFITS AND BENEFICIARIES.

A. POWERS AND DUTIES IN RELATION TO BENEFITS.

Va. Code 1919, § 4277; Barnes Code ch. 55 A, §§ 5, 12.

Power to Provide for Payment of Death or Annuity Benefits upon Laws of Children.—Va. Acts 1918, ch. 420, § 1; Pollard's Code Biennial, p. 667.

Power to Grant Extended and Paid up Protection or Withdrawal Equities.—Va. Code 1919, § 4277.

B. RESTRICTIONS OR LIMITATIONS UPON NAMING OF BENEFICIARIES.

Unless some statute or rule of public policy forbids, restrictions in a by-law or contract of a fraternal life insurance association, as to the beneficiaries to be named, are to be regarded for the benefit of the insurer alone, which it may waive, and the association is the only one that can object that the beneficiary designated does not come within the class of persons who by the by-law or contract are entitled to be so designated. *Pleasants v. Locomotive, etc., Ins. Ass'n*, 70 W. Va. 389, 73 S. E. 976; *Chambers v. Great State Council*, 76 W. Va. 614, 620, 86 S. E. 467.

Where in an action on such a contract, by the beneficiary named, defendant appears, admits its liability, and pays the money into court, such an act constitutes a waiver of objection to the beneficiary, and an intervening claimant is not entitled to object, defend or claim the benefit accrued under the contract on that ground. *Pleasants v. Locomotive*,

etc., *Ins. Ass'n*, 70 W. Va. 389, 73 S. E. 976.

The rule of insurable interest is applicable alike to ordinary life insurance policies and to contracts of mutual benefit societies, unless there be something in the contract, constitution or by-laws of the society, or statute law controlling the same, prohibiting it. *Chambers v. Great State Council*, 76 W. Va. 614, 86 S. E. 467.

C. EFFECT OF INVALID CHANGE OF BENEFICIARY.

If a beneficiary of a certificate in a benefit society has been lawfully designated, but subsequently a change is sought to be made in the beneficiary, if for any reason the change is invalid, the rights of the first beneficiary remain in force. *Pettus v. Hendricks*, 113 Va. 326, 74 S. E. 191.

D. AMOUNT OF BENEFITS ALLOWED.

Barnes Code, ch. 55 A, § 5.

Upon Insurance of Lives of Children.—Va. Acts 1918, ch. 420, § 1; Pollard's Code Biennial, p. 667; W. Va. Acts 1919, p. 207, ch. 47, § 36.

E. WHEN DECISION OF BENEFICIARY BOARD AS TO DISABILITY BENEFITS, CONCLUSIVE.

Where the beneficiary certificates and constitution of the association provide that certain injuries shall constitute total and permanent disability entitling the member to payment of the full amount of his certificate, but that other claims for disability shall not create any legal liability or be the basis of a civil suit, but shall be determined by its beneficiary board, whose decision shall be final and conclusive, and a favorable finding a condition precedent to the right to receive benefits, such provisions will be upheld as valid regulations; and a decision of the board, made in good faith, will not be disturbed in any

court of law. *Robinson v. Brotherhood*, 80 W. Va. 567, 92 S. E. 730.

F. EXEMPTION OF OFFICERS AND MEMBERS FROM INDIVIDUAL LIABILITY FOR BENEFITS.

Va. Code 1919, § 4290; Barnes Code, ch. 55 A, § 20.

G. DISPOSITION OF DEATH BENEFITS.

Va. Code 1919, § 4278; Barnes Code, ch. 55 A, § 6.

Charter Provision for Designating Beneficiaries "According to Its By-Laws."—Where the charter of a benefit society provides that the association will "pay to the nearest relative, or such other dependent as may be designated by the member according to its by-laws, such sum of money upon the death of such member as said by-laws shall provide," the phrase "according to its by-laws" is merely intended to reserve to the association the right to prescribe a method of designation if it should see fit to do so, and the charter is, in this respect, self-executing. *Pettus v. Hendricks*, 113 Va. 326, 74 S. E. 191.

Effect of Marriage of Insured.—Where in a contract of insurance in a voluntary mutual benefit association the applicant in accordance with the regulations of the association has appointed his father and mother to death benefits resulting solely from natural causes or from accident not under control of the person or corporation by whom he is employed, as stipulated, such appointment is not revoked by the subsequent marriage of the insured, unless so stipulated in the contract or by the rules and regulations made part thereof. *Hamilton v. McLain*, 83 W. Va. 433, 98 S. E. 445.

Where a subsequent regulation specifically provides that death benefits for death resulting from accident shall go to the widow, children or parents of the deceased member, but

provides that if at the time of his application the member shall have neither of the preferred beneficiaries named, he may if he so elects appoint some other person or persons beneficiary or beneficiaries, the subsequent provision thereof that his marriage subsequent to such application shall be a revocation of such appointment, the effect of such revocation should be limited to death benefits resulting from accident and should not be extended by construction to benefits for death resulting from natural causes which the member in his application has directed to be paid otherwise and according to some other provision of the contract. *Hamilton v. McLain*, 83 W. Va. 433, 98 S. E. 445.

Interest of Subscriber to Purely Benevolent Association — Failure of Beneficiary.—A certificate of membership in a wholly voluntary incorporated association organized entirely for eleemosynary purposes, providing that the fund contributed upon the death of a subscriber shall be paid to such beneficiary as he may designate, with the right to change the beneficiary at pleasure, upon notice, and containing no provisions, under any contingency, for payment of the fund voluntarily donated, in whole or in part, to the subscriber while living, or to his estate after his death, is not an ordinary life insurance policy. Under such certificate, neither the estate of the subscriber nor his next of kin has any interest whatsoever in the fund where he fails to designate a beneficiary, or where the beneficiary designated dies before the subscriber, or has no insurable interest in his life, or for any other reason it not entitled to the fund. In all such cases the donation reverts to the association. Neither the subscriber in his lifetime, nor his personal representative after his death, has any property rights in the policy. He has only the power to ap-

point a beneficiary. *Smith v. Hatke*, 115 Va. 230, 78 S. E. 584.

H. EXEMPTION OF BENEFITS FROM ATTACHMENT, GARNISHMENT OR OTHER PROCESS.

Va. Code 1919, § 4292; *Barnes W. Va. Code*, ch. 55A, § 22.

VII 1/7. POWERS AND DUTIES IN RELATION TO FUNDS AND SEPARATION AND DISTRIBUTION THEREOF.

Va. Code 1919, §§ 4281-4283, 4294, 4296; Va. Acts 1918, ch. 420, §§ 3-5; *Pollard's Code Biennial*, p. 668; *Barnes Code*, ch. 55A, §§ 9, 10, 11.

VII 2/7. FINANCIAL CONDITION REQUIRED TO BE MAINTAINED.

Va. Code 1919, § 4295.

VII 3/7. SALE, EXCHANGE, CONVEYANCE, REINVESTMENT OR INCUMBRANCE OF PROPERTY.

Va. Code 1919, §§ 45-47, 3876; *Barnes Code* 1919, ch. 57, § 9.

VII 4/7. HOMES AND ASYLUMS.

Authority to Acquire Real Estate Upon Which to Erect.—*Barnes Code* ch. 55A, §§ 32b, (1), 32b, (4); ch. 57, § 3.

Government and Control of.—*Barnes Code*, ch. 55A, § 32b, (2).

VII 5/7. CONDITIONS PRECEDENT TO ACTION AGAINST.

Barnes Code, ch. 55A, § 32b, (2).

The evidence in the case at bar shows that sufficient efforts were made without avail, to secure a settlement of the liability on the policy in suit from the order issuing it before resorting to the courts, and a sufficient compliance with the provisions of the policy requiring a presentation of the claim and the proof thereof to certain designated functionaries, and the exhaustion of all remedies within the order before taking any other pro-

ceedings to enforce payment. *United Moderns v. Rathbun*, 104 Va. 736, 52 S. E. 552.

VII 6/7. SERVICE OF PROCESS.

Upon Foreign Association.—Va. Code 1919, §§ 3845, 3846; Barnes Code ch. 55A, § 18.

X. EVIDENCE.

A. PRESUMPTIONS AND BURDEN OF PROOF.

Certified Copies of Constitution and By-Laws as Amended, Prima Facie Evidence of Legal Adoption.—Barnes Code, ch. 55A, § 23.

Members of a beneficial society are presumed to know its constitution and by-laws, and, after they have been proved, if a member claims that there has been a change in them affecting his rights, the burden is upon him to prove it. *United Moderns v. Rathbun*, 104 Va. 736, 52 S. E. 552; *Knights of Columbus v. Burroughs*, 107 Va. 671, 680, 60 S. E. 40; *Fraternities Acci. Order v. Armstrong*, 106 Va. 746, 56 S. E. 565; *Bixler v. Modern Woodmen*, 112 Va. 678, 72 S. E. 704.

Agreement by Trustees Holding Real Estate Not Presumed Ultra Vires.—An agreement by trustees holding real estate for the use of a society of Independent Order of Odd Fellows, who are by Barnes Code, ch. 57, § 6, constituted a corporation to purchase a lot of ground containing no greater quantity than such corporation is allowed by law to hold, will not be presumed to be an ultra vires act. *Board v. Board*, 78 W. Va. 445, 88 S. E. 1099.

B. ADMISSIBILITY.

Admissibility of Certified Copies of Benefit Certificates.—Va. Code 1919, § 4280; Barnes Code, ch. 55A, § 8.

XI. CRIMINAL OFFENSES IN RELATION TO.

Va. Code 1919, §§ 4304, 4719; Barnes W. Va. Code, ch. 55A, § 31.

XII. ASSOCIATIONS, SOCIETIES AND LODGES EXEMPT FROM PROVISIONS OF WEST VIRGINIA STATUTE.

Barnes Code, ch. 55A, § 29.

BENEFICIARIES IN INSURANCE.—See post, INSURANCE, and references there given.

BENEVOLENT.—See ante, BENEFICIAL AND BENEVOLENT ASSOCIATIONS.

In *Hays v. Harris*, 73 W. Va. 17, 22, 80 S. E. 827, **benevolent** was defined as having a disposition to do good, possessing or manifesting love to mankind, and a desire to promote their prosperity and happiness; disposed to give to good objects; kind; charitable.

Benevolent Object of Public Character.—"That the establishment and maintenance of hospitals by counties and towns is regarded in Virginia as a **benevolent object of a public character**, is manifest from sections 1719 and 1720 of the Code, authorizing such hospitals and their maintenance out of the public funds; and it seems hardly necessary to say that the maintenance of the indigent poor is also a **benevolent or charitable object of a public character**." *Pirkey v. Grubb's Ex'or*, 122 Va. 91, 100, 94 S. E. 344. See post, CHARITIES.

BENTS.—See post, COLUMNS.

BEQUEATH.—See post, WILLS.

BEQUEST.—See *Wood v. Tredway*, 111 Va. 526, 69 S. E. 445. See, also, post, CHARITIES; WILLS.

Berkeley Springs.

See the title BERKELEY SPRINGS, vol. 2, p. 352, and references there given.

BEST AND SECONDARY EVIDENCE.

I. The "Best Evidence" Rule, 671.

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CROSS REFERENCES.

See the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 355, and references there given. In addition, see ante, ADVERSE POSSESSION; post, DOCUMENTARY EVIDENCE; EVIDENCE; EXECUTION AND PROOF OF DOCUMENTS; FOREIGN JUDGMENTS; FOREIGN LAWS; LOST INSTRUMENTS AND RECORDS; PAROL EVIDENCE; PRODUCTION OF DOCUMENTS; PROFERT AND OYER; RECORDING ACTS; RECORDS; WITNESSES. As to the admissibility of a written statement of a dying declaration, see post, DYING DECLARATIONS. As to proof of execution of will by attesting witnesses, see post, WILLS.

I. THE "BEST EVIDENCE" RULE. A. STATEMENT OF GENERAL RULE.

The authorities are uniform to the

effect that the best evidence of which the nature of the case admits must be produced. *Chicago Art Co. v. Thacker*, 65 W. Va. 143, 145, 63 S. E. 170; *Cobb*

v. Glenn Boom, etc., Co., 57 W. Va. 49, 49 S. E. 1005.

Production of Articles Connected with Homicide.—The rule of best and secondary evidence applicable to instruments of writing, is not generally, if ever, applicable to instruments employed, or to the clothing or other articles connected with a homicide, and the trial court committed no reversible error in permitting the witness who found an empty shell on deceased's premises to describe the shell and its condition when found, without producing the shell found, and delivered by him to the sheriff. *State v. Davis*, 74 W. Va. 657, 82 S. E. 525.

Waiver of Objections.—The general rule is that the failure to object or otherwise raise the question of the admissibility of evidence on the trial is a waiver of all objection thereto. If secondary evidence is admitted without objection, instead of primary, the jury must consider and give due weight to such evidence. *Newberry v. Watts*, 116 Va. 730, 82 S. E. 703, 705; *Elswick v. Deskins*, 75 W. Va. 109, 83 S. E. 283. See also, post, EVIDENCE.

B. APPLICATIONS OF RULE.

1. Proof of Contents of Private Writings.

a. General Rule.

Proving Fact in Writing Distinguished.—"Elliott, in his work on Evidence, in discussing the question of the rule as to the best and secondary evidence, Vol. 1, § 216, says: "There is a clear distinction between proving the existence of a fact which has been put in writing and proving the writing and contents of the writing itself. If the essential fact to be proved is not the contents of a written instrument, but an independent fact, to which the writing is merely collateral, or of which it is merely an incident, there is no reason for the application of the rule. In such cases the contents of the documents are no part of the issue and there is no understanding that the writ-

ing shall be the sole repository of the fact. When the parol evidence is as near to the fact testified as to the writing itself, then each is primary.' See also, 2 Wigmore on Evidence, §§ 1246-1247; and Jones on Evidence (2nd ed.), § 203." *Dixon-Pocahontas Fuel Co. v. Myers Grain Co.*, 71 W. Va. 715, 718, 77 S. E. 362.

The provisions of the constitution and by-laws of a fraternal society, as to the duties of certain committees and boards constituted thereby, constitute the best evidence thereof, and it is not error to reject oral evidence of witness as to what such provisions are. *Chambers v. Great State Council*, 76 W. Va. 614, 86 S. E. 467.

Attested Copy of Recorded Contract.—When a builder's contract has been recorded in the office of the clerk of the county court pursuant to § 5, ch. 75, Code, a copy thereof, attested by such clerk, may be used as evidence in lieu of the original. Such copy is primary evidence. *Elswick v. Deskins*, 75 W. Va. 109, 83 S. E. 283.

Sufficiency of Evidence to Show that Document in Question Is Original.—*Davis v. Cole Bros.*, 115 Va. 501, 79 S. E. 1033, 1034.

Nonproduction of a letter, relevant and important as evidence, is waived, by failing to object to proof of its contents. *Campbell v. Beard*, 57 W. Va. 501, 50 S. E. 747.

Necessity for Showing Title Papers.—Where one claims under a paper title he should generally exhibit his title papers or copies thereof, or such of them at least as will make out prima facie case of title. *Woolfolk v. Graves*, 113 Va. 182, 69 S. E. 1039, 73 S. E. 721.

b. Exceptions to Rule.

(1) Writings Collateral to Main Issue.

Office in Corporation—To Show Relation to Subject-Matter.—Where the fact that witness is president of a certain company is not in issue, and the sole purpose of proving his position is to show his relation to the subject-

matter of his testimony, the highest and best evidence is not required to establish such a status, and his own parol testimony is sufficient without documentary proof. *Star Grocery Co. v. Bradford*, 70 W. Va. 496, 74 S. E. 509.

2. Public Documents or Records.

a. Statutory Provisions.

Copies of Codes, etc.—Va. Code 1919, §§ 6189-6193; Barnes Code, ch. 130, § 1.

Copies of Legislative Journals.—Va. Code 1919, § 6191; Barnes Code, ch. 130, § 2.

Copies of Records or Papers in Public Offices.—Va. Code 1919, §§ 6197-6198; Barnes Code, ch. 130, §§ 5-7.

Form of Certificate.—While it is provided by § 3334 of the Va. Code (Code 1919, § 6197) that a copy of any record or paper in the clerk's office of any court, attested by the officer in whose office the same is, may be admitted in evidence in lieu of the original, the form of the certificate is not prescribed, and there is no statutory provision regulating the manner in which the records of the proceedings of a court in this state are to be authenticated so as to make them evidence in any other court in the state. *Hurley v. Charles*, 112 Va. 706, 72 S. E. 689.

Records and Exemplifications of Office Books in Public Offices of United States, or of a State, Not Pertaining to Court.—Va. Code 1919, § 6206; Barnes Code, ch. 130, § 20.

Copies of Foreign Deeds, Powers of Attorney, Policies of Insurance, etc.—Va. Code 1919, § 6207; Barnes Code, ch. 130, § 21.

Certified Copies of Lost Instruments.—Va. Code 1919, § 6241; Barnes Code, ch. 73, § 109.

Copies of Certain Deeds.—Va. Code 1919, § 6195; Barnes Code, ch. 130, § 4.

Authenticated Court Records and Proceeding of Other States or of United States.—Va. Code 1919, § 6205; Barnes Code, ch. 130, § 19.

Certified Copies of Records of Vital Statistics.—W. Va. Code, ch. 63, § 27; Va. Code 1919, § 5180.

Copies from Records of Land Titles.—W. Va. Code, ch. 68A, § 3.

b. Judicial Records.

See ante, "Statutory Provisions," I, B, 2, a.

Testimony of witnesses as to suits pending in a sister state, and as to what had been done therein, is inadmissible, as the records of the court are the best evidence as to such matters. *Catron v. Bostic*, 123 Va. 355, 96 S. E. 845.

c. Records Other than Judicial.

See ante, "Statutory Provisions," I, B, 2, a.

Ordinarily, production of public records, provable by certified copies, will not be compelled. *Bluefield v. McClaugherty*, 64 W. Va. 536, 63 S. E. 363.

Copy of Tax Return.—On the trial of an ejectment suit by tax purchaser against one claiming under the former owner, a certified copy of such void delinquent return is admissible in evidence on behalf of the defendant to impeach the tax deed based thereon and it is error to exclude it. *Wilkinson v. Linkous*, 64 W. Va. 205, 61 S. E. 152.

A certified copy of the sheriff's original return of sales made for delinquent taxes, on file in the auditor's office, is proper evidence as to the quantity of land sold in a particular instance. *Wellman v. Hoge*, 66 W. Va. 234, 66 S. E. 357.

Evidence of Appointment and Qualification of Officer.—Where upon a trial for murder the official character of a public officer is only incidentally and collaterally involved, the record evidence of his appointment and qualification is not necessary; evidence that he was known to be and acted as such officer being sufficient. *State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

Certificate of Appointment.—A mere certificate by a clerk that by an order

of his court a certain person had been appointed a receiver, is not admissible to prove, and does not prove, such appointment. *Hudkins v. Bush*, 69 W. Va. 194, 71 S. E. 106.

A certificate by the clerk of account that a special receiver qualified by giving bond as required in the decree appointing him is not admissible in evidence. An authenticated copy of the record showing such qualification is the necessary and proper evidence thereof. *Hagan v. Holderby*, 62 W. Va. 106, 57 S. E. 289.

d. Records of Deeds, Wills and Patents.

See ante, "Statutory Provisions," I, B, 2, a.

Writing Not Sealed.—W. Va. Acts 1921, p. 187.

Deed or Certified Copies as Evidence of Title.—"Plaintiff having claimed to have title by deed, the deeds themselves, or, under our statute, certified copies thereof, were the best evidence to the title." *Iguano Land, etc., Co. v. Jones*, 65 W. Va. 59, 69, 64 S. E. 640.

Certified copies of deeds having been shown to exist it was necessary to make them parts of the record in order to prove title. Parol evidence on this point was secondary, and therefore inadmissible evidence, no reason being shown making it necessary to resort to it. *Iguano Land, etc., Co. v. Jones*, 65 W. Va. 59, 69, 64 S. E. 640.

Copy of Record of Will.—Where the copy of a will is attested by "A. B. Buchanan, D. Clerk," without saying for whom or for what county he is deputy clerk, but this is immediately followed by a copy of the order of probate which is attested by "A. B. Buchanan, Deputy Clerk for S. M. Graham, Clerk of the Circuit Court of Tazewell County, Virginia," it plainly appears that A. B. Buchanan is the deputy clerk of Tazewell county, authorized by law to act in place of his principal, and the copy of the will so authenticated is ad-

missible in evidence. *Hurley v. Charles*, 112 Va. 706, 72 S. E. 689.

f. Proof of Foreign Laws.

See post, FOREIGN LAWS.

4. Ownership or Control of Property.

Title to Personality—In General.

"The following authorities are also in point, and hold that the mere fact of title to personal property may be shown by oral evidence, notwithstanding there is also a writing evidencing the sale which is not produced nor its absence accounted for, unless the contents of the writing itself become material, in which case the writing itself becomes the best evidence and must be produced, or its absence accounted for, before oral evidence will be admitted as to its contents." *Dixon-Pocahontas Fuel Co. v. Myers Grain Co.*, 71 W. Va. 715, 77 S. E. 363.

"What better proof of title to personal property could there be than the consistent oral testimony of both buyer and seller. Such evidence is certainly primary and, we think, the best evidence of which the nature of the case will admit." *Dixon-Pocahontas Fuel Co. v. Myers Grain Co.*, 71 W. Va. 715, 77 S. E. 362, 363.

Title to Money in Bank—Necessity of Producing Draft.—In a controversy between a creditor of the drawer of a draft, who has attached the fund in the hands of the collecting banks, and the endorsee thereof, concerning title to the fund, oral evidence is admissible to prove title without the production of the draft. *Dixon-Pocahontas Fuel Co. v. Myers Grain Co.*, 71 W. Va. 715, 77 S. E. 362.

9. Carbon and Letter-Press Copies.

See post, "Refusal to Produce Primary Evidence on Notice," II, C.

Duly authenticated carbon copies of letters, telegrams or other documents, identified as resulting from the same operation of the typewriter by the use of carbon sheets properly adjusted, are admissible as duplicate originals,

and constitute primary rather than secondary evidence of the facts they recite or contain, without accounting for the nonproduction of the originals or demanding their production, where the latter are in the possession of the party objecting to their introduction. *Elias & Bro. v. Boone Timber Co.*, 85 W. Va. 508, 102 S. E. 488.

A letter-press copy is not regarded as equivalent to the letter itself, but a carbon copy, which is made at the same time and by the same impression of type with the letter, may well be regarded as a duplicate original with the letter itself and receivable in evidence as such. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 101, 51 S. E. 171; *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 56 S. E. 725.

A letter-press copy of a letter, taken out of a book with numbered pages, would seem to stand upon the same footing as a carbon copy, and be competent and admissible in evidence, under proper circumstances, as a duplicate original. *Burton v. Seifert & Co.*, 108 Va. 338, 61 S. E. 933.

10. Telegrams.

From the authorities there is some difficulty in determining what are original telegrams within the meaning of the rule that the best evidence must be produced. "By the decided weight of authority the question whether the communication sent or the one received is to be deemed the original depends upon which party is responsible for its transmission. In other words, for whom the telegraph company is agent. If there is but a single communication, the dispatch as delivered at the place of destination is the best evidence. * * * Of course, there must be competent proof that the alleged sender did actually send or authorize the sending of the message in question. * * * In proving a contract by telegrams, the best evidence is the telegram containing the offer as received at the point of destination and the dispatch containing the acceptance

as delivered for transmission." *Jones on Evidence*, § 209. *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49, 56, 49 S. E. 1005.

The message sent to a telegraph office to be transmitted in reply to one received, is the original, and not the message received at the place to which it is transmitted. The latter must be considered as a copy, and carries with it none of the qualities of primary evidence, and can not be admitted until the foundation is laid for the admission of secondary evidence, and then can only be admitted upon proof that the copy offered is a correct transcript of a message actually authorized by the party sought to be affected by its contents. But even where the original is produced, its authenticity must be established, and this either by proof of the handwriting or by other proof establishing its genuineness. *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49, 49 S. E. 1005.

Whether a copy of a telegram is introduced or the original, it is necessary that the genuineness of it should be shown before it becomes competent evidence. *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49, 57, 49 S. E. 1005.

11. Establishment of Public Roads.

Record evidence of action taken by a county court or other governmental agency empowered to control the establishment and maintenance of public roads, streets and alleys, and showing the establishment of such a highway or its official recognition by the appointment of road supervisors who have repaired and improved it, is the best evidence of the fact, and, as a general rule, ought to be produced or its absence accounted for. *Williams v. Main Island Creek Coal Co.*, 83 W. Va. 464, 98 S. E. 511.

II. GROUNDS FOR ADMISSION OF SECONDARY EVIDENCE.

½A. INABILITY TO PRODUCE BEST EVIDENCE.

Inability to produce the best evidence justifies admission of secondary.

Showalter v. Chambers, 77 W. Va. 720, 88 S. E. 1072.

"Secondary evidence is admissible when primary evidence is not to be had." *Snyder v. Charleston, etc.*, Bridge Co., 65 W. Va. 1, 63 S. E. 616; *Austin v. Calloway*, 73 W. Va. 231, 80 S. E. 361, 363.

A. LOSS OR DESTRUCTION OF PRIMARY EVIDENCE.

"It is settled law that where a plaintiff claims title under a lost or destroyed paper, 'the proof of its former existence, contents and loss or destruction, must be strong and conclusive before the court will permit a title to be established by parol evidence.' *Carter v. Wood*, 103 Va. 68, 48 S. E. 553." *Johnson v. McCoy*, 112 Va. 580, 582, 72 S. E. 123.

Lost Note.—Where it is proven that a note declared on has subsequently been lost, secondary evidence of its contents is admissible. *Austin v. Calloway*, 73 W. Va. 231, 80 S. E. 361.

A copy of an original contract, which has been lost, made by counsel and filed with the bill of one of the parties to the contract, which bill alleged that the original had been filed with the answer of the party in another suit, although not authenticated by the certificate of the clerk of the court among the records of which the original was filed at the time such copy was made, is admissible in evidence. The fact that at the time such copy was filed it was not the best evidence and valid objection might have been made in that suit to its introduction in evidence, is immaterial, after the original has been lost, and § 3334, Va. Code of 1904 (Code 1919, § 6197) has no application. *Baber v. Baber*, 121 Va. 740, 94 S. E. 209.

Lost Telegrams.—Where it appeared from the testimony of plaintiff that he took a copy of an original telegram, which with others formed the contract of employment between him and defendant, but had been unable to locate this copy, and further that he had

made an unsuccessful effort to procure a copy from the telegraph company and the defendant, it was competent for the plaintiff to prove the contents of the lost telegram; the same being as effectual for probative purposes under such circumstances as the original. *Radford Water Power Co. v. Dunlap*, 128 Va. 658, 105 S. E. 257.

Dedication of Streets and Alleys Where Original Map Is Lost.—If the original map made by the proprietor, showing building lots, streets and alleys, is proven to have become detached from the record and lost, after it was signed and acknowledged by the proprietor and the trustees of the municipality, and properly recorded, thus proving both a dedication and an acceptance of such streets and alleys as were delineated on the map, secondary evidence may be resorted to to prove that a certain alley appeared thereon. *Wilson v. McConnell*, 72 W. Va. 81, 77 S. E. 540.

B. PRIMARY EVIDENCE OUT OF JURISDICTION.

Reservation of Vendor's Lien in Deed to Personalty.—Recognition and enforcement of a vendor's lien reserved in an unrecorded deed to personalty were excepted to for want of proof. The deed was not in evidence, but there was oral proof of such a reservation therein as was claimed. It seemed that the vendees had carried the deeds beyond the jurisdiction of the court. Search for the deed and other writings relating to the lien failed to reveal them. They were neither in the possession of the plaintiff nor under its control. Held that the circumstances justify the admission of secondary evidence of the contents of the deed. *Birch River Boom, etc., Co. v. Glendon, etc., Lumber Co.*, 71 W. Va. 507, 76 S. E. 972.

C. REFUSAL TO PRODUCE PRIMARY EVIDENCE ON NOTICE.

Carbon copies of the originals of let-

ters written and mailed are admissible in evidence, where their authenticity is proved and the addressee has been called on to produce the originals but fails to do so. *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

Letter Press Copy. — Upon notice having been given to a writer to produce the original of the letter to which his was a reply and his failure to produce such original, a letter-press copy thereof is admissible in evidence. *Loverin, etc., Co. v. Bumgarner*, 59 W. Va. 46, 52 S. E. 1000.

Sufficiency of Notice.—Where a letter-press copy is sought to be introduced in evidence, the question of what is a reasonable notice to produce the original is a relative one and depends (in the absence of statutory requirements) upon the circumstances of each case. *Burton v. Seifert & Co.*, 108 Va. 338, 61 S. E. 933.

Where the party notified resided at the place of trial, and circumstances indicated that the paper was then in court or could be produced without causing inconvenience or delay, notice given at the trial was held sufficient. *Burton v. Seifert & Co.*, 108 Va. 338, 61 S. E. 933.

E. PRIMARY EVIDENCE INADMISSIBLE.

Where a contract was not lawfully admitted under §§ 2 and 3, ch. 73, Code of West Virginia, a certified copy thereof under § 5, ch. 130, Code, would not be admissible as evidence against him; and of course the record in the deed book would be no better evidence. *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384.

III. LAYING FOUNDATION FOR ADMISSION OF SECONDARY EVIDENCE.

A. IN GENERAL.

Must Show that Party Unable to Produce Paper Relied upon. — Oral evidence to prove, in an action of debt to recover a balance due on an account, the contents of a written admission of

the plaintiff as to the state of the account between the parties, on a certain date, is not admissible, unless it be first shown that the paper is not in the possession of the party, relying upon it, and can not be produced. *Chicago Art Co. v. Thacker*, 65 W. Va. 143, 63 S. E. 770.

Effort to Produce Primary Evidence.

—The record of a deed or other instrument, or a certified copy therefrom, is not admissible in evidence against a party thereto as to whom the same has not been lawfully admitted to record as provided by §§ 2 and 3, ch. 73, Code of West Virginia; the record of the contract was not the best evidence, and, without an effort to procure and offer the original contract or a showing entitling a party to offer secondary evidence, should not have been admitted. *Cobb v. Dunlevie*, 63 W. Va. 398, 404, 60 S. E. 384.

Sufficiency of Foundation for Admission of Letter or Telegram.—Denial of the receipt and possession of a letter or telegram excuses demand for production thereof, as a step preliminary to proof of its contents. *Showalter v. Chambers*, 77 W. Va. 720, 88 S. E. 1072.

In laying the foundation for proof of the contents of a letter, receipt of which is denied, it suffices, in the absence of an objection on account of form, to prove in general terms that the letter was sent to the parties denying receipt thereof, by the United States mail. *Showalter v. Chambers*, 77 W. Va. 720, 88 S. E. 1072.

B. EVIDENCE OF LOSS OR DESTRUCTION OF PRIMARY EVIDENCE.

$\frac{1}{2}$. In General.

Before the contents of a lost paper can be properly given in evidence, it is not only necessary to prove that it is lost and that diligent search has been made to find it, but its due execution as well. *Snyder v. Charleston, etc., Bridge Co.*, 65 W. Va. 1, 63 S. E. 616.

Presumption.—The existence of facts will not be presumed merely because records have been lost or destroyed. Such loss or destruction gives rise to no presumption and has the effect merely of changing the mode of proof of such record, admitting secondary evidence in the place of an exemplification of the record. *Board v. Norfolk, etc., R. Co.*, 119 Va. 763, 91 S. E. 124.

Ancient Deed—Proof of Execution.—If an ancient deed be lost, but its existence and contents be proven by oral evidence; and it be also proven to have been recently in the possession of and produced by the grantee, and such account thereof is given, as might be reasonably expected, under all the circumstances, such oral evidence is admissible to establish such deed or grant, without otherwise proving the due execution and delivery thereof; and such deed will be treated as presumptively genuine, until such presumption is overcome by evidence to the contrary. *Shaffer v. Shaffer*, 69 W. Va. 163, 71 S. E. 111.

2. Sufficiency.

Copy of Lost Note.—"The note ap-

pearing to have been lost, the court permitted a copy of it to be used as evidence over the objection of defendant, and this is assigned as error. Its loss is accounted for by proof of the following facts. After the depositions were taken they were sealed and addressed to the clerk of the circuit court of Mason county as registered mail; but, at the request of the West Virginia attorney, the note was not filed as an exhibit with the depositions, and was mailed to him in a separate envelope, not as registered matter. That night the post office burned, and all the letters were destroyed, except registered matter which the postmaster had placed in an iron safe. This is sufficient accounting for the loss of the note to make secondary proof admissible. Before sending the note to Kentucky, plaintiff's attorney had made a copy of it. His testimony shows that the copy is an exact copy of the original. In view of these facts it was not error to admit the copy of the note as evidence." *Austin v. Calloway*, 73 W. Va. 231, 80 S. E. 361.

BETTING.—See post, GAMING.

BEVO.—See post, INTOXICATING LIQUORS.

BEYOND A REASONABLE DOUBT.—See post, REASONABLE DOUBT.

BIAS.—See post, JUDGES; JURY; WITNESSES.

BICYCLES.

CROSS REFERENCES.

See the title BICYCLES, vol. 2, p. 371, and references there given. In addition, see ante, AUTOMOBILES; post, STREETS AND HIGHWAYS.

"A bicycle is a vehicle. It may be lawfully ridden upon a street or highway, and has the same rights upon the highway as other vehicles, and it is the duty of a street railway company to give to a bicyclist who is riding on or attempting to cross its track in front of its car the usual and sufficient warning, and to exercise the same degree of care as is required in favor of other vehicles." *Ashley v. Kanawha Valley Tract. Co.*, 60 W. Va. 306, 312, 55 S. E. 1016.

As to actions for injury incurred in collision between automobile and bicycle, see *Bohannon-King & Co. v. Vellines*, 120 Va. 428, 91 S. E. 621.

Prohibiting Riding or Driving on Sidewalk in Unincorporated Towns and Villages.—Va. Code 1919, § 4733.

How Person Riding Bicycle Shall Pass Vehicle, etc.—Va. Code 1919, § 4736.

West Virginia Statute.—Barnes Code, p. 660, ch. 47, § 49, f.

BIDS.—See ante, AUCTIONS AND AUCTIONEERS; post, JUDICIAL SALES; SHERIFF'S SALES.

BIGAMY.

CROSS REFERENCES.

I. Statutory Provisions.

See the title BIGAMY, vol. 2, p. 372, and references there given.

I. STATUTORY PROVISIONS.

W. Va. Code, p. 1219, ch. 149, §§ 1, 2.
Va. Code 1919, §§ 4538-4539; Barnes

BILL.—As to bill of revivor, see ante, ABATEMENT, REVIVAL AND SURVIVAL. As to bill of review, see post, BILL OF REVIEW. As to bill of exchange, see post, BILLS, NOTES AND CHECKS. As to bill of lading, see post, CARRIERS. As to bill of attainder, see post, CONSTITUTIONAL LAW. As to bill of discovery, see post, DISCOVERY. As to bill in equity, see post, EQUITY; and references there given. As to bill of exceptions, see post, EXCEPTIONS, BILLS OF. As to bill of conformity, see post, EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES. As to bill of interpleader, see post, INTERPLEADER. As to bill to quiet title, see post, QUIETING TITLE. As to bill of sale, see post, SALES.

For the meaning of bill as used in the constitution, requiring three readings of bills, see *Smith v. Mitchell*, 69 W. Va. 481, 72 S. E. 755. See also post, STATUTES.

BILLIARD SALOON.—What Constitutes—License.—Va. Code 1919, p. 3140; Barnes Code, ch. 32, secs. 1, 99.

BILL OF PARTICULARS.

- ½I. To What Cases Law of Bills of Particulars Applies, 680.**
- I. Office of the Bill, 681.**
- II. Relation of Bill to Pleading, 681.**
- II¼. When Motion for Bill Proper Remedy, 681.**
- II½. Affidavit to Accompany Motion in Criminal Cases, 682.**
- III. When Demanded and When Filed, 682.**
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- A. Discretion of Court, 683.
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- V. Requisites and Sufficiency, 685.**
- VI. Amendments, 686.**
- VII½. Curative Effect of Bill, 686.**
- VIII. Demurrer, 686.**
- A. General Rule, 686.
- IX. Objections—Motion for a More Specific Bill, 686.**
- X. Evidence, 686.**
- X½. Waiver, 687.**

CROSS REFERENCES.

See the title BILL OF PARTICULARS, vol. 2, p. 376, and references there given. In addition, see ante, APPEAL AND ERROR; ASSAULT AND BATTERY; post, INSTRUCTIONS. As to amendment of bill of particulars, see ante, AMENDMENTS. As to account filed in assumpsit, see ante, ASSUMPSIT. As to bill of particulars in actions on insurance policies, see post, INSURANCE.

½I. TO WHAT CASES LAW OF BILLS OF PARTICULARS AP- PLIES.

Va. Code 1919, § 6091; Barnes W. Va. Code, ch. 130, § 46.

The Virginia statute confers the right to move for a bill of particulars "in any action or motion," and declares how it may be enforced. *Pine v. Com.*, 121 Va. 812, 93 S. E. 652.

The law of bills of particulars applies to both criminal and civil cases. *State v. Lewis*, 69 W. Va. 472, 72 S. E. 475; *State v. Sixo*, 77 W. Va. 243, 87 S. E. 267.

In West Virginia it has been held that the right to require a bill of par-

ticulars in criminal cases can be exercised only where the law allows general statements in the pleadings, and justice requires further information of the accusation. *State v. Sixo*, 77 W. Va. 243, 87 S. E. 267.

Apparently, the Virginia statute relating to bills of particulars (§ 3249 of the Code; Code 1919, § 6091) was not intended to apply to a criminal prosecution, but the right is inherent in the trial court in the orderly administration of justice, to prevent wrong and injustice to persons who are presumed to be innocent, and to assure to them their constitutional rights. The indictment, of course, must charge the

offense, and if it fails to give the information necessary to enable the defendant to concert his defense, such information may be supplied by a bill of particulars; but if the offense is not charged in the indictment, the defect can not be supplied by a bill of particulars. *Pine v. Com.*, 121 Va. 812, 93 S. E. 652. See post, "When Ordered," IV, B.

I. OFFICE OF THE BILL.

In Civil Cases.—The object of the statement of particulars authorized by § 3249 of the Virginia Code (Code 1919, § 6091) is to facilitate an intelligent preparation of actions at law for trial and to prevent surprise at the trial. *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S. E. 835; *Metropolitan Life Ins. Co. v. Hayslett*, 111 Va. 107, 111, 68 S. E. 256.

Its object is to give the opposing parties more definite information of the character of the claim or defense than is generally disclosed by the declaration, notice or plea. *Richmond v. Leaker*, 99 Va. 1, 37 S. E. 348. *Metropolitan Life Ins. Co. v. Hayslett*, 111 Va. 107, 111, 68 S. E. 256. *Newport News, etc., Elect. Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011.

It is intended to simplify and shorten pleadings, by providing that, if the declaration or other pleading do not present distinctly the grounds or subject of action, the plaintiff, if required to do so, should file such a statement of particulars as will put the defendant in possession of the character thereof. *Richmond v. Wood*, 109 Va. 75, 63 S. E. 449.

The object in requiring a defendant to state the grounds of his defense when so ordered by the court, is not to punish the defendant for failure to comply with the order, but to protect the plaintiff from prejudice by surprise at the trial. *City Gas Co. v. Poudre*, 113 Va. 224, 74 S. E. 158; *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62. See post, "Evidence," X.

In Criminal Cases.—An indictment

must charge the offense, and if it fails to give the information necessary to enable the defendant to concert his defense, such information may be supplied by bill of particulars. A bill of particulars may supply the fault of generality or uncertainty, but not the omission of an essential averment of the indictment. *Wilkerson v. Com.*, 122 Va. 920, 95 S. E. 388.

II. RELATION OF BILL TO PLEADING.

A bill of particulars is no part of the declaration and statements contained therein can not be read into the declaration. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 98, 51 S. E. 161; *Robinson v. Board*, 70 W. Va. 66, 73 S. E. 337.

II½. WHERE MOTION FOR BILL PROPER REMEDY.

Of Defendant. — If a declaration, when read as a whole, states a good cause of action and sufficiently informs the defendant of the case he has to meet, and yet the defendant desires a more particular statement of the grounds of complaint, his remedy is by a motion for a bill of particulars, under § 3249 of the Code (Code 1919, § 6091). *Clinchfield Coal Corp. v. Osborne*, 114 Va. 13, 75 S. E. 750; *Chesapeake, etc., R. Co. v. Swartz*, 115 Va. 723, 80 S. E. 568; *Washington Virginia R. Co. v. Bouknight*, 113 Va. 696, 75 S. E. 1032; *Norfolk Southern R. Co. v. Crocker*, 117 Va. 327, 84 S. E. 681; *Interstate R. Co. v. Tyree*, 110 Va. 38, 65 S. E. 500.

A plaintiff may, in different counts of his declaration, allege any number of distinct acts of negligence on the part of a defendant, and the defendant may guard against surprise by calling for a bill of particulars, under § 3249 of the Code (Code 1919, § 6091) which will be granted in a proper case. *Pocahontas Collieries Co. v. Rukas*, 104 Va. 278, 51 S. E. 449. See post, "Ordering the Bill," IV.

Where the declaration, in an action

to recover damages for a personal injury, claims only general damages, a bill of particulars may be demanded. *Bettman v. Skinner*, 113 Va. 24, 73 S. E. 436.

The assertion in a declaration, by a servant against his master for injury by negligence, of a higher degree of duty on the part of the latter than the law imposes, as to provide the servant a safe place to work, instead of a reasonably safe place, is a defect in form rather than substance, remediable by application to the court for a more specific statement of the ground of the action, and does not render the count bad on demurrer. *Jaeger v. City R. Co.*, 72 W. Va. 307, 78 S. E. 59. See post, DEMURRERS; PLEADING.

If a declaration in tort does not plainly describe "the sickness or disorder" alleged to result from a physical injury charged, the defendant may require the needed particularity by calling for a bill of particulars under § 3249 of the Code (Code 1919, § 6091). *Norfolk, etc., R. Co. v. Spears*, 110 Va. 110, 65 S. E. 482.

Of Plaintiff. — The remedy of the plaintiffs to obtain further particulars of the set-off claimed by the defendants was by motion for a bill of particulars under § 3249 of the Code of 1904 (Code 1919, § 6091), and not by objection to the plea. *New Idea, etc., Co. v. Rogers & Sons*, 122 Va. 54, 94 S. E. 351. See post, "Discretion of Court." IV, A.

II½. AFFIDAVIT TO ACCOMPANY MOTION IN CRIMINAL CASES.

In a criminal case, a motion by defendant for a bill of particulars must be accompanied by an affidavit specifically showing the grounds and reasons therefor. *State v. Hurley*, 78 W. Va. 638, 90 S. E. 109. See *State v. Sixo*, 77 W. Va. 243, 87 S. E. 267.

III. WHEN DEMANDED AND WHEN FILED.

Unreasonable Delay in Applying for

Bill Will Preclude Order Therefor.—Barnes Code, ch. 125, §§ 62, 63.

Section 63, c. 125 (§ 4817, Code 1913) authorizing a plaintiff to apply for an order requiring defendant to file a more particular statement of his defense, impliedly requires promptness in making the motion. *Paxton Lumber Co. v. Panther Coal Co.*, 83 W. Va. 341, 98 S. E. 563.

Ordinarily such a motion, made when the case is called for trial, approximately six months after issue joined upon the appropriate plea, comes too late. *Paxton Lumber Co. v. Panther Coal Co.*, 83 W. Va. 341, 98 S. E. 563.

Time for Motion in Criminal Cases.

—The motion for a bill of particulars in criminal cases should be made before pleading. *State v. Sixo*, 77 W. Va. 243, 87 S. E. 267.

When Bill May Be Filed.—Plaintiff is not obliged to file his bill of particulars at the same time he files his declaration, but may do so the term of court at which the case is tried, unless ordered sooner to do so by the court, or the judge in vacation. *Franklin v. Lilly Lumber Co.*, 66 W. Va. 164, 66 S. E. 225.

III½. WHEN PLAINTIFF PROCEEDS BY MOTION IN LIEU OF ACTION AT LAW.

Same Rule Applicable as to Bills of Particulars as Is Provided by Law in Other Actions or Motions.—Va. Code 1919, § 6046.

Where an account upon which a notice of motion for judgment was based gave the defendant no sufficient notice of the service rendered for which the charges were made, defendant was entitled to a bill of particulars supplying this information. *Mankin v. Aldridge*, 127 Va. 761, 105 S. E. 459.

Where there is a plea of non-assumpsit to a motion on an open account, under § 3211 of the Code (Code 1919, § 6046) and no list of set-offs is filed,

and the plaintiff is not apprised of the nature of the defense, his remedy is to demand a statement of the grounds under § 3249 of the Code. (Code 1919, § 6091.) *Whitley v. Booker Brick Co.*, 113 Va. 434, 74 S. E. 160. See post, "Discretion of Court," IV, A.

The notice of a motion for a judgment under § 3211 of the Code (Code 1919, § 6046), against the endorser of a negotiable note must contain such allegations of presentment for payment and notice of dishonor to the endorser as will fix a liability upon him for the payment of the note, else the notice will be bad upon demurrer. The defendant is not obliged to call for a bill of particulars in such case. *Security Loan, etc., Co. v. Fields*, 110 Va. 827, 67 S. E. 342.

In the instant cases a bill of particulars was filed by the plaintiff following the original notices of motion for judgment. The original notices were dismissed by the court below, after which amended notices were filed, but no bill of particulars was filed after the filing of the amended notices. Held: That on the question of the sufficiency of their allegations, the amended notices must stand or fall alone, unaided, upon demurrer, by the bills of particulars which were filed, or any which could be filed, in the cases. The bills of particulars which were filed went out of the cases with the original notices when the latter were dismissed. *Rinehart v. Pirkey*, 126 Va. 346, 101 S. E. 353.

IV. ORDERING THE BILL.

A. DISCRETION OF COURT.

Va. Code 1919, § 6091; Barnes Code, ch. 125, §§ 62, 63; ch. 130, § 46.

There is no inflexible rule in respect to requiring a bill of particulars to be filed. It is a general rule, a matter resting in the sound judicial discretion of the trial court, and its action will not be reviewed unless plainly erroneous. *Blue Ridge Light, etc., Co. v. Tut-*

wiler, 106 Va. 54, 55 S. E. 539; *Keister v. Philips*, 124 Va. 585, 98 S. E. 674. See *Pine v. Com.*, 121 Va. 812, 93 S. E. 652.

"Under § 46 of chapter 130 of the Code of 1906 the defendant may always demand and obtain a bill of particulars in actions ex delicto as well as ex contractu, when it appears, from the nature of the case, to be necessary. *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 622, 40 S. E. 591; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 740, 20 S. E. 696; *Wheeling v. Black*, 25 W. Va. 266." *Jacobs v. Williams*, 67 W. Va. 377, 382, 67 S. E. 1113.

A motion for a bill of particulars under § 3249, Code of 1904 (Code 1919, § 6091), should be sustained in cases where the notice, declaration or other pleading is so drawn as not to give the defendant proper notice of the particulars of the claim. *Keister v. Philips*, 124 Va. 585, 98 S. E. 674.

Not in every case can a bill of particulars be demanded. Only in cases where the law allows general statements in a declaration can specification be demanded. The right can not in every case be used. It can only be exercised where the law allows a general statement in the pleading, but justice demands further information of the demand or accusation. It is a matter of sound, but not arbitrary discretion. *State v. Lewis*, 69 W. Va. 472, 473, 72 S. E. 475.

Where the charge in an indictment is too general and indefinite to apprise the defendant of the cause and nature of his accusation, without the aid of some sort of specification, or a bill of particulars, it is reversible error for the trial court to refuse to require such particulars to be furnished. *Pine v. Com.*, 121 Va. 812, 93 S. E. 652. See post, "When Ordered," IV, B.

B. WHEN ORDERED.

Declaration Giving Only Partial Notice of Nature of Claim.—If a declara-

tion gives the defendant partial but not complete notice of the nature and character of the plaintiff's claim, a bill of particulars may be required of the latter. *Hunter v. Burroughs*, 123 Va. 113, 96 S. E. 360.

Declaration Not Stating Distinctly the Items of Claim.—Where the declaration is little more than a skeleton, and does not state distinctly the several items of the plaintiff's claim, but omits many particulars as to which the defendant should have been informed, it is error for the trial court to refuse the defendant's request for a bill of particulars. *Clinchfield Coal Corp. v. Brooks*, 118 Va. 72, 86 S. E. 829.

Special Pleas Giving with Particularity Every Ground of Defense.—It is not error to refuse to require a defendant to file a statement of the particulars of his defense under § 3249 of the Virginia Code (Code 1919, § 6091), when the special pleas filed give with detailed particularity every ground of defense relied on. *Newport News, etc., Elect. Co. v. Bickford*, 105 Va. 182, 52 S. E. 1011.

If, in a criminal case, an affidavit showing the necessity for additional information is filed in time, and it appears that it is necessary for the defendant to have the information asked for, its refusal is reversible error. *State v. Sixo*, 77 W. Va. 243, 254, 87 S. E. 267. See ante, "Affidavit to Accompany Motion in Criminal Cases," II½.

"Specification, or a bill of particulars, is allowed in order to apprise the defendant of 'the crime and nature of his accusation,' when the indictment is not sufficiently specific for that purpose." *Pine v. Com.*, 121 Va. 812, 93 S. E. 652.

"If the charges in an indictment are too general in their nature to advise a defendant of the particular act with which he is charged, and he is, consequently, unable to properly prepare his defense, the court may require the attorney for the state to furnish him a bill of particulars. 22 Cyc. 371; 1 Bish's. *Crim. Proc.*, § 643." *State v.*

Railroad Co., 68 W. Va. 193, 195, 69 S. E. 703.

Indictment for Larceny.—Under an indictment for simple larceny a bill of particulars specifying the character of larceny to be proven may be demanded by the defendant. *State v. Lewis*, 69 W. Va. 472, 72 S. E. 475.

An indictment for larceny charged in one count the larceny of a check for a certain amount, the property of another person, under § 3708, Code of 1904 (Code 1919, § 4442), and in another count the larceny of that amount of money, the property of the same person. The accused moved the court to require the commonwealth's attorney to give a bill of particulars, stating whether he proposed to try the accused for larceny at common law, or for larceny of the check. Held: That the court properly overruled this motion. Each count of the indictment charged the accused with grand larceny, and with sufficient particularity. No bill of particulars could have been properly required which would have given him any more specific information of the crime with which he was charged. *Allen v. Com.*, 122 Va. 834, 94 S. E. 783.

Where an indictment against a railroad company for obstructing a public road by suffering one of its trains to remain standing across the road for a longer time than is allowed by law, fails to designate the particular train, or the time when the wrong was committed, the court should require a bill of particulars, if motion therefor is made before pleading to issue, supported by affidavit showing that defendant, during the year, ran many trains over its railroad each way, some passenger trains and some freight trains, each train being in charge of a different crew, and that it is not advised concerning the particular train that caused the obstruction. *State v. Railroad Co.*, 68 W. Va. 193, 69 S. E. 703.

Prosecution for Unlawful Sale of Intoxicating Liquors.—A bill of particu-

lars will be denied, in a prosecution for the unlawful sale of intoxicating liquors, where the only ground assigned in the motions therefor is that the indictment, valid and in the usual form, does not specify the name of the person to whom the alleged sale was made. *State v. Huff*, 80 W. Va. 468, 92 S. E. 681.

V. REQUISITES AND SUFFICIENCY.

The statement of a bill of particulars is not the issue to be tried, and is not expected to possess the formality or precision of a formal pleading. It is sufficient if it fairly and plainly gives notice to the adverse party of the character of a cause of action or defense not adequately described in the notice, declaration, or other pleading. *Metropolitan Life Ins. Co. v. Hayslett*, 111 Va. 107, 110, 68 S. E. 256, citing *Columbia Acci. Ass'n v. Rockey*, 93 Va. 678, 25 S. E. 1009.

Oath Required.—Barnes Code, ch. 125, §§ 62, 63.

Omission to Endorse Style of Actions.—Evidence is admissible under an account filed with a declaration showing the names of the parties to the action, and the subject matter of which is the same as that of a count in the declaration, and which is otherwise sufficient, notwithstanding omission to endorse on it the style of the action. *Anderson v. Lewis*, 64 W. Va. 297, 61 S. E. 160.

Statement of Grounds of Defense.—In an action of debt, defendant pleaded *nil debet* and *non est factum*, and upon the court's order requiring defendant to file a bill of particulars, she filed a statement of her grounds of defense, alleging that the plaintiff had forged the instrument sued upon, and that in an attempt to carry out a general scheme of fraud, had not only forged the note sued upon, but other notes on other parties, naming them. Held, that the scope of defendant's pleadings was broad enough to warrant the introduc-

tion of evidence in proof of the facts set up in the grounds of defense. *Ely v. Gray*, 125 Va. 708, 100 S. E. 660.

A clause in a bill of particulars specifying two grounds of damages, and claiming a stated amount on account thereof, without specification of the part of sum claimed on each ground, is sufficient, in the absence of a demand for separation, and justifies admission of proof of damages on both of such grounds. *State v. United States Fidelity, etc., Co.*, 81 W. Va. 749, 95 S. E. 783.

Action of Assumpsit to Recover Attorney's Fees.—A bill of particulars filed with the declaration in an action of assumpsit to recover fees for services rendered by an attorney-at-law in a suit or legal proceeding, giving date of the services, the suit or proceeding in which they were rendered and the sum charged for the entire services is sufficient. *Newman v. Levi*, 74 W. Va. 223, 81 S. E. 1036.

The plaintiff in an action on a policy of fire insurance, being required to file a more particular statement of the nature of his claim, files a statement giving notice to the defendant insurance company that it would be held liable for the full face of the policy on the specific property insured thereby, and, in addition, that it would be held liable for the amount of "fixtures," not insured thereby, the part of such statement giving notice that the defendant would be held liable for the amount of "fixtures," is immaterial and should be treated as surplusage. Such statement is sufficient if it, in effect, gives notice to the defendant of the nature of the plaintiff's claim. *Tucker v. Colonial Fire Ins. Co.*, 58 W. Va. 30, 51 S. E. 86.

Where in an action for personal injuries the bill of particulars filed clearly states the matters on account of which damages are claimed, and the amount of damages asked because of each of such matters, it is sufficient to permit the introduction of evidence thereun-

der. *Bartlett v. Baltimore, etc., R. Co.*, 84 W. Va. 120, 99 S. E. 322.

In this case the statement of set-offs filed describes each item with particularity as property sold by the defendant to the plaintiff, affixes a value to each, and is a sufficient compliance with the statute. *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 52 S. E. 835.

VI. AMENDMENTS.

See ante, AMENDMENTS.

VII½. CURATIVE EFFECT OF BILL.

"It has been held in *Wheeling v. Black*, 25 W. Va. 266, in an action on a bond with collateral condition, that under our statute, chapter 130, § 46 of the Code, providing for the filing of a bill of particulars of plaintiff's claim, the necessity for special assignment of breaches is to a great extent if not entirely obviated by filing such bill of particulars with the declaration and that by filing such bill of particulars with the declaration the plaintiff may dispense with such special assignment in most if not in all cases." *Stephenson v. Collins*, 57 W. Va. 351, 359, 50 S. E. 439.

In an action under the federal employer's liability act (U. S. Comp. St., §§ 8657, 8665) for personal injuries suffered by a motorman of one of defendant's cars in collision with another car, a count in the declaration charged that the servants of defendant in charge of the other car negligently collided with the car operated by plaintiff. It was objected to this count that it did not state the time, place or circumstances under which the collision occurred. Held: That the objection to this count was cured by a bill of particulars, giving in detail the grounds of negligence relied on. *Washington, etc., Railway v. Warner*, 124 Va. 452, 97 S. E. 799.

VIII. DEMURRER.

A. GENERAL RULE.

A bill of particulars, or a statement of the grounds of the defense, being no

part of the pleadings, defects therein can not be reached by demurrer, or by objections equivalent to a demurrer. *Ely v. Gray*, 125 Va. 708, 100 S. E. 660; *Tucker v. Colonial Fire Ins. Co.*, 58 W. Va. 30, 51 S. E. 86; *Stephenson v. Collins*, 57 W. Va. 351, 359, 50 S. E. 439.

The remedy is to object to the introduction of evidence under the defective bill. *Tucker v. Colonial Fire Ins. Co.*, 58 W. Va. 30, 51 S. E. 86; *Stephenson v. Collins*, 57 W. Va. 351, 359, 50 S. E. 439.

IX. OBJECTIONS—MOTION FOR A MORE SPECIFIC BILL.

As to objections equivalent to a demurrer, see ante, "General Rule," VIII, A.

A bill of particulars may be filed by the plaintiff in an action for personal injuries, even though the same is not demanded by the adverse party, and if the defendant would take advantage of insufficiencies therein he must move for a more specific one. An objection to the filing thereof will not avail him. *Bartlett v. Baltimore, etc., R. Co.*, 84 W. Va. 120, 99 S. E. 322.

X. EVIDENCE.

Effect as to Admission of Evidence of Failure to File Bill of Particulars.—Va. Code 1919, § 6091; Barnes Code, p. 1136, ch. 130, § 46.

If a party fail or refuse to comply with an order for a bill of particulars, the court may exclude evidence of any matter not described in the pleadings plainly enough to give the opposite party notice of its character. *Jacobs v. Williams*, 67 W. Va. 377, 382, 67 S. E. 1113.

If the bill of particulars is not sufficient, the court should require a sufficient statement, and if it is not furnished exclude evidence of any matter not described in the notice, declaration, or other pleading so plainly as to give the adverse parties notice of its character. *Metropolitan Life Ins. Co. v.*

Hayslett, 111 Va. 107, 111, 68 S. E. 256.

If a defendant's grounds of defense, when called for, are not sufficient, the court should require a further and sufficient statement to be filed, and if not furnished to exclude evidence of any matter not described in the grounds of defense, or plea, so plainly as to give the plaintiff notice of its character. *Chestnut v. Chestnut*, 104 Va. 539, 540, 52 S. E. 348.

If defendant desires more specific information of plaintiff's claim than is contained in a notice of motion for judgment, he has the right to move the court to order the plaintiff to file a statement of the particulars of his claim, and if the court makes such order and the plaintiff fails to comply with it, the court may exclude evidence of any matter not so plainly described in the notice as to give the defendant information of its character. *Rinehart v. Pirkey*, 126 Va. 346, 101 S. E. 353.

The object of § 3249 of the Code (Code 1919, § 6091), in requiring a defendant to state the grounds of his defense when so ordered by the court, is not to punish the defendant for failure to comply with the order, but to protect the plaintiff from prejudice by surprise at the trial. He is not debarred from all evidence in his defense, but is confined to evidence upon the point covered by the language of his plea. Hence, if a defendant pleads not guilty to an action of trespass, and fails to state his ground of defense, when required by the court, he may, nevertheless, introduce any evidence tending to show he did not commit the trespass in the declaration alleged. *City Gas Co. v. Poudre*, 113 Va. 224, 74 S. E. 158. See ante, "Officer of the Bill," I.

If a defendant in an action of trespass on the case who has pleaded the general issue of "not guilty" fails to comply with an order requiring him to

specify his grounds of defense, he should not be allowed to introduce any evidence controverting the plaintiff's claim, as his plea gives no notice thereof. *Colby v. Reams*, 109 Va. 308, 63 S. E. 1009.

Where the defendant in assumpsit has pleaded the general issue of non-assumpsit, and the plaintiff has called for a specification of his grounds of defense, under § 3249 of the Code (Code 1919, § 6091), and the defendant either files none at all, or merely states matters which the plaintiff is obliged to prove in order to maintain his action, the defendant is not debarred from offering any evidence at all in his defense, but is limited to evidence in denial of the plaintiff's claim. *Williamson v. Simpson*, 113 Va. 439, 74 S. E. 162.

Limitation of Defenses Where Defendant Files His Grounds of Defense.

—Where a defendant in an action of assumpsit has filed a specification of his grounds of defense under § 3249 of the Code (Code 1919, § 6091), his defenses will be limited to his specification. *Carolina, etc., Railway v. Clinch Valley Lumber Co.*, 112 Va. 540, 72 S. E. 116. See ante, ASSUMPSIT, p. 90.

X½. WAIVER.

Waiver of Statement of Grounds of Defense—Waiver.—The object and effect of § 3249 of the Code of 1904, § 6091 of the Code of 1919, permitting a plaintiff to call upon the defendant for a statement of his grounds of defense, was to limit the scope and operation of the general issue, and to confine the introduction of evidence to the particular defenses disclosed by the statement. The statute, however, was not enacted to punish the defendant, but to protect the plaintiff against surprise at the trial, and hence its provisions may be waived by the plaintiff if he chooses to do so. *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

Bill of Peace.

See the title BILL OF PEACE, vol. 2, p. 383, and references there given.

BILL OF REVIEW.

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CROSS REFERENCES.

See the title BILL OF REVIEW, vol. 2, p. 383, and references there given. In addition, see ante, ABATEMENT; REVIVAL AND SURVIVAL; APPEAL AND ERROR; post, EQUITY; JUDGMENTS AND DECREES.

I. DEFINITIONS AND GENERAL CONSIDERATION.

A. BILL OF REVIEW.

"A bill of review is a bill filed to reverse or modify a decree that has been signed and enrolled for error in law ap-

parent upon the face of such decree, or on account of new facts discovered since publication was passed in the original cause, and which could not by the exercise of due diligence have been discovered or used before the decree was made. 3 Enc. Pl. & Pr. 570."

Phipps v. Wise Hotel Co., 116 Va. 739, 749, 82 S. E. 681.

Analogous to Appeal.—"A bill of review for errors of record is analogous to an appeal. *Harrison v. Harmon*, 80 W. Va. 68, 92 S. E. 460.

Distinguished from Rehearing.—See post, REHEARING.

Bill and Motion.—The court has the power to correct error on a bill of review, in the same manner that the statute authorizes it to correct error on mere motion. They are concurrent remedies. *Kanawha Oil, etc., Co. v. Wenner*, 71 W. Va. 477, 76 S. E. 893.

An erroneous petition for rehearing, where the court by entering a final decree in vacation had lost control of the cause, may be treated as a bill of review, where it plainly sought to correct an error of law apparent upon the face of the record, and was, in substance, a bill of review, which is the appropriate proceeding for the correction of a final decree by the court in which it has been rendered. *Matney v. Yates*, 121 Va. 506, 93 S. E. 694.

As Answer.—After a final decree in a suit to obtain the removal of a guardian and the settlement of his accounts, the guardian filed a petition for rehearing (regarded by the court as a bill of review) on the ground that the commissioner in taking his account failed to allow him certain credits dependent upon extrinsic evidence. Held: That the bill of review of the guardian was in truth a belated answer sought to be filed after a final decree, and that this could not be done even under the liberal practice permitted by § 3275 of the Virginia Code of 1904. (Code 1919, § 6122.) *Gills v. Gills*, 126 Va. 526, 101 S. E. 900.

Not Part of Cause—New Suit.—The bill of review is a new suit having for its object the correction of the final decree in the former suit. *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913. See *State v. Moore*, 77 W. Va. 325, 87 S. E. 367.

A bill of review forms no part of the
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proceedings in the original cause, but is offered after the suit is completely ended. *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913; *Dunfee v. Childs*, 59 W. Va. 225, 239, 53 S. E. 209.

A bill of review or appeal to reverse a final decree in a suit as a *lis pendens* is a new *lis pendens*, as regards purchasers claiming title under the decree, and is not a mere continuation of the original suit. *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

"A bill of review or appeal is a second *lis pendens*, and must have its own notice. It does not relate back to the rendition of the judgment or decree." *Dunfee v. Childs*, 59 W. Va. 225, 238, 53 S. E. 209.

"There could not be two bills of review for the same cause." *Dunfee v. Childs*, 59 W. Va. 225, 234, 53 S. E. 209.

II. PURPOSE.

A bill of review is designed to relieve against errors apparent upon the face of the decree, as for after-discovered testimony. *Prince v. McLemore*, 108 Va. 269, 61 S. E. 802.

Proceedings by bill of review are for the correction of errors in decrees or judgments already entered. *State v. Moore*, 77 W. Va. 325, 87 S. E. 367.

III. FORM AND REQUISITES.

A bill of review which names no parties or makes no allegations affecting the rights of the parties to the decree complained of is defective and should be dismissed on demurrer. *Spangler v. Vermillion*, 80 W. Va. 75, 92 S. E. 449.

A bill of review to review prior decrees for alleged errors of law which do not appear on the face of the record, and also for after discovered evidence which is not shown by the bill, and no reasons given why such supposed evidence was not discovered before final decree entered and produced before trial, is properly dismissed on demurrer. *Alexander v. Tilton*, 74 W. Va. 81, 81 S. E. 570.

A bill of review for after-discovered evidence should be refused where the allegations are not sufficient to warrant a reversal, or relate to matters with which complainants are no longer concerned. *Goode v. Bryant*, 118 Va. 314, 87 S. E. 588.

VI. WHAT DECREES REVIEWABLE.

B. CONSENT DECREES.

A decree or order, made by consent of the counsel for the parties, can not be set aside by bill of review, unless, by clerical error, anything has been inserted in the order, as by consent, to which the party had not consented; in which case a bill of review might lie. *Prince v. McLemore*, 108 Va. 269, 276, 61 S. E. 802.

A consent decree finally disposing of a cause and which was obtained by accident or mistake, with the knowledge of a quasi party affected thereby, though without fraud on the part of the parties consenting thereto, can not be set aside by a bill of review, but may be upon an original bill filed for that purpose and stating a proper case. *Prince v. McLemore*, 108 Va. 269, 61 S. E. 802.

E. DECREES APPEALED FROM.

A bill of review for error of law can not be maintained while an appeal is pending in the supreme court of appeals. *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

And after affirmance by an appellate court, a decree appealed from is not reviewable in the lower court for alleged error of law or fact apparent. As to such errors the questions are res adjudicata. *McLanahan v. Mills*, 73 W. Va. 246, 80 S. E. 351.

VI. GROUNDS FOR REVIEW.

½A. IN GENERAL.

A bill of review will lie only for error apparent on the face of a decree, for newly-discovered matter of defense, or for newly-discovered evidence of a defense known and pleaded; and such

newly-discovered matter or evidence will not, if known beforehand, be available after publication of the decree. *Richmond v. Richmond*, 62 W. Va. 206, 57 S. E. 736. See *Gills v. Gills*, 126 Va. 526, 101 S. E. 900. *

To decree relief against an infant on a bill, taken for confessed and without proof, is prejudicial error for which the decree should be reversed on bill of review. *Harrison v. Harman*, 80 W. Va. 68, 92 S. E. 460.

A. ERROR.

1. Errors Apparent.

Only errors apparent on the face of the record can be corrected and eliminated by a bill of review. *McIlwaine, etc., Co. v. Fielder*, 76 W. Va. 111, 85 S. E. 548; *Gills v. Gills*, 126 Va. 526, 101 S. E. 900. *Richmond v. Richmond*, 62 W. Va. 206, 57 S. E. 736.

The errors on the record for which a bill of review will lie must be errors of law apparent upon the face of the record. They must be such as appear on the face of the decrees, orders and proceedings in the cause, arising on facts either admitted by the pleadings, or stated as facts in the decrees. *Valz v. Coiner*, 110 Va. 467, 66 S. E. 730.

A bill of review will not lie unless the facts upon which it is based are recited in the decree or admitted in the pleadings. *Phipps v. Wise Hotel Co.*, 116 Va. 739, 82 S. E. 681.

A decree, founded upon matter set up in a cross bill, foreign to the subject matter of the bill, may be reversed on a bill of review for error of law. *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733.

It is reversible error to decree cancellation of a note and a deed of trust securing the same in the absence as a party of the assignee thereof, before suit brought, and when the fact appears on the record a bill of review for error of law apparent on the face thereof will lie at the suit of the payee and assignor of the note to correct such error, notwithstanding the decree at-

tempts to limit its effect to the rights of the parties before the court which include the trustee in the deed of trust. *Bristow v. Tyler*, 82 W. Va. 629, 96 S. E. 1052.

Favorable Error — Guardian's Accounts.—It is not ground for a bill of review by the surety of a guardian for error on the face of the record that a commissioner's report, confirmed by final decree stating the accounts of the guardian, failed to adopt one rest day and mixed principal and interest, where the account as stated was more favorable to the guardian, and hence more favorable also to the surety, than if it had been correctly stated. *Gills v. Gills*, 126 Va. 526, 101 S. E. 900.

When the question of costs is not discretionary, but controlled by statute, as in this case, or by contract, as in some cases, and such costs are not merely incidental to the matter in controversy before the court, error in the judgment or decree may be corrected by bill of review. *State v. Moore*, 77 W. Va. 325, 87 S. E. 367.

And where the state is plaintiff in such suit, and the erroneous judgment or decree is in its favor, the error may be so corrected notwithstanding the provision of § 35, of article 6, of the constitution, that the state shall never be made a defendant in any court of law or equity. *State v. Moore*, 77 W. Va. 325, 87 S. E. 367.

Errors Not Apparent.—The instant case was a bill of review to set aside a final decree removing a guardian and confirming a commissioner's report stating his accounts for the alleged omission of the commissioner to allow the guardian certain items of credit, which items are alleged to have existed prior to the taking and stating of such account, which the guardian neglected to assert in any way before the commissioner or before the court prior to the decree, although the guardian was a party defendant to the suit and had been brought before the court by personal service of process,

and had been personally served with notice of the taking of the account. Held: It being apparent that the right of the guardian to any and all of such claims of credit was dependent upon extrinsic evidence, that the errors alleged in the bill of review as grounds for the rehearing were not errors in law apparent on the face of the decree. *Gills v. Gills*, 126 Va. 526, 101 S. E. 900.

Determination of Error.—See post, "Hearing and Determination," XII½.

1½. Error Must Be Objected to.

In order to found a bill of review for errors apparent on the face of the record, the errors must have been excepted to and must be specifically pointed out. *Phipps v. Wise Hotel Co.*, 116 Va. 739, 82 S. E. 681.

Want of notice of the time and place of a commissioner taking an account is not sufficient reason for a bill of review or petition for rehearing, such objection not having been taken, as it ought to have been before the decree was rendered. *Gills v. Gills*, 126 Va. 526, 101 S. E. 900.

Decree against Guardian and Surety.—A final decree having been entered against a guardian and his surety, removing the guardian and confirming the report of a commissioner stating the guardian's account and requiring the guardian to pay over the amounts found due, and the commissioner's report not having been excepted to prior to the decree by the surety, a party defendant personally before the court, the surety could not bring the cause again before the court by bill of review, on the ground that it had no notice of the taking of the account. *Gills v. Gills*, 126 Va. 526, 101 S. E. 900.

2. Errors of Judgment.

A bill of review lies to error of law, but not to an erroneous conclusion on evidence. *Marshall v. Nicolette Lumber Co.*, 76 W. Va. 531, 85 S. E. 723.

3. Release of Errors.

Where a suit to enforce liens on real estate has been referred to a master to take an account of the liens and their relative priorities, and the account has been taken and confirmed without objection, and a sale of the land has been made and confirmed, and the proceeds of the sale distributed, and lienors and others have acquired rights in reliance upon the decrees of the court, a party holding a vendor's lien on the land, who was party to the suit and had notice of all the proceedings therein, including the time and place for taking the account by the master and of the proceedings to confirm the sale, but who failed to except to the report of the master or to object to the decree of sale, to the confirmation thereof, or the manner of distributing the proceeds, cannot by a bill of review have a re-establishment of the liens upon the property, since he has by his negligence put it beyond the power of the court to place the other parties to the suit in statu quo. *Phipps v. Wise Hotel Co.*, 116 Va. 739, 82 S. E. 681.

B. NEW EVIDENCE.

See ante, "In General," VI, ½A.

That a bill of review lies to review, for after discovered evidence, a decree below after affirmation or reversal here on appeal, is settled law in *West Va. Pulp, etc., Co. v. Cooper*, 87 W. Va. 781, 106 S. E. 55.

To entitle a party to a bill of review on the ground of after discovered evidence, the evidence must have been discovered since the rendition of the final decree, and it must appear that it could not have been discovered earlier by the exercise of reasonable diligence. It must be material and such as, if true, ought to produce, on another hearing, a different result on the merits, and must not be merely cumulative. *Durbin v. Roanoke Bldg. Co.*, 108 Va. 468, 62 S. E. 339; *Becker v. Johnson*, 111 Va. 245, 68 S. E. 986; *Sutherland v. Gent*, 111 Va. 511, 69 S. E. 340; *Phipps v.*

Wise Hotel Co., 116 Va. 739, 82 S. E. 681; *Dunfee v. Childs*, 59 W. Va. 225, 235, 53 S. E. 209; *McLanahan v. Mills*, 73 W. Va. 246, 80 S. E. 351; *Marshall v. Nicolette Lumber Co.*, 76 W. Va. 531, 85 S. E. 723. See *Gills v. Gills*, 126 Va. 526, 101 S. E. 900.

Matters Existing at Date of Decree.—"All definitions of newly-discovered evidence as a basis for a bill of review require that it shall relate to matters of fact existing at the date of the decree sought to be reversed by reason of such newly-discovered evidence." *Dunfee v. Childs*, 59 W. Va. 225, 234, 53 S. E. 209.

Cumulative Evidence.—Additional evidence of the same kind and to the same point is cumulative and will not avail as after-discovered evidence to maintain a bill of review. *Marshall v. Nicolette Lumber Co.*, 76 W. Va. 531, 85 S. E. 723.

Newly-discovered evidence tendered with a bill of review cannot be said to be cumulative when, upon the first hearing, there was no evidence at all upon the subject. *Durbin v. Roanoke Bldg. Co.*, 108 Va. 468, 62 S. E. 339.

The reversal by the supreme court is not newly-discovered evidence or matter for a bill of review to reverse a decree of a circuit court made before such reversal. *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

A decree of the supreme court reversing, for error of law, a decree under which land is sold, is not newly-discovered evidence for a bill of review to reverse a later decree of a circuit court dismissing a bill filed to set aside a deed made to the purchaser under such decree of sale by the former owner of the land after the sale and its confirmation. *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

VII. FILING BILL.

A. WHO MAY FILE.

1. In General.

A bill in the nature of a bill of review cannot be maintained by one who

has not been a party to the suit in which the decree, reversal or annulment whereof is sought, was made. *Mackey v. Maxin*, 63 W. Va. 14, 59 S. E. 742.

A person interested in the subject matter of a bill in equity and a decree thereon, but not made a party thereto, may, after final decree therein, file an original bill in the nature of a bill of review, for correction of any adjudication therein to his prejudice and vindication of his rights in the premises and have it treated as a cross bill in the original cause. *Kanawha Hardwood Co. v. Evans*, 65 W. Va. 622, 64 S. E. 917.

B. TIME FOR FILING.

1. In General.

A bill of review is allowed only after the suit is completely ended. *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913.

2. Statute of Limitations.

a. In General.

The statutes fix the time within which bills of review may be filed or appeals taken and if litigants permit this time to elapse without availing themselves of the remedies provided for their relief, they are without remedy. The case is not different from any other where a remedy is barred by the statute of limitations. *Johnson v. Merritt*, 125 Va. 162, 99 S. E. 785, citing *Jefferson v. Gregory*, 113 Va. 61, 73 S. E. 452. See *Goode v. Bryant*, 118 Va. 314, 87 S. E. 588.

In allowing or denying bills of review a court of equity, will, in addition to the limitation arising from lapse of time, apply the ordinary rules in reference to the laches of the complainant. *Phipps v. Wise Hotel Co.*, 116 Va. 739, 82 S. E. 681.

Va. Code 1919, § 6316, provides: "No bill of review shall be allowed to a final decree, unless it be exhibited within one year next after such decree, except that an infant or insane

person may exhibit the same within one year after the removal of his or her disability."

The limitation of one year prescribed by the Virginia Code, within which a bill of review must be filed, is not subject to any exceptions not contained in that section. No inherent equity can create an exception where the statute makes none, and the mere want of knowledge of a creditor is insufficient to suspend the operation of the statute. A decree of the supreme court, after the expiration of the rehearing period, becomes final and irreversible except upon the ground of after-discovered evidence, and a bill of review upon this ground must be filed within the year prescribed by the state. *Matthews & Co. v. Progress Distilling Co.*, 108 Va. 777, 62 S. E. 924.

Barnes Code, ch. 133, § 5, as amended by Acts 1921 p. 170 provides: "No bill of review shall be allowed to a final decree, unless it be exhibited within eight months next after such decree, except that an infant or insane person may exhibit the same within eight months after the removal of his or her disability. Provided, that if such decree was pronounced before this section as amended takes effect, such bill of review may be exhibited within one year after such decree.

Former Rules in West Virginia.—The limitation for a bill of review from a decree made before chap. 40, Acts of 1909, took effect, reducing the limitation to one year, was three years. *Dunbar v. Dunbar*, 67 W. Va. 518, 68 S. E. 120.

Sec. 5, ch. 133, serial section 4951, Code 1913, as amended by Ch. 40, Acts 1909, does not limit the rights of a person under disability, to file a bill of review, to one year after the removal of such disability, if the decree complained of was pronounced before the statute as amended took effect. In such case, a person under disability has three years after the removal thereof in which to file a bill of review. *Harrison v.*

Harman, 76 W. Va. 412, 85 S. E. 646.

Rehearing.—The Virginia Code of 1904, § 3233 (Code 1919 § 6072 reducing the limitation to two years), gives non-residents three years within which to appear and ask to reopen a decree. After this time has expired a bill of review comes too late. *Johnson v. Merritt*, 125 Va. 162, 99 S. E. 785. See post, REHEARING.

b. As to Infants.

See ante, "In General," VII, B, 1.

C. LEAVE OF COURT.

1. Discretion of Court.

A bill of review is not a matter of right but rests in the sound discretion of the court. *Richmond v. Richmond*, 62 W. Va. 206, 57 S. E. 736.

2. Necessity for Leave.

"In no case shall such a bill be filed, without the leave of the court first obtained, unless it be for error of law apparent upon the face of the record." Va. Code 1919, § 6316.

VII½. INJUNCTION OR STAY OF PROCEEDINGS.

A court or judge allowing a bill of review may award an injunction to the decree to be reviewed. Va. Code 1919 § 6316; W. Va. Acts 1921, p. 170, amending Barnes Code, ch. 133, § 5.

Where upon filing a bill of review, an injunction against the decree to be reversed has been granted, and all that was done in the suit has been set aside, the effect is to leave all the issues presented in that record undetermined to await the final decree of the court upon the bill of review, and the former decree can not be pleaded anywhere as a final adjudication of the controversy. *Sutherland v. Gent*, 111 Va. 511, 69 S. E. 340.

XI½. EVIDENCE.

Burden of Proof—Sufficiency.—A bill in the nature of a bill of review alleged that defendant's attorney had fraudulently misled the complainant

into absenting himself from the taking of the depositions in the cause, and had improperly and wrongfully procured the decree in his absence and without his knowledge. Held: That the burden was on complainant to establish the grave charge he was making, and even his own version of what transpired on the occasion in question was insufficient to sustain it, while the testimony of the attorney who is alleged to have misled him was clear and convincing to the contrary. *Perrow v. Webster*, 124 Va. 321, 97 S. E. 770.

XII½. HEARING AND DETERMINATION.

Upon a bill of review for errors apparent on the record, the court should review the cause and in one order or decree, like procedure on appeal, adjudicate so as to correct the errors. *McIlwaine, etc., Co. v. Fielder*, 76 W. Va. 111, 85 S. E. 548.

Matters Dehors the Record Not Considered.—On a bill of review, for errors apparent on the record, the court can look only to the pleadings and decrees entered in the original suit in order to ascertain whether there is error. Matters dehors the record cannot be considered. *Harrison v. Harman*, 80 W. Va. 68, 70, 92 S. E. 460. See *Garten v. Layton*, 76 W. Va. 63, 84 S. E. 1058.

Matters dehors the record can not be set up as a defense to a bill to review errors appearing on the record. Such errors are determinable by the record alone, and if they are such as would call for a reversal of the decrees complained of, on appeal, they likewise warrant a reversal on bill of review by the court that committed the errors. *Harrison v. Harman*, 80 W. Va. 68, 92 S. E. 460.

Same—Review as to Evidence.—The evidence outside of the decree cannot be examined to determine whether the court erred in its judgment in the determination of the facts. This is the proper office of the court upon an ap-

peal, but not upon a bill of review. *Valz v. Coiner*, 110 Va. 467, 66 S. E. 730.

On a bill of review for error of law, the court cannot consider the evidence by way of review of its former findings as to issues of fact, but it may examine the depositions to ascertain whether there is any evidence therein, tending to establish facts put in issue by the pleadings, and essential to the relief granted, or whether evidence sufficient, if uncontradicted, to warrant relief, is opposed by contradictory evidence so as to create an issue respecting the right to relief. *Garten v. Layton*, 76 W. Va. 63, 84 S. E. 1058.

Upon a bill of review the court will not look into evidence bearing on the question whether a deed was procured by fraud or coercion, as that can only be done upon an appeal. *Dunfee v. Childs*, 59 W. Va. 225, 236, 53 S. E. 209.

On a bill of review to correct error of record, the court can not review the evidence to correct an error of judgment relating to matters of fact. Such error is correctible only by appeal. *Kanawha Oil, etc., Co. v. Wenner*, 71 W. Va. 477, 76 S. E. 893, citing *Wethered v. Elliott*, 45 W. Va. 436, 32 S. E. 209; and *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66.

Exhibits—Report of Judicial Sale.—"Being parts of the pleadings, exhibits may be considered. So may a report of a judicial sale, because made a part of the court's proceedings." *Garten v. Layton*, 76 W. Va. 63, 84 S. E. 1058.

Consideration of Depositions.—Upon a bill of review for error of law depositions cannot be considered. *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209; *Harrison v. Harman*, 80 W. Va. 68, 70, 92 S. E. 460.

Re-Opening Case.—A bill seeking to review a cause for errors apparent on the record, can not re-open the case for general rehearing. The proceeding brings about an appeal for error, not a

re-opening for a continuation of the cause. *McIlwaine, etc., Co. v. Fielder*, 76 W. Va. 111, 85 S. E. 548.

Entering Such Decree as Should Have Been Entered.—On a bill of review to correct error of record, the court may make the correction by reversing wholly the erroneous decree and entering such decree as should have been entered. *Kauawha Oil, etc., Co. v. Wenner*, 71 W. Va. 477, 76 S. E. 893.

It is not material that such decree is styled after the manner of the bill of review, instead of according to the original suit. It is, nevertheless a decree made in the original cause. *Kanawha Oil, etc., Co. v. Wenner*, 71 W. Va. 477, 76 S. E. 893.

Decree of Finding of Fact—Presumption.—Where commissioners to make partition have reported the land not susceptible thereof, assigning reasons therefor, to which there were no exceptions, and the court thereupon finds accordingly, and decrees a sale and the land is sold, upon bill of review to reverse the decree of sale for errors of record, averring the loss of the commissioner's report, and assailing the court's decree on the finding of fact, such finding will be presumed to be correct, in the absence of any averment or proof of fraud. *Thompson v. Buffalo Land, etc., Co.*, 77 W. Va. 782, 88 S. E. 1040.

Effect of Reversal of Former Decree.—The title of a purchaser of land, sold and confirmed to him by erroneous decrees, who is a party to the suit and has induced the errors, fails on a reversal of the decree. His title is not protected by sec. 8, ch. 132, Code. *Harrison v. Harman*, 80 W. Va. 68, 92 S. E. 460.

XIII. APPEALS.

C. LIMITATIONS.

Va. Code 1919, § 6337, provides: " * * If the final decree from which an appeal is asked is a decree refusing a bill of review to a decree rendered more than six months prior thereto, no appeal from or supersedeas to such decree so

refusing a bill of review shall be allowed unless the petition be presented within six months from the date of such decree." See also § 6355.

Under the provisions of this section of the Code, if the decree appealed from is a decree refusing a bill of review to a final decree rendered more than six months prior thereto, the party aggrieved has six months from the date of the decree refusing such bill of review within which to perfect his appeal, but if the bill of review is refused within six months after the final decree, the time for perfecting an appeal from the final decree is the same as if no bill of review had been refused. The right of appeal from a final decree within one year is not diminished or impaired by the refusal of a bill of review thereto within six months. *Adams v. Booker*, 114 Va. 796, 77 S. E. 611.

D. REVERSAL.

The reversal, on appeal, of a decree sustaining a demurrer to a bill of review to correct errors of record and dismissing the bill on the ground that it had not been filed within time, is an ad-

judication of the sufficiency of the averments, and entitles the plaintiff therein to relief, if the matters alleged are supported by the record. *Harrison v. Harman*, 80 W. Va. 68, 92 S. E. 460. See ante, APPEAL AND ERROR.

Reversal as to One Defendant.—A wife, holding the legal title to a tract of land, died, leaving surviving her, her husband, and her heirs at law, a brother and two sisters. After her death, the husband, claiming to have purchased the land and to have paid the purchase money therefor, and to have had the same conveyed to the wife, pursuant to an agreement between himself and wife, that she would take the conveyances in her name and hold the land in trust for him, filed his bill in equity against the heirs for the enforcement of the trust. There was no legal service of process upon one of the defendants. The defendants, being cotenants, and the decree against them being joint, a reversal of such decree, upon bill of review, as to the one not served with process, operates as a reversal as to all of them. *Johnson v. Ludwick*, 58 W. Va. 464, 52 S. E. 489.

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See the title BILLS, NOTES AND CHECKS, vol. 2, p. 401, and references there given. In addition, see post, FALSE PRETENSES AND CHEATS; FRAUDS, STATUTE OF; GIFTS; JUDICIAL SALES AND RENTINGS; PENALTIES AND FORFEITURES; PLEDGE AND COLLATERAL SECURITY; SALES; UNDUE INFLUENCE; VENDOR AND PURCHASER; WITNESSES. As to admissibility of parol evidence to show that a note executed by an agent was intended to be the obligation of the principal only, see ante, AGENCY. As to attachment of negotiable notes indorsed in blank for collection, and title acquired thereby, see ante, ATTACHMENT AND GARNISHMENT. As to authority of bank cashier to bind bank by representations as to negotiable paper, see ante, BANKS AND BANKING. As to certification of checks, see ante, BANKS AND BANKING. As to the offense of issuing notes for circulation, see ante, BANKS AND BANKING. As to bills of lading in general, see post, CARRIERS; SHIPS AND SHIPPING. As to confession of judgment under power of attorney

in negotiable note, see post, **CONFESSION OF JUDGMENTS**. As to when it is a misdemeanor to obtain a negotiable instrument by false pretenses, see Va. Laws 1918, p. 453. See also, generally, post, **FALSE PRETENSES AND CHEATS**. As to the operation of promissory notes as a gift, see post, **GIFTS**. As to waiver of homestead exemption in negotiable instruments, see post, **HOMESTEAD EXEMPTIONS**. As to office judgment on note and necessity of inquiry of damages, see post, **JUDGMENTS AND DECREES**. As to the embezzlement of negotiable instruments as larceny, see post, **LARCENY**. As to jurisdiction of suit upon lost instruments, see post, **LOST INSTRUMENTS AND RECORDS**. As to acceptance of new note as payment of original note under agreement, see post, **PAYMENT**. As to effect of giving check or note as payment of debt, see post, **PAYMENT**. As to pledge of negotiable paper as collateral security, see post, **PLEDGE AND COLLATERAL SECURITY**. As to check as receipt, see post, **RECEIPTS**. As to subrogation of indorser paying note, see generally, post, **SUBROGATION**. As to effect on liability of surety on note of principal's incapacity to contract, see post, **SURETYSHIP**. As to when fiduciaries may invest in negotiable instruments, see Va. Laws 1918, p. 271. See also, generally, post, **TRUSTS AND TRUSTEES**. As to warehouse receipts see post, **WAREHOUSES AND WAREHOUSEMEN**. As to competency of holder of note as witness where other parties to note are incompetent, see post, **WITNESSES**. As to the fraudulent sale of promissory notes, etc., see Va. Code 1919, § 4465.

I. DEFINITIONS, CHARACTERISTICS, AND DISTINCTIONS.

A. DEFINITIONS AND CHARACTERISTICS.

½. In General.

See post, **REQUISITES, CONSTRUCTION AND VALIDITY, II.**

"The payee of a bill of exchange is a person in whose favor it is drawn, that is to say, the person to whom it is to be handed first in order that he may deal with it. In order to make a document a bill of exchange, there must be a real payee." *Bank v. McDowell County Bank*, 66 W. Va. 545, 555, 66 S. E. 761.

Purchaser's Note Securing Vendor's Lien.—Such a note is commercial paper performing the functions, and having the qualities, accorded to it by the law merchant, and the lien to secure payment thereof is ancillary collateral and incidental to it and legally separable therefrom, for full and complete effectuation of the intent and purposes of the parties to the two instruments, as disclosed by their terms. *Shanabarger v. Phares*, 86 W. Va. 64, 103 S. E. 349.

1. Bill of Exchange.

See post, "Promissory Note", I, A, 2; "Maturity and Time of Payment," III.

A written request in the following words, addressed by one person to another and signed by the person making it, is a bill of exchange, viz.: "\$165.49. Please pay to the order of Lewis Hubbard & Co. One Hundred sixty five & 49/100 Dollars and charge to our acct." *Lewis, etc., Co. v. Morton*, 80 W. Va. 137, 92 S. E. 252.

"Documents resembling bills of exchange, and dishonestly purporting to be bills of exchange, though they are not really bills of exchange, may have to be treated as bills of exchange, subject to the law merchant rules of bills of exchange, if circumstances are proved to exist between certain parties sufficient according to general law to prevent one of them from denying to the other that the document in certain particulars is a regular bill of exchange. In this case the document is not a bill of exchange. It has no real drawer and no real payee." *Bank v. McDowell County Bank*, 66 W. Va. 545, 556, 66 S. E. 761.

2. Promissory Note.

Va. Code 1919, § 5746; Barnes Code, ch. 98A, § 184.

3. Check.

Va. Code 1919, § 5747; Barnes Code, ch. 98A, § 185.

B. DISTINCTIONS.**1. Distinctions between Bills and Notes.**

See post, "Requisites, Construction and Validity," II.

1½. THE NEGOTIABLE INSTRUMENTS LAW IN GENERAL.

Reason for N. I. L.—The uncertain status of an irregular or anomalous indorser at the common law, as interpreted by the courts of the different jurisdictions, was, as generally agreed, one of the chief inducements for the movement that culminated in the adoption of the uniform negotiable instruments law by many of the states of the Union. *Thompson v. Curry*, 79 W. Va. 771, 773, 91 S. E. 801.

Purpose of N. I. L.—"The Negotiable Instruments Law," which appears as § 2841-a of the Code of 1904 (§§ 55-63 et seq. Va. Code 1919) was intended to embody in one act all the statutory law of the state and all of the rules of the law merchant on the subject of negotiable instruments. *Fleshman v. Bibb*, 118 Va. 582, 585, 88 S. E. 64, citing *Trustees v. McComb*, 105 Va. 473, 476, 54 S. E. 14.

Same — Foreign Decisions — Uniformity.—Where the law on a question relating to negotiable instruments can not be regarded as previously settled, it is proper to consider the purpose and policy of the negotiable instruments law and the course of decision which already prevails in a majority of the states having substantially the same statutory law upon the subject; uniformity of interpretation and enforcement being no less important than uniformity of enactment. *Colley v. Summers Parrott Hdw. Co.*, 119 Va. 439, 445, 89 S. E. 906.

Construction and Application of N. I. L.—The construction and applica-

tion of the Negotiable Instruments Law (Code, § 2841-a [§§ 5563 et seq. Va. Code 1919]), should tend to simplify and facilitate, not to confuse and impede, trade and commerce in and by means of negotiable paper. *Fleshman v. Bibb*, 118 Va. 582, 585, 88 S. E. 64.

For construction and application of particular provisions in the negotiable instruments law see the appropriate subdivisions of this title.

Application of Prior Binding Decisions.—Decisions binding upon the court, which antedate the enactment of the negotiable instrument's law, concerning the liability of an indorser at common law are still applicable to establish liability not declared or modified by the statute. *Thompson v. Curry*, 79 W. Va. 771, 772, 91 S. E. 801.

Usury Statute Not Repealed by N. I. L.—The negotiable instruments law (Acts 1907, ch. 81; Code 1913, ch. 98a [Barne's Code, ch. 98a]) does not, by implication or otherwise, repeal, limit or qualify in any degree or in any particular Code 1913, § 5, ch. 96 (Barnes Code, ch. 96 § 5), declaring all contracts for the loan of money at a greater interest rate than now allowed by law void as to such excess. *Eskridge v. Thomas*, 79 W. Va. 322, 91 S. E. 7.

Effect upon Illegal Contracts.—Chapter 81 of the Acts of 1907, chapter 98A. (§§ 4172-4368 of the Code [Barnes Code ch. 98 A, §§ 1-197]), known as the negotiable instruments law, does not legalize contracts expressly condemned and declared void by the statutes of this state, nor those forbidden by the policy of its laws. *Raleigh County Bank v. Poteet*, 74 W. Va. 511, 82 S. E. 332.

II. REQUISITES, CONSTRUCTION AND VALIDITY.**½A. IN GENERAL.**

Va. Code 1919, §§ 5563-5585; Barnes Code, ch. 98A, §§ 1-23.

Form and Interpretation of Bills of

Exchange.—Va. Code 1919, §§ 5688-5693; Barne's Code, ch. 98A, §§ 126-131.

Validity of Instrument Payable to Person Who Is Dead.—Va. Code 1919, § 5761.

Bills in Sets.—Va. Code 1919, §§ 5740-5745; Barne's Code, ch. 98A, §§ 178-183.

See post, "Negotiability and Validity in General," II, D; "Maturity and Time of Payment," III; "Defenses Available against Holder," VII, B; "Presumptions and Burden of Proof," XI, G, 1.

A. COMPETENT PARTIES, ETC.

4. Persons Acting in Representative Capacity.

a. Agents, etc.

(1) Authority of Agents.

See generally, ante, AGENCY.

(a) To Execute Paper in Principal's Name.

Payment for Stock in Promissory Notes.—Power of attorney given an agent to purchase shares of stock in corporations, "formed or to be formed," and to pay for same by "promissory notes," payable at such time and place as the agent may determine, authorizes such agent to purchase stock in a newly formed corporation, and to execute his principal's commercial notes therefor. *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400.

(b) To Fill Blanks.

Rule of Law Merchant.—It is a rule of the law merchant that where a negotiable instrument is intrusted to another with an unfilled blank, the person in possession has authority, so far as concerns a holder in due course, to complete it, consistently with the written or printed terms of the instrument, although he may thereby violate his actual authority. *Frank v. Lilienfeld*, 33 Gratt. (73 Va.) 377. *Guerrant v. Guerrant*, 7 Va. Law Reg. 639.

Same—N. I. L.—But this rule of the law merchant has been altered by the negotiable instruments law, in the case where the holder takes the instrument before the blank is filled. In such case, he is put on notice, and must ascertain the real authority of the person intrusted with the incomplete instrument, and takes it at his peril. *Guerrant v. Guerrant*, 7 Va. Law Reg. 639.

(3) Ratification of, or Estoppel to Deny, Agent's or Other's Acts.

Silence.—Mere silence of one whose name has been signed to a note as surety, by the principal therein, a stranger in the legal sense of the term, without authority, until sued on the note, is evidence of ratification of the unauthorized act, but, if unaided by any other circumstance tending to prove intention to ratify it or an element of estoppel, such evidence is insufficient to sustain a verdict based on the hypothesis of ratification. *Myers v. Cook*, 87 W. Va. 265, 104 S. E. 593.

Admonition.—An admonition by the party whose name has been so used, to the offending party, not to do so again, being altogether uncertain and inconclusive as to intent respecting the past act, is not an additional or supplementary circumstance or declaration of such character as will make failure to disavow the act, until sued on the note, amount to ratification, although it too is admissible evidence. *Myers v. Cook*, 87 W. Va. 265, 104 S. E. 593.

b. Partners.

(1) Power of One Partner to Bind Firm.

(a) In General.

See generally, post, PARTNERSHIP.

A member of a trading partnership has implied authority to execute commercial paper of the firm, and, if he executes and disposes of it for his individual purpose, without notice thereof to the purchaser, or knowledge of

facts sufficient to put him on inquiry as to it, the firm is bound, notwithstanding the improper use of the firm name. *Bank v. Lowry & Co.* 81 W. Va. 578, 94 S. E. 985.

Form of Signature.—In *Burdett v. Greer*, 63 W. Va. 515, 518, 60 S. E. 497, the court quoting *Bates on Partnership*, § 197, says: "As to the form of the signature of the firm's name, a note 'I promise,' signed A., for A., B., C. & Co., will bind the firm. So of a contract by W., Superintendent of Keetes Mining Co., parties of the first part, signed W., Superintendent of Keetes Min. Co. So I promise, signed by the firm's name, A., B., & Co. So a promise by the company, signed A. B., treasurer, is the company's note." "If in the body of a note made by one partner the language is 'I promise' but signed with the partnership name, such note is binding on the firm."

5. Corporations and Corporate Officers.

See generally, post, CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Accommodation Indorsement. — "As a general rule, corporations can not lend their credit in the form of accommodation endorsements, suretieships and guaranties. To fix such a liability upon a corporation, it is necessary to establish, not only authority in the officer or agent to execute the paper, but also power in the corporation to bind itself in that way. This rule is universally applied to banking, insurance, railroads, plank-road and other transportation companies, manufacturing companies and building and loan associations." *Haupt v. Vint*, 68 W. Va. 657, 660, 70 S. E. 702. See post, CORPORATIONS.

In *Purd's Beach on Private Corporations*, § 582, it is said: "Where its business is private, and it is solvent, a private corporation, with the assent of all the shareholders, may become accommodation endorser of negotiable paper." *Wheeling Ice, etc., Co. v.*

Conner, 61 W. Va. 111, 127, 55 S. E. 982.

Scope of Authority.—In cases of negotiable instruments, as well as others, one contracting with an agent must inquire into his authority; and a corporation is bound only when an agent acts within the apparent scope of his authority. *Wheeling Ice, etc., Co. v. Conner*, 61 W. Va. 111, 127, 55 S. E. 982.

B. CONSIDERATION.

See post, "Valuable Consideration," VII, A, 1. Va. Code 1919 §§ 5586-5587; Barnes Code, ch. 98A, §§ 24-29.

1. Presumption of Consideration.

Va. Code 1919, § 5586, quoted in *Lynchburg Milling Co. v. National Exch. Bank*, 109 Va. 639, 642, 64 S. E. 980.

A negotiable note, as between the payee and maker, is deemed prima facie to have been issued for a valuable consideration, and will be so held in the absence of evidence to the contrary. This is especially true where it states on its face that it was executed "for value received." *Reid v. Windsor*, 111 Va. 825, 69 S. E. 1101.

2. Legality of Consideration.

See post, "Illegality, Want or Failure of Consideration," VII, B, 8.

Gambling Debt.—Negotiable paper, the consideration whereof is money lost or bet in gaming, is void in the hands of the holder, even though he took it for value and without notice of the character of the consideration. *Twentieth St. Bank v. Jacobs*, 74 W. Va. 525, 82 S. E. 320.

Usury.—A contract by statute declared void, because in part usurious, is as to such usury a nullity, and, although negotiable in form, no currency in the market and no innocence or ignorance on the part of the holder can impart validity to it. *Eskridge v. Thomas*, 79 W. Va. 322, 91 S. E. 7.

Insolvency—Note for Payment of Dividends.—No jurisdiction to declare invalid a note in the name of an insol-

vent corporation by its president, the proceeds of which are intended and used to pay dividends on its capital stock, exists except upon averment and proof of insolvency contemporaneous with the declaration of dividends. *Williams v. Smith Ins. Agency*, 79 W. Va. 16, 90 S. E. 393; S. C., 75 W. Va. 494, 84 S. E. 235.

3. Sufficiency of Consideration.

See post, "Sufficiency," VII, A, 1, b; "Illegality, Want, or Failure of Consideration," VII, B, 8.

A pre-existing debt due to the plaintiff is a sufficient consideration for a note. *Colley v. Summers Parrott Hdw. Co.*, 119 Va. 439, 442, 89 S. E. 906.

Contract as Consideration.—In the absence of an agreement to the contrary, a promissory note, given for the purchase money of property, is not payment thereof; but the contract constitutes a valuable consideration for the note and an action may be maintained thereon, even though the property was never delivered and the title thereto never passed. *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235.

The sale of a scheme of advertising is an ample consideration for the notes given in payment thereof. Although the scheme contemplated giving away the articles of merchandise as premiums or prizes, yet these articles and the services furnished by the plaintiff in connection with the advertising scheme, represented property and value. *Brenard Mfg. Co. v. Brown*, 120 Va. 757, 92 S. E. 850.

Release of Cause of Action.—Where the defendant had a complete cause of action against the complainant for a breach of promise of marriage which she released, this was held a sufficient consideration for certain negotiable notes from which the complainant sued to be relieved on the ground that they were without consideration. *Ford v. Engleman*, 118 Va. 89, 86 S. E. 852.

In Nature of Testamentary Disposi-

tion.—A promissory note given to a near relative, by a person in declining years, by way of compensation or reward for services rendered and to be rendered, is so much in the nature of a testamentary disposition of property, that, ordinarily, the maker's estimate of the value of the services will not be disturbed on the ground of disparity between the actual value thereof and the amount of the note. *Bade v. Feay*, 63 W. Va. 166, 61 S. E. 348.

"**A moral obligation**, though coupled with an express promise, will not constitute a valuable consideration, and it is only where there is a precedent duty which would create a sufficient legal or equitable right if there had been an express promise at the time, or where there is precedent consideration, that an express promise will create or revive a cause of action." *Daniel on Nego. Instruments*, § 182." *Gooch v. Gooch*, 70 W. Va. 38, 43, 73 S. E. 56.

Money Advanced by Parent.—A promissory note given by a son to his widowed mother for money paid by her for board while at college and his college education, after such expenditure, without promise or expectation of repayment on the part of either, at the time of such expenditure, wants legal consideration, and is not enforceable. *Gooch v. Gooch*, 70 W. Va. 38, 73 S. E. 56.

Services Rendered Parent.—See post, PARENT AND CHILD.

4. Want of Consideration.

See post, "Illegality, Want or Failure of Consideration," VII, B, 8.

"Notes for which there is absolutely no consideration are void, not only as between the parties thereto, but as to third persons aside from questions of negotiability and estoppel." *Bradshaw v. Farnsworth*, 65 W. Va. 28, 31, 63 S. E. 755.

In a suit by the payee of a negotiable note against the maker, the latter may defend by showing that it was

made for the payee's accommodation and without consideration. *First Nat. Bank v. Freeman*, 83 W. Va. 477, 98 S. E. 558.

5. Failure of Consideration.

In an action between the maker and payee, on negotiable note based upon a contract of sale, after maturity, the defendant may defeat or limit the amount of the recovery thereon, by proving, in the one case, a total unexcused nonperformance, on the part of the vendor, of his contract to deliver the property, or loss, on the part of the vendee, of the benefit of the contract, occasioned by want of title in the vendor, and, in the other, refusal of the vendee to accept the property and notice of his intention not to do so given before the title passed; all on the theory of failure of consideration in whole or in part. *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235. See post, CONTRACTS; SALES.

Failure to Use Consideration.—

When one by contract sells and grants the privilege of removing and marketing sand from the bed, of a stream not technically navigable, running through or by his land, and requires a stipulated monthly compensation therefor whether the privilege granted is exercised or not during each month, does not obstruct the exercise of the right granted, and the vendee and surety execute notes for such monthly installments, though no sand is in fact removed by the vendee, payment of such notes cannot be defeated on the ground of failure in the consideration for which they were executed. *Burner v. Nutter*, 77 W. Va. 256, 87 S. E. 359.

Advertising Scheme — Refunding Agreement Based on Misrepresentation.

—Defendant purchased from plaintiff under a written contract a copyrighted advertising plan and certain goods and supplies to be used in connection therewith, giving his notes in payment therefor. Plaintiff gave his bond to secure a refund to defendant, if defend-

ant's sales were not increased in the following year to a certain fixed sum, but the agreement for a refund in case defendant's sales were not increased to the named sum was based upon a representation of defendant as to sales during the past year which was admittedly false. Held, that in an action on the notes there was no merit in the defense that defendant's sales did not reach the sum named in the contract. *Brenard Mfg. Co. v. Brown*, 120 Va. 757, 92 S. E. 850.

In such case, it was held, that to adopt a certain contention would be to make a new contract for the parties, there being no evidence of any agreement to increase the defendant's sales, except the refunding agreement. *Brenard Mfg. Co. v. Brown*, 120 Va. 757, 92 S. E. 850.

Agreement to Resell Stock—Held:

That none of the defenses relied upon was well founded. Defendant got exactly what he contracted for, stock in the corporation, and a contract to resell. The time for the performance of the contract to resell had not arrived when the instant case was tried, and so far as the record shows, defendant had never made any effort to ascertain the value or availability of the contract up to the time at which the bank paid the certificate of deposit given as consideration for the notes. *Duncan v. Broadway Nat. Bank*, 127 Va. 34, 102 S. E. 577.

Where a promissory note is given to a near relative, by a person in declining years, by way of compensation or reward for services rendered and to be rendered, the fact that it calls for a larger sum than the services were probably worth does not invalidate it on the ground of fraud or failure of consideration. *Bade v. Feay*, 63 W. Va. 166, 61 S. E. 348.

C. THE PROMISE OR ORDER TO PAY.

1. Certainty.

a. As to Amount Payable.

General Rule — Blanks — Margin—

The amount for which a negotiable note is made out must be clearly expressed in the note, and if the blank for the amount in the body of a note be left unfilled, its place cannot be supplied from the margin whether written cut in full or expressed in figures. The margin may be used to remove an ambiguity in the body of the note, or to clear up a doubt, but not to supply a blank. *Chestnut v. Chestnut*, 104 Va. 539, 52 S. E. 348.

Blanks—Effect of.—Where a blank in the body of a negotiable note for the amount thereof is left unfilled, the instrument is incomplete, and there can be no recovery on it; but it is not invalid simply because incomplete. It creates certain rights and obligations, and, when properly filled up by a bona fide holder, may be enforced at law, or, if left blank by mistake, the mistake may be corrected in equity. *Chestnut v. Chestnut*, 104 Va. 539, 52 S. E. 348. See post, "Delivery," II, E, 1.

The figures in a check following the words in the body thereof denoting the sum called for, are not a material part of the instrument, the words being controlling in determining its legal effect. *State v. Lotono*, 62 W. Va. 310, 58 S. E. 621.

b. Instrument Must Be Payable Absolutely and at All Events.

The words "Credit the maker. Security on contract of April 20, 1905," in a note of the same date, otherwise negotiable, render its payment uncertain and conditional, destroying its negotiability, and the owner and holder thereof by indorsement can not by § 11, chapter 99, Code 1906, maintain a joint action thereon against drawer and indorser. *Greenbrier Valley Bank v. Bair*, 71 W. Va. 684, 77 S. E. 274.

3. Agreements for Attorney's Fees and Other Costs of Collection.

What Law Controls.—A negotiable note made in Virginia but payable in New York, and discounted there, is a

New York contract, and its validity, when sued on in this state, is to be determined by the laws of New York. A clause in such a note providing for the payment of a fee of ten per cent for collection by an attorney is, like the provisions for the payment of interest and exchange, a mere incident of the principal contract, and to be governed by the same law, although payment is sought to be enforced in Virginia. *Oglesby Co. v. Bank*, 114 Va. 663, 77 S. E. 468.

Construction of Provision for "Costs of Collection."—A note contained the following provision: "The makers and indorsers of this note hereby * * * agree to pay costs of collection or ten per cent. attorney's fee in case payment shall not be made at maturity." "Costs of collection" refers not to costs of suit, which are recoverable by law, but to the "attorney's fee" for services in making or attempting to make collection. The proper construction of the provision in the note under consideration therefore is that the makers and indorsers of the note agreed to pay the lawful holder thereof such reasonable attorney's fee as such holder may actually incur for services of attorney in making collection thereof, not exceeding ten per cent. maximum stipulated. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

Validity.—Under the negotiable instruments law (Code 1904, § 2841-a [§§ 5563 et seq. Va. Code 1919]) a stipulation in a negotiable note for the payment of a reasonable attorney's fee if suit be brought thereon is valid and may be enforced. It is neither usury nor a mere penalty. *Colley v. Summers Parrott Hdw. Co.*, 119 Va. 439, 89 S. E. 906, overruling *Fields v. Fields*, 105 Va. 714, 54 S. E. 888; *Rixey v. Pearre Bros. & Co.*, 89 Va. 113, 15 S. E. 498. See 10 Va. Law Reg., N. S., 461; 11 Va. Law Reg., N. S., 241; 2 Va. Law Reg., N. S., 321, cited by the court.

A provision on the face of a negotiable note for an attorney's fee for making collection is valid, subject always to the power of the court if the fee be unreasonable in amount or unconscionable, to reduce it. *Triplett v. Second Nat. Bank*, 121 Va. 189, 92 S. E. 897, citing 2 Va. Law Reg., N. S., 321.

While former cases in this state have held that an agreement in a note to pay attorney's fees for collection was a penalty and not enforceable, the agreements in those cases were made before the adoption of the negotiable instruments act permitting such agreements. *Oglesby Co. v. Bank*, 114 Va. 663, 77 S. E. 468.

The provision for attorney's fees is in substance as if it had been to pay such reasonable attorney's fee for collection actually incurred by the lawful holder of the note, up to but not exceeding ten per cent. of the amount of the debt due to the holder of the note, principal and interest, in case of non-payment of the note at maturity. The rule in this state is, in effect, that such a contract is valid and enforceable to the extent of a reasonable attorney's fee incurred as aforesaid, not exceeding the percentage named in the note. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666; *Colley v. Summers Parrott Hdw. Co.*, 119 Va. 439, 89 S. E. 906.

Amount Recoverable. — The makers and indorsers of a note agreed to pay costs of collection or ten per cent. attorney's fee in case payment should not be made at maturity. Held: That although the plaintiff, an indorser who took up the note upon maturity, might not have paid the payees or indorsees of the note any costs of collection or attorney's fee, yet if by reason of the default of the makers of or other prior parties to the obligation, the plaintiff after the payment of it by him had to place the note in the hands of an at-

torney for collection, he was entitled to recover judgment against the makers of and prior parties to the obligation for such an amount of expense incurred by him of costs of collection or attorney's fee as the contract when properly construed provides for. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

Upon the issue being made as to what amount is recoverable under a provision in a note for attorney's fees, the judge should allow only such an amount as may be reasonable, considering the services of the attorney actually performed in and about the collection of the debt in view of the customary charges of the profession in the locality for such services, not exceeding the maximum amount stipulated in the obligation. And where the services of an attorney are not in fact employed by the holder of the obligation, and the latter party seeks such recovery, no recovery should be allowed of any attorney's fee. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

West Virginia Doctrine—Usurious Tendency of Contract. — Stipulations in a negotiable note for payment of a certain percentage of the principal and the statutory attorney fee as collection charges, are invalid and unenforceable. (Miller, J., dissenting.) *First Nat. Bank v. Sanders*, 77 W. Va. 716, 88 S. E. 187, following *First Nat. Bank v. Bank*, 76 W. Va. 356, 85 S. E. 541, and *Raleigh County Bank v. Poteet*, 74 W. Va. 511, 82 S. E. 332, L. R. A. 1915B, 928.

A stipulation in a negotiable promissory note for the payment of "five per cent collection fees" on the principal thereof, and in addition there to "and \$10.00 attorney fee in addition to the attorney's fee taxed or allowed by law" is, in this state, forbidden by the policy of the law and void and unenforceable. The negotiable instruments law has not altered this policy or doctrine. *Raleigh County Bank v.*

Poteet, 74 W. Va. 511, 82 S. E. 332. (Two JJ. dissenting.)

There can be no additional recovery, by reason of a stipulation in a negotiable note, of an attorney's fee, or the cost of collection. (Miller and Williams, JJ., dissenting.) First Nat. Bank v. Bank, 76 W. Va. 356, 357, 85 S. E. 541, following Raleigh County Bank v. Poteet, 74 W. Va. 511, 82 S. E. 332, L. R. A. 1915B, 928.

D. NEGOTIABILITY AND VALIDITY IN GENERAL.

See post, "Negotiation," VI.

2. What Paper is Negotiable.

See post, "Negotiability as Affected by Certain Matters," II, D, 3.

a. In General.

Payable in Money.—One of the essential attributes of a negotiable note is that it is payable in money. Rector v. Hancock, 127 Va. 101, 102 S. E. 663.

Certificates of Deposit.—A certificate of deposit issued by a bank for a certain sum of money, not subject to check and payable to the order of the depositor in current funds, on the return of the certificate properly endorsed, is negotiable within the meaning of § 7 of chapter 99 of the Code (repealed by Acts 1907 ch. 81, Barnes Code, ch. 98a). Pomeroy Nat. Bank v. Huntington Nat. Bank, 72 W. Va. 534, 79 S. E. 662; Bank v. Bryan, 72 W. Va. 29, 78 S. E. 400.

Same—Fraud.—Certificates of deposit in a bank, fraudulently issued, are valid obligations in the hands of a holder thereof for value without notice of the fraud. Benedum v. First Citizens Bank, 72 W. Va. 124, 78 S. E. 656.

"A promissory note does not necessarily possess the quality of negotiability." Colley v. Summers Parrott Hdw. Co., 119 Va. 439, 441, 89 S. E. 906.

3. Negotiability as Affected by Certain Matters.

The use of the word trustee follow-

ing the name of the payee in a negotiable note does not destroy its negotiability if the trustee has the right to sell it and receive the proceeds; its only effect is to put the purchase upon notice concerning the trustee's title and authority in respect to the note. Dollar Sav., etc., Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089.

An assignment of "all right, title and interest in and to the within note" endorsed on the back of an instrument, being a qualified endorsement, in no way affects the negotiability of the paper, and the endorsee having possession thereof is deemed prima facie a holder in due course. Marion Nat. Bank v. Harden, 83 W. Va. 119, 97 S. E. 600.

A recital of the consideration in a note, otherwise negotiable in form, does not render it nonnegotiable. Dollar Sav., etc., Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089.

Stipulation to Pay Attorney's Fees.

—A note, if otherwise in negotiable form, is not affected as an instrument of the law merchant, by a stipulation on the part of the maker to pay ten per centum additional, as attorney's fees, in case of non-payment at maturity. Birdsall & Co. v. Guill, 3 Va. Law Reg. 895.

"No question arises as to the effect of the provision (for attorney's fees) upon the negotiability of the paper, the statute in terms resolving that previously mooted question in favor of the stipulation. (Code, 2841-a, subsec. 2, cl. 5 [Va. Code 1919, § 5564, cl. 5])." Colley v. Summers Parrott Hdw. Co., 119 Va. 439, 443, 89 S. E. 906.

Confession of Judgment Authorized.

—Under the negotiable instruments law (Code 1904, § 2841-a, subsec. 5, subdiv. [Va. Code 1919, § 5567, cl. 2]), the negotiability of a note is not affected by a provision authorizing a confession of judgment if not paid at maturity. Colona v. Parksley Nat.

Bank, 120 Va. 812, 826, 92 S. E. 979.

Negotiability of Note Not Affected by Instrument Creating Vendor's Lien.

—Though a negotiable note and an instrument creating a lien on real estate to secure payment thereof are related documents usually executed at the same time and may be, and sometimes should be, construed together, for some purposes, they do not necessarily constitute one instrument in the legal sense of the terms, and they may be so interpreted as to permit each to perform its own function, agreeably to the intent of the parties. *Shanabarger v. Phares*, 86 W. Va. 64, 103 S. E. 349.

Stipulation for Retention of Title.—

A promissory note, otherwise in negotiable form, is rendered non-negotiable by a stipulation therein on the part of the maker, but "the title, ownership or right of possession" of the chattel which is the consideration of the note "does not pass from the E. M. B. Co. [payee] until this note, with interest, attorney's fees and cost, is paid in full." *Birdsall & Co. v. Guill*, 3 Va. Law Reg. 895.

The recovery of a judgment by the payee of a negotiable note against the maker destroys its further negotiability. *Selden v. Williams*, 108 Va. 542, 62 S. E. 380.

E. DELIVERY AND COMPLETION.

1. Delivery.

Where Secured by Deed of Trust.—

Upon suit to enforce a deed of trust the delivery or nondelivery of the notes secured by it is immaterial. The deed of trust is in itself sufficient evidence of the existence of the debts, in the absence of any proof of their payment subsequent to its delivery. *Murphy's Hotel Co. v. Herndon*, 120 Va. 505, 519, 91 S. E. 634.

2. Filling Blanks.

Authority to Fill. — The rule at common law was that, if, at the time an incomplete instrument was negoti-

ated to a holder for value, the latter was without notice of any limitation upon the authority to complete the instrument, other than was given by the incomplete instrument itself, the person who signed the incomplete instrument, either as maker or indorser, and delivered it, in order that it might be converted into a negotiable instrument, was not allowed thereafter to defend an action against him on the instrument upon the ground that the blanks were not filled up in accordance with the authority he may have given to the person into whose hands he delivered the incomplete instrument. That is to say, in such case, the authority in any holder for value of such an instrument, to complete it, was absolute. *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977.

The delivery of a note in which the amount is expressed in the margin but not in the body is generally authority to a bona fide holder to fill the blank for the true amount due not exceeding the amount stated in the margin. *Chestnut v. Chestnut*, 104 Va. 539, 52 S. E. 348.

Same—Prima Facie or Absolute.—

At common law before an incomplete instrument was negotiated to a holder for value—before the consideration of the note passed—the authority to complete it was prima facie only. But after this occurrence in its history, the authority to complete the note became, at common law, absolute. *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977.

The negotiable instruments law (Code 1904, § 2841-a, subsec. 14 [§ 5576, Va. Code 1919]) makes the authority to complete negotiable instruments executed and delivered in blank prima facie only, after, as well as before its negotiation to a purchaser for value. It allows, at the trial, even in the case of a holder for value without notice, the defense that the blanks were not filled up in accordance with the authority given to the person into

whose hands the incomplete instrument was delivered. This was a very important change in the common law on this subject and very far-reaching in its effect. *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977.

Same—Prima Facie Authority Not Rebutted.—Where the defendant, who signed and delivered an incomplete instrument, in order that it might be converted into a negotiable instrument, introduced no evidence, nor was there any in the case, to rebut the prima facie authority of the plaintiff, as holder for value, to complete the instrument under the negotiable instruments law (Code 1904, § 2841-a, subsec. 14 [§ 5576 Va. Code 1919]), it was held that such authority was the same in effect as if it had been absolute, as at common law. *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977.

Reasonable Time for Filling Blanks.—Both at common law and by virtue of the express provisions of the negotiable instruments law in Virginia (Code 1904, § 2841-a, subsec. 14 [§ 5576, Va. Code 1919]), the blanks in an incomplete negotiable instrument must be filled within a reasonable time in order to hold the maker or indorser. *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977.

A blank note was indorsed by defendant and delivered to his brother, who signed it and delivered to the plaintiff to secure the payment of any notes that plaintiff might subsequently indorse for defendant's brother. Upon the day after the death of the defendant's brother, insolvent, the plaintiff filled up the blanks and completed the note. Held, that since it was not until the brother's death that it could be determined that plaintiff might not be asked by him and consent to indorse other notes for him, the note could not have been completed before the brother's death, and have accomplished the purpose for which it was delivered to the plaintiff, and that the note was

completed within a reasonable time. *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977.

H. INTEREST.

Interest.—A note made payable one day after date "without interest" will begin to bear interest only from the time payment is demanded or suit is brought thereon. *Pierpoint v. Pierpoint*, 71 W. Va. 431, 76 S. E. 848.

A promissory note payable one day after date was written on a blank form reading, "with interest at—per cent per annum." The figure "6" was written on the blank intended for the rate of interest; but a revenue stamp was placed over the words, "with interest at 6," and the words "without interest" were added in ink. Held the parties intended to make the note bear no interest, at least until demand made or suit brought and judgment recovered. *Pierpoint v. Pierpoint*, 71 W. Va. 431, 76 S. E. 848.

III. MATURITY AND TIME OF PAYMENT.

Neither the absence of a date, nor failure to specify a time of payment affects the validity of such bill. Presumptively it bears date as of the time of its issue, which may be shown by parol evidence, and is payable on demand. *Lewis, etc., Co. v. Morton*, 80 W. Va. 137, 92 S. E. 252.

Extension of Time—Consideration.—"The promise of one liable to pay a promissory note to make certain payments thereon, made after the same is due, is not a good consideration for an agreement to extend the time of payment upon said note." *Cole v. George*, 86 W. Va. 346, 349, 103 S. E. 201.

IV. ACCEPTANCE OF BILLS OF EXCHANGE.

Va. Code 1919. §§ 5694-5704; Barnes Code, ch. 98A, §§ 132-142.

Bills in Sets.—Va. Code 1919, § 5743; Barnes Code, ch. 98A, § 181.

B. FORM.**Acceptance on Separate Paper—N.**

I. L.—Under the negotiable instruments law (Code 1904, § 2841-a, subsec. 134 [§ 5696 Va. Code 1919]) providing that an acceptance written on a paper other than the bill itself does not bind the acceptor, except in favor of a person to whom it is shown and who on the faith thereof receives the bill for value, a postscript to a letter from the drawee of a draft to the drawer thereof, saying: "We phoned the bank to send your draft yesterday. They will send it over today" does not bind the drawee in favor of a bank to whom the letter was never shown, or who did not, on the faith thereof, receive the draft for value. *Jones v. Crumpler*, 119 Va. 143, 89 S. E. 232.

Qualified.—The drawee of a bill of exchange is not bound to take a qualified acceptance, and, if he does so, he must give the drawer reasonable notice thereof, otherwise he is discharged from liability. *Lewis, etc., Co. v. Morton*, 80 W. Va. 137, 92 S. E. 252.

C. EFFECT OF ACCEPTANCE.

See ante, "Form," IV, B.

Unaccepted Draft as Lien on or Assignment of Fund—N. I. L. — Under the negotiable instruments law (Code 1904, § 2841-a, subsec. 127 [§ 5689, Va. Code 1919]) an unaccepted draft does not operate as an assignment of the funds in the hands of the drawee available for its payment, and the drawee, not having accepted the same, is not liable thereon, nor has the holder any lien on, title to, or ownership in the fund of the drawer in the hands of drawee. *Jones v. Crumpler*, 119 Va. 143, 89 S. E. 232.

E. PROMISE TO ACCEPT.

Letter Authorizing Draft.—A letter from the garnishees stating that it would be all right for the debtor to draw on them for a certain amount

against a quantity of produce consigned to them, provided bills of lading therefor were in their hands before the draft was made, did not constitute an acceptance of a draft drawn and cashed at a bank before compliance with the condition. *Jones v. Crumpler*, 119 Va. 143, 146, 89 S. E. 232.

F. ACCEPTANCE FOR HONOR.

Va. Code 1919, §§ 5723-5732; Barnes Code, ch. 98A, §§ 161-170.

V. ACCEPTANCE OR CERTIFICATION OF CHECKS.

Va. Code 1919, §§ 5749-5751; Barnes Code, ch. 98A, §§ 187-189.

Certifying Falsely.—Barnes Code, ch. 54, § 81a (18).

VI. NEGOTIATION.

Va. Code 1919, § 5592-5612; Barnes Code, ch. 98A, §§ 30-50.

A. BY INDORSEMENT.**2. Necessity of Indorsement.**

A negotiable note payable to the order of the maker is a nullity until indorsed by him and negotiated, since one can not be both maker and payee at the same time. *Dotson v. Skaggs*, 77 W. Va. 372, 374, 87 S. E. 460.

A note made by a person to himself, or to himself or order, is not a good legal contract until it becomes such by endorsement, but where a note, whether payable to the maker, or to one of two or more makers, is negotiable and endorsed, it becomes available as a security at law in the hands of the endorsee, who may sue upon it. *Reid v. Windsor*, 111 Va. 825, 69 S. E. 1101.

3. Form and Requisites.**½a. In General.**

Assignment in Accompanying Letter.—Where the maker of a note forwarded it to a bank accompanied by a letter, in which it was stated that the maker did assign and deposit the note

as collateral security to secure the bank against any loss by overdraft of the maker, the signature of the maker to the letter of assignment was held a sufficient indorsement under the provision of the negotiable instruments law (Code 1904, § 2841-a, subsec. 31 [§ 5593 Va. Code 1919]) that, "The indorsement must be written on the instrument itself or upon a paper attached thereto." *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979.

Position of Signature—N. I. L. — The indorsement, as its derivation and meaning would indicate, is generally made by writing the transferror's name on the back of the paper, but it may be written—although unusual and irregular—on any other portion of it, even on the face and under the maker's name. The position of the signature of an indorser upon a negotiable note is not in itself conclusive of the purpose of the signature. This is expressly recognized in the negotiable instruments law (Code 1904, § 2841-a, subsec. 17, subdiv. 6 [§ 5579, Va. Code 1919]) which provides that where a signature is so placed upon an instrument that it is not clear in what capacity the person signing the same intended to sign, he is to be deemed an indorser. Undoubtedly, the names of indorsers usually appear on the back of the paper but they may appear elsewhere without offending against the regularity required by the negotiable instruments law. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979.

Same—Parties Held Indorsers.—Appellants were members of a farmers' mutual exchange. Anticipating that the approaching crop season would call for money with which to handle the crops of its members, a committee was appointed to solicit indorsers for a loan. A note was prepared and sent out from the office of the exchange. The body of the note and the signature of the exchange appeared in

type; then follow the names of twenty individual members (appellants), some immediately under the signature of the maker and some in another column to the left. In a suit in equity to cancel a judgment by confession upon the note, it was contended that the note showed upon its face that it was invalid because it appeared to be signed by the exchange and appellants as joint makers, payable to the order of themselves and not indorsed by them. Held, that the substance and essence of the transaction as a whole did not, as against the bank, the holder in due course, justify such contention, and that the appellants manifestly did not at any time mean to become bound otherwise than as indorsers. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979.

a. Instrument Payable to Two or More Persons.

Indorsement in Blank by One Joint Payee.—Where the maker of a negotiable note is not sole payee, but joint payee with another, the two not being general partners, the indorsement in blank by the joint payee who is also maker does not pass legal title to the other, because, not being partners, it would require their joint indorsement to pass title. *Dotson v. Skaggs*, 77 W. Va. 372, 374, 87 S. E. 460.

One joint payee does not become liable to the other by his indorsement in blank of a negotiable note; the legal import of such indorsement being implied authority to the other payee to negotiate the note by completing the indorsement and passing title to a third party. *Dotson v. Skaggs*, 77 W. Va. 372, 375, 87 S. E. 460.

Same—Partners.—If a note be made payable to several persons, not partners, it can only be transferred by a joint indorsement of all of them; but when it is made to two or more persons as partners, it may be transferred by the indorsement of any one of

them. *Dotson v. Skaggs*, 77 W. Va. 372, 374, 87 S. E. 460.

4. Kinds of Indorsement.

b. Indorsement in Blank.

See ante, "Instrument Payable to Two or More Persons," VI, A, 3, a.

By the terms of the negotiable instruments law (Code 1904, § 2841-a, subsec. 63 [§ 5625 Va. Code 1919]) a person who indorses in blank a negotiable note, without qualification, though it is still in the hands of the agent of the payee, is deemed to be an indorser. *Colley v. Summers Parrott Hdw. Co.*, 119 Va. 439, 89 S. E. 906.

Effect of Possession. — An agent having in his possession, for discount, sale, safe-keeping or other purpose, on behalf of his principal, bills, notes or other paper belonging to his principal, indorsed in blank, or in such other form as to permit transfer of title thereby by mere delivery, may be regarded, by strangers having no notice of the agency or the capacity in which such paper is held, as the owner thereof, and dealt with accordingly in respect to it. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880.

d. Indorsement without Recourse.

See post, "In General," VI, A, 5, a.

5. Effect of Indorsement.

a. In General.

See ante, "Instrument Payable to Two or More Persons," VI, A, 3, a; "Indorsement in Blank," VI, A, 4, b.

Warranty. — "It is uniformly held that a bank endorsing a check, not drawn upon it, warrants the genuineness of all the preceding signatures endorsed on it, including that of the payee, but not that of the drawer." Observe that the warranty is of the genuineness of signature, not solvency of parties. *Bank v. McDowell County Bank*, 66 W. Va. 545, 552, 66 S. E. 761. See ante, BANKS AND BANKING.

Same — Endorsement without Re-

course. — The substance of the decisions is summarized as follows in 7 Cyc. 831-2: "The transferrer of commercial paper, even where endorsed 'without recourse,' warrants the validity of the instrument. Thus he is held impliedly to warrant that the paper is supported by a valid consideration, that it is properly stamped, that prior parties had capacity to contract, that the instrument is still subsisting as a valid obligation, and in general that there is no legal defense growing out of his own connection with the paper." *Trustees v. Siers*, 68 W. Va. 125, 128, 69 S. E. 468.

B. BY ASSIGNMENT.

See ante, ASSIGNMENTS.

D. INJUNCTION.

Equity will enjoin the transfer of a negotiable note on ground which, as between maker and payee, would prevent the payee from enforcing the note. *Atkinson v. Cain*, 61 W. Va. 355, 56 S. E. 519. See generally, post, INJUNCTIONS.

VII. RIGHTS OF HOLDER.

Va. Code 1919, §§ 5613-5621; Barnes Code, ch. 98A, §§ 51-59.

Bills in Sets.—Va. Code 1919, § 5742; Barnes Code, ch. 98A, § 179.

A. WHAT CONSTITUTES ONE A BONA FIDE HOLDER FOR VALUE.

½. In General.

Holder in Due Course under N. I.

L. — One who holds an instrument complete upon its face, which had not been dishonored, and that he took in good faith and for value, without notice of any infirmity in the instrument or defect in the title of the person negotiating it, is a holder in due course under §§ 52, 56, and 57 (§§ 5614, 5618, 5619, Va. Code 1919) of the negotiable instrument act. *Ratcliffe v. Costello*, 117 Va. 563, 85 S. E. 469, 471.

"Virginia Code, § 2841-a, subsection

52 (§ 5614, Va. Code 1919) defines a holder in due course to be a holder who has taken the instrument under the following conditions: 1. That it is complete and regular upon its face. 2. That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." *Holdsworth v. Anderson Drug Co.*, 118 Va. 359, 361, 87 S. E. 565; *City Nat. Bank v. Hundley*, 112 Va. 51, 54, 70 S. E. 494; *Trustees v. McComb*, 105 Va. 473, 477, 54 S. E. 14.

In *Trustees v. McComb*, 105 Va. 473, 477, 54 S. E. 14, the court says. "Every holder of a negotiable instrument under the conditions named (in Va. Code 1919, § 5614) is a holder in due course, unless excluded by some other provision of the act. Subsection 53 expressly provides that the holder of an instrument payable on demand, negotiated an unreasonable length of time after its issue, shall not be regarded as a holder in due course, and who, but for this express provision excluding him, would have been a holder in due course, under subsection 52."

Knowledge Not Retroactive — Where a bona fide holder in due course sells negotiable notes and later buys them back under circumstances which would impute knowledge of certain infirmities in the instruments, that knowledge does not relate back so as to impair his original possession as a purchaser for value and without notice. *Ratliffe v. Costello*, 117 Va. 563, 85 S. E. 469.

Credit on Depositor's Account While in Due Course—Fraud. — The mere crediting by a bank to a depositor's account of the proceeds of a note will not constitute the bank a holder in due course when after non-

payment the amount remains to the credit of such depositor. And if the instrument was given for the price of property sold and the sale and purchase thereof was manifestly to prevent the defense of breach of warranty, the transaction will be regarded fraudulent. In such a case the transaction lacks the quality of a purchase in "good faith and for value" required of a purchaser in due course." *Marion Nat. Bank v. Harden*, 83 W. Va. 119, 97 S. E. 600.

Notes Fraudulently Procured by Corporation Transferred to Its President by Its Sales-Manager. — Held: That the president stood on no higher footing than if the notes had been transferred to him by his corporation; and he could not set up the defense of a bona fide holder in due course, as he was president. *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

1. Valuable Consideration.

See ante, "Consideration," II, B; "In General," VII, A, ½.

½a. In General.

Special Indorsement to One—Interest of Third Person.—Though a negotiable note be indorsed specially, before maturity, to one person, while a third person paid one-half of the consideration and was to receive one-half of the proceeds thereof, the indorsee takes the legal title to the whole, is a holder in due course under the negotiable instruments-law (Code 1904, § 2841-a [§§ 5563 et seq. Va. Code 1919]) and may maintain an action thereon in his own name, and, in the absence of any evidence that the third person occupied any worse or different position from the indorsee, with reference to the purchase of said note, no defense can be set up against the interest of such third person in the note which could not be set up against the indorsee. *Fleshman v. Bibb*, 118 Va. 582, 88 S. E. 64.

a. Necessity.

See ante, "Want of Consideration," II, B, 4; "Failure of Consideration," II, B, 5.

b. Sufficiency.

See ante, "Sufficiency of Consideration," II, B, 3.

(1) In General.

Section 5616 of the Code 1919.—In an action by a bank, the holder of certain notes, against the maker thereof, where the bank had purchased the notes, paying for them with a certificate of deposit maturing in six months, the bank is entitled to recover, notwithstanding section 5616, of the Code of 1919, where nothing transpired prior to the maturity and payment of the certificate of deposit to give notice to the bank of an alleged infirmity in the consideration for the notes. *Duncan v. Broadway Nat. Bank*, 122 Va. 34, 102 S. E. 577. See ante, **BANKS AND BANKING.**

Satisfaction by Subsequent Indorser.—An indorser of a note who, upon the default of the maker, satisfies the demands of the indorsee, and takes up the note, becomes the lawful holder and may enforce the terms of the contract against all prior indorsers as well as against the maker. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

(2) Payment of Pre-Existing Debt.

See ante, "Sufficiency of Consideration," II, B, 3.

Purchase of Judgment against Maker for Less than Face Value and Its Release by Payee.—This was held a sufficient consideration. *Wiley v. Martin*, 73 W. Va. 228, 80 S. E. 879.

(3) Collateral Security for Pre-Existing Debt.

See generally, post, **PLEDGE AND COLLATERAL SECURITY.**

The fact that a negotiable note is assigned as collateral security does not make the transfer any the less effective. It is settled in Virginia that

such a transfer constitutes the transfer of a holder in due course. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979; *Anderson v. Union Bank*, 117 Va. 1, 83 S. E. 1080.

The plaintiff was the "holder of notes in due course," as defined by the negotiable instruments law (§ 2841a, art. 4, cl. 52 of the Code [§ 5614, Va. Code 1919]) and held the notes free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. *Id.* cl. 57. *Anderson v. Union Bank*, 117 Va. 1, 83 S. E. 1080.

In Virginia a pre-existing debt is of itself a valuable consideration for a deed of trust made to secure its payment, and if such deed transfers unmatured negotiable notes to secure creditors of the grantor, the trustee is a holder in due course within the terms of § 52 of the negotiable instruments act (Code 1904, § 2841a, ch. 52 [§ 5614, Va. Code 1919]) if within the other terms of that section. *Trustees v. McComb*, 105 Va. 473, 54 S. E. 14.

2. Good Faith and Want of Notice of Defenses.

See post, "Presumptions in Holder's Favor," VII, C.

On the question of "good faith and (so: value)" required of a purchaser in due course, mere knowledge of facts sufficient to create suspicion, without actual knowledge, will not deprive him of the rights of a purchaser in due course, but if the facts, circumstances and conditions attending his purchase are so cogent and obvious that to remain passive amounts to bad faith on his part and show bad faith on the part of the seller, the purchaser will be deprived of the status of holder in due course. *Marion Nat. Bank v. Harden*, 83 W. Va. 119, 97 S. E. 600.

Under the negotiable instruments act of this state, in order to invalidate the title of the holder in due course of a negotiable note endorsed in blank, on account of notice of any infirmity in the instrument of defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. *City Nat. Bank v. Hundley*, 112 Va. 51, 70 S. E. 494.

Mere suspicion of its infirmity, by the purchaser for value and in due course of commercial paper, is not evidence of bad faith. *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400.

Duty to Make Inquiry.—In the absence of actual or constructive notice of defect of title, fraud or other circumstance which would vitiate the title, a purchaser is under no duty to make inquiry as to how the holder of negotiable paper acquired it. He may safely rely upon the possession of the holder as sufficient evidence of title for the purpose of a valid contract of sale. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880.

Negligence or Suspicion Not Equivalent to Fraud.—The fact that the holder in due course of a negotiable note acted negligently or was affected with suspicious circumstances in taking the note, is not sufficient to defeat his right of action thereon, in the absence of proof of facts amounting to fraud on his part. *Fleshman v. Bibb*, 118 Va. 582, 88 S. E. 64.

Suspicion of Want or Defect of Title.—A party who takes negotiable paper before maturity, for a valuable consideration, without knowledge of defect of title, and in good faith, obtains indefeasible title thereto, although, at the time of the purchase, he had knowledge of circumstances which were sufficient to excite, in the mind of a prudent man, a suspicion of

want or defect of title, and was grossly negligent in taking it. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880.

Same—Partnership Note.—The purchaser of a negotiable note of a partnership, executed and discounted by a member of the firm, is not bound to exercise ordinary diligence to ascertain whether such member signed the firm name to it for the purpose of paying his individual obligation, or securing his individual debt, or procuring money for his individual purposes. *Bank v. Lowry & Co.*, 81 W. Va. 578, 94 S. E. 985.

Same — Knowledge of Agency of Holder.—A bank discounting negotiable paper, with knowledge of the person from whom it is taken holds it as agent only, is bound to ascertain the extent of the authority of the agent; but, in the absence of knowledge of any limitation upon the authority apparently conferred by the principal, it may rely upon such apparent authority. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880.

But where the agent has in his possession negotiable paper for discount or sale and the stranger has notice of the fact of agency, his dealings and transactions, respecting the paper, are governed by the law of agency. He must regard the paper as the property of the principal and confine his dealings with the agent, concerning it, within the scope of the authority of the latter, actually or apparently conferred. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880. See ante, AGENCY, p. 31.

Care Required of Maker and Purchaser Compared.—“Those who execute negotiable paper and set it afloat are chargeable with a much higher degree of diligence and caution than those who purchase such paper in due course of commercial transactions.” *Fleshman v. Bibb*, 118 Va. 582, 88,

88 S. E. 64; *Colona v. Parksley Nat. Bank*, 120 Va. 812, 822, 92 S. E. 979.

Knowledge of Consideration.—Knowledge by an assignee, in due course, of a negotiable note, that it was given for the purchase price of a specified quantity of land at a specified price per acre, is not notice to him of failure of title or shortage in quantity. *Dollar Sav., etc., Co. v. Crawford*, 69 W. Va. 109, 70 S. E. 1089.

Purchase for Less than Face Value.—The fact that the purchaser of notes before maturity purchased them for a sum considerably less than their face value, and attempted to get even a greater discount, did not charge the purchaser with knowledge of equities inhering in the notes. *Catron v. Bostic*, 123 Va. 355, 96 S. E. 845.

Provision in Deed for Abatement of Purchase Money for Deficiency of Land.—A stipulation in a deed reserving a vendor's lien to secure payment of negotiable purchase money notes, providing for an abatement from the purchase money evidenced by the notes, in the event of a deficiency in the land, is not constructive notice of such right of abatement, to a purchaser of the notes for value and before maturity. *Shanabarger v. Phares*, 86 W. Va. 64, 103 S. E. 349.

In the absence of proof of actual notice of such provision at the time of his purchase of such notes or the legal equivalent thereof, he may recover the full amounts of the notes, notwithstanding the existence of a shortage in the land and right of abatement as between the parties to the conveyance. *Shanabarger v. Phares*, 86 W. Va. 64, 103 S. E. 349.

Partnership Note—Individual Deposit.—On a firm note executed and discounted by one member of a trading partnership a bank may recover, although, with its knowledge, the proceeds of the note were deposited in it to the individual credit of such member. That fact alone does not relieve

the other members of the firm, but it is proper matter to go to the jury, with other evidence relied upon for proof of good reason on the part of the bank for belief that such member was perpetrating a fraud upon his associates in the execution and disposition of the note, which, if found by the jury, would preclude right of recovery by the bank against his associates. *Bank v. Lowry & Co.*, 81 W. Va. 578, 94 S. E. 985.

Credit on Depositor's Account—Fraud.—The mere crediting by a bank to a depositor's account of the proceeds of a note will not constitute the bank a holder in due course when after non-payment the amount remains to the credit of such depositor. And if the instrument which was given for the price of property sold and the sale and purchase of the note was manifestly to prevent the defense of breach of warranty, the transaction will be regarded fraudulent. In such a case the transaction lacks the quality of a purchase in "good faith and for value" required of a purchaser in due course. *Marion Nat. Bank v. Harden*, 83 W. Va. 119, 97 S. E. 600. See ante, **BANKS AND BANKING.**

Notice to Agent.—"The general rule that knowledge or notice on the part of the agent is notice to the principal is based on the duty of the agent to communicate all material information to his principal and the presumption that he has done so. In short, this rule rests on the presumption that the agent will do his duty to the principal by communicating material information to the latter. The rule can not stand without this presumption." *American Nat. Bank v. Ritz*, 70 W. Va. 409, 411, 74 S. E. 679.

If an agent who is authorized to sell and collect takes from the purchaser a negotiable note payable to himself, and before it is due, and without consideration endorses it over to his principal, the principal takes it sub-

ject to the conditions, made within the scope of the agent's employment, affecting its execution. Such assignment will not defeat the maker's equities. *Buckeye Saw Mfg. Co. v. Rutherford*, 65 W. Va. 395, 64 S. E. 444. See ante, AGENCY.

Same—Adverse Interest. — Knowledge of the infirmity of commercial paper, acquired by an officer or director of a bank, outside of his official duties, who is personally interested in having the paper discounted, is not attributable to the bank. *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400. See also ante, BANKS AND BANKING.

Knowledge by one of the officials of a bank, acquired in a capacity other than as its representative, relating to infirmity in commercial paper offered for discount, is not notice to the bank when that official is also an officer of the corporation seeking the discount and has an interest in the transaction so adverse to the bank that the reasonable presumption is that he would not communicate the knowledge to it. *American Nat. Bank v. Ritz*, 70 W. Va. 409, 74 S. E. 679. See post, CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Notice of Infirmity — Relationship between Officers of Different Banks. — The mere existence of a personal relationship between the cashier of one bank and the president of another, to which it sends commercial paper, regular on its face, in the usual course of business, is not proof of such notice of infirmity in the paper, to the receiving bank or its president, as the cashier of the sending bank may have had. *Hartley v. Ault Woodenware Co.*, 82 W. Va. 780, 97 S. E. 137.

Admission by and Subsequent Claim of Holder. — One who has destroyed his prima facie title to negotiable paper, arising from the fact of possession, by admitting that he has no title, can not

restore it by a mere verbal claim that he since obtained title or the right to discount the paper for his own benefit. A purchaser who is put on inquiry by sufficient knowledge, can not rely upon the information imparted by one whose interest it is to deceive him. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 626, 50 S. E. 880.

Collateral Agreement on Separate Paper. — Where, at the time a negotiable note is made, an agreement in writing is executed by the maker and the payee of the note, which is therein declared to be a part and parcel of the note, by which it is declared that the note is only to be payable on certain conditions, the two writings together constitute the contract between the parties, and if both of them are endorsed by the payee and delivered to a third person, he acquired thereby only such rights as the payee of the note had. *Nottingham v. Ackiss*, 107 Va. 63, 57 S. E. 592.

Purchaser from Bona Fide Holder. — The general rule is that if a person with notice purchase from one without notice, he is entitled to stand in the latter's shoes, and take shelter under his good faith. *Citizens Nat. Bank v. McDannald*, 116 Va. 834, 83 S. E. 389.

Where a note for money to be used in gambling has once passed into the hands of a bona fide holder it is not affected by the circumstances that it subsequently passed into the hands of a prior indorser who had notice of the object to which the avails were to be applied, and he has the rights of a bona fide holder. *Citizens Nat. Bank v. McDannald*, 116 Va. 834, 83 S. E. 389.

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As a general rule the holder for value and without notice of a negotiable note acquired before maturity can transmit a complete title to a third person, even though the latter has knowledge of facts which would have defeated a recovery upon the note in

the hands of the payee; but this rule is subject to the exception that if a payee sell negotiable paper to an innocent third party, and repurchases it, he does not thereby acquire any better title against the maker than he possessed in the first instance. *Aragon Coffee Co. v. Rogers*, 105 Va. 51, 52 S. E. 843.

Fraud in the procurement of an accommodation endorsement of a negotiable promissory note, alleged to have been perpetrated by the holder thereof, may be proved as matter of defense in an action at law, instituted by him on the note. *Prewett v. Citizens Nat. Bank*, 66 W. Va. 184, 66 S. E. 231.

3. Transfer Before Maturity.

See post, "General Rule as to Equities," VII, B, 1.

Purchase after Maturity. — Where more than one note is executed and it is stipulated therein or in the security given therefor that failure to pay any one of the notes when due will automatically mature all the others, such stipulation will be given effect according to its terms, and a purchaser of such notes with notice after such maturity will thereby be deprived of the rights of a purchaser in due course. *Marion Nat. Bank v. Harden*, 83 W. Va. 119, 97 S. E. 600.

Same—Demand Paper—N. I. L.—

Under the provision of the negotiable instruments law (Code 1904, § 2841-a, subsec. 53 [§ 5615, Va. Code 1919]) that "when an instrument payable on demand is negotiated an unreasonable length of time after it is issued, the holder is not deemed a holder in due course," what is a reasonable time for any purpose depends always upon the facts of the particular case; and where a note dated August 24, 1911, payable on demand, was not discounted until October 31, 1911, but was given in anticipation of its use to raise money for the purpose of handling the season's crops, when and as such use might be necessary, it was held that there was no unreasonable delay in

its negotiation. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979.

B. DEFENSES AVAILABLE AGAINST HOLDER.

½. In General.

Where promissory notes have come into the hands of third persons without notice of any infirmity, before maturity and in due course, they are not subject to equities in favor of the maker. *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400; *Dollar Sav., etc., Co. v. Crawford*, 69 W. Va. 109, 70 S. E. 1089; *Duncan v. Broadway Nat. Bank*, 127 Va. 34, 102 S. E. 577.

Agreement Unknown to Holder. —

A note was signed by a farmers' mutual exchange and appellants. Appellants testified that they signed the note with the understanding that none of them should be liable until it was brought back to them for their indorsement, and that it was to be entirely optional with them to place their names on it or not, as they might finally prefer. This testimony was objected to by the appellant, a bank, the holder of the note in due course, which, under the evidence, was warranted in treating appellants as indorsers. Held, the objection was well taken, as a holder of the note in due course could not be affected by such an understanding. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979.

Right to Curtail Note Monthly.—A depositor in bank gave his note to the bank payable to order for the amount of an over-check. The directors of the bank adopted a resolution stating that it was the understanding that said note be "subject to a monthly payment as curtail at the pleasure and indulgence of the directors," but this does not appear on the face of the note. Subsequently the bank sold the note to one who was alleged to have notice of the resolution of the directors, and he offered it as an offset to another note on which he was sued by the maker. The offset was objected

to on the ground that the directors could only require the note to be curtailed by monthly instalments at their pleasure and indulgence, and that full payment of the note at one time could not be demanded. Held: The resolution of the directors imposed no obligation upon the bank and conferred no right on the debtor; and hence the offset was valid. *Williams v. Liphart*, 116 Va. 281, 81 S. E. 77.

Agreement between Maker and Holder after Indorsement.—See post, "Change or Alteration of Contract," X, B, 1.

Nonnegotiable Paper. — "A person who deals in nonnegotiable paper acquires it subject to all equities in the maker and the right of recourse as against remote assignors, subject to the equities of such assignors. It could hardly be said that equities could arise between maker and payee or the holder of a note until delivery." *Kidd v. Beckley*, 64 W. Va. 80, 85, 60 S. E. 1089.

Equities against non-negotiable promissory notes in the hands of an assignee, acquired, by the promisor, against him, while he held them, are available as discounts or credits against a subsequent assignee. *Marshall v. Porter*, 71 W. Va. 330, 76 S. E. 653.

Same—Maker as Agent of Indorser.—Where a note not negotiable is irregularly endorsed, and left by the endorser in the hands of the maker to be delivered only upon condition of the maker securing others to endorse the same, he constitutes such maker his agent for that purpose, and the payee will take the same unaffected by any such agreement or understanding, unless before delivery he has notice thereof, or, either from the instrument or in some other way is put upon inquiry as to whether such delivery was authorized. *Kidd v. Beckley*, 64 W. Va. 80, 60 S. E. 1089.

1. General Rule as to Equities.

See ante, "In General," VII, B, ½.

2. Fraud.

See ante, "Good Faith and Want of Notice of Defenses," VII, A, 2.

½a. In General.

Fraud Perpetrated after Negotiation.—Where the plaintiff is a holder in due course of the negotiable note sued on, which is in all respects regular, and there is no sufficient evidence of knowledge brought home to him, of any infirmity in the instrument or defect in the title of the person negotiating the same to affect his right of recovery thereon, it is immaterial that a fraud was perpetrated on the maker of the note after it was negotiated to the plaintiff. *Hawkes v. Bowles*, 119 Va. 108, 89 S. E. 93.

To Shift Burden of Proof.—"Under a special plea by § 5, chapter 126, serial § 4825, Code 1913 (Barnes Code ch. 126, § 5), fraud would be provable even as against the holder of a note in due course, for the purpose of shifting on him the burden of proving that he was a bona fide purchaser for value in the usual course of business, without notice of equities as between the original parties to the contract." *Interstate Finance Co. v. Schroder*, 74 W. Va. 67, 81 S. E. 552, 553.

b. Fraud in Execution of Paper.

Fraud in Procuring Signature.—"If the signature to the paper as a note was fraudulently procured, the paper is not, in law, a note, although signed and apparently one." *Acme Food Co. v. Older*, 64 W. Va. 255, 277, 61 S. E. 235.

In Procuring Authority to Execute.—Notes given under a power of attorney granting an agent power to purchase shares of stock in corporations and to pay for the same by promissory notes, are collectible by an indorsee for value and without notice, who, relying upon the agent's author-

ity, purchased them before maturity, notwithstanding the authority of the agent was procured by the fraudulent misrepresentations of a third person, and the stock for which they were given was worthless. *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400.

4. Want of Capacity of Parties.

While it is true that the bona fide holder for value of negotiable paper, not due, who has acquired it without notice of the facts, is not affected by facts which make the note invalid between the original parties, this rule does not protect such holder when he takes a note issued without authority. *Wheeling Ice, etc., Co. v. Conner*, 61 W. Va. 111, 123, 55 S. E. 982.

If the holder of negotiable paper truly inform a person intending to purchase it, that he has no title to it, or that he holds it in the capacity of agent for the maker or other party to it, and afterwards a sale of the paper is effected between the parties, the purchaser, under the hypotheses first stated herein, takes no title, and, under the second, his title depends upon the authority of the agent, actually or apparently conferred. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880.

The doctrine that an agent disposing of the property of his principal without authority transfers no title as against the principal, does not apply in currency, or negotiable instruments without restrictive endorsement, where they have come into the hands of a bona fide purchaser for value without notice. *Perry v. Oerman*, 63 W. Va. 566, 60 S. E. 604.

5. Alteration.

See ante, ALTERATION OF INSTRUMENTS.

Erasure. — A negotiable instrument constituting an unconditional promise to pay a certain sum of money is not rendered invalid in the hands of the purchaser thereof in due course with-

out notice by the erasure from the margin of the memorandum, "This note is to fulfill an agreement of a certain date", or "This note is to fulfill a certain agreement", or "This note is to fulfill a contract dated July 7th, 1915." The instrument being unconditional such a memorandum constitutes merely a statement of the transaction which gave rise to the instrument, and being immaterial its erasure does not vitiate the paper in the hands of a holder in due course. It is protected by section 3, chapter 98A. *Barnes Code. Mason v. Shaffer*, 82 W. Va. 632, 96 S. E. 1023.

Perversion of Blank Note.—The authority implied by a signature to a blank note, and the credit given, are so extensive, that the party so signing will be bound to a holder for value in due course, although such note was only authorized to be used for a purpose different from that to which it has been perverted. *Rusmisseil v. White Oak Stove Co.*, 80 W. Va. 400, 92 S. E. 672.

6. Forgery.

Forged Check or Bill.—"In law, there is neither a payee nor an indorser in the case of a forged check or bill. The entire instrument is a nullity; but, for the purpose of working out justice in favor of innocent parties injured by it, it is treated, on the principle of estoppel, as a valid paper, to the extent of denying the drawee right of recovery against them, if he paid it before discovery of the forgery, and they have omitted no duty in the premises. What purports to be an endorsement by a payee, in such a case, is not an endorsement. It is a mere fraudulent act, part and parcel of the fraudulent process by which money is obtained on the forged paper." *Bank v. McDowell County Bank*, 66 W. Va. 545, 554, 66 S. E. 761.

In the absence of negligence or mis-

conduct on the part of the holder of forged paper, contributing to the fraud by which the person on whom it purports to be a check or acceptance is induced to part with money on the faith of it, such person must determine at his peril whether the signature is genuine. *Bank v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. 761.

7. Usury.

See ante, "The Negotiable Instruments Law in General," 1½; "Agreements for Attorney's Fees and Other Costs of Collection," II, C, 3.

8. Illegality, Want or Failure of Consideration.

See also, ante, "Fraud," VII, B, 2; post, "Statutory Invalidity," VII, B, 8½.

The true rule applicable in the case of an indorsee who has acquired the paper in regular course, and the maker of a note, as to the effect to be given to a recital of the consideration, is briefly stated in 7 Cyc., 947, as follows: "If the purchaser knows at the time of his purchase that the consideration for which the note was given has failed, if he is informed that the validity of the consideration is a question yet to be tested, or if he knows or has legal constructive notice that the consideration is illegal, he can not be considered a bona fide holder. But a failure of the consideration in whole or in part after a bona fide transfer does not affect the character of the purchaser, although he had full knowledge of the original consideration for which the note was given." Quoted in *Dollar Sav., etc., Co. v. Crawford*, 69 W. Va. 109, 114, 70 S. E. 1089.

Failure of consideration as between the original parties to a negotiable instrument constitutes no defense in an action by the purchaser thereof in due course without notice. *Mason v. Shaffer*, 82 W. Va. 632, 96 S. E. 1023; *Interstate Finance Co. v. Schroder*, 74 W. Va. 67, 81 S. E. 552.

Money Borrowed for Illegal Purpose.—The fact that the endorser of a note knew that the proceeds of the note were to be used by the maker in gambling in stocks can not affect the rights of the bank which discounted the note for the maker in ignorance of the use to be made of the money. It is the business of a bank to lend money and it is under no obligation to inquire of the borrower what he wants the money for, nor is it to be affected by any use which the borrower chooses to make of the money. Such a discount by the bank is not within the purview of § 2836 of the Code (§ 5558 Va. Code 1919), relating to gaming contracts. *Citizens Nat. Bank v. McDannald*, 116 Va. 834, 83 S. E. 389.

Gambling Debt.—See post, "Statutory Invalidity," VII, B, 8½.

8½. Statutory Invalidity.

While a merely illegal consideration in a negotiable instrument does not invalidate it in the hands of a holder in due course, a paper negotiable in form, but declared void by a statute, is not enforceable at the instance of anybody. *Twentieth St. Bank v. Jacobs*, 74 W. Va. 525, 82 S. E. 320.

Effect of Negotiable Instruments Law.—Chapter 81 of the Acts of 1907, ch. 98A of the Code (Barnes Code, ch. 98A), known as the negotiable instruments law, does not legalize contracts expressly condemned and declared void by the statutes of this state, nor those forbidden by the policy of its laws. *Raleigh County Bank v. Poteet*, 74 W. Va. 511, 82 S. E. 332; *Eskridge v. Thomas*, 79 W. Va. 322, 330, 91 S. E. 7.

Gambling or Usurious Consideration.—"No currency in the market, and no degree of innocence or ignorance on the part of a holder for value, can impart validity to a negotiable instrument which is declared void by statute because based upon

a gambling or usurious consideration." *Eskridge v. Thomas*, 79 W. Va. 322, 329, 91 S. E. 7.

Money Lost in Gambling. — "A paper negotiable in form for money lost in gaming is, under § 1, ch. 97, Code (Barnes Code, ch. 97, § 1), void in the hands of the holder, even though he took it for value without notice of the character of the consideration." *Eskridge v. Thomas*, 79 W. Va. 322, 330, 91 S. E. 7.

Negotiable paper the consideration whereof is money lost or bet in gaming is void in the hands of the holder, even though he took it for value and without notice of the character of the consideration. *Twentieth St. Bank v. Jacobs*, 74 W. Va. 525, 82 S. E. 320.

Effect of Negotiable Instruments Law.—Chapter 81, Acts of 1907, ch. 98 A of the Code, known as the negotiable instruments law, does not by implication or otherwise, repeal, limit or qualify, in any degree or respect, § 1 of ch. 97 of the Code (Barnes Code, ch. 97, § 1), declaring void what are commonly known as gambling contracts. *Twentieth St. Bank v. Jacobs*, 74 W. Va. 525, 82 S. E. 320.

9. Set-Off and Counterclaim.

The defense of set-off is not applicable to a negotiable note, transferred for an adequate consideration before maturity, even though the transferee purchased the note with notice of the claim of set-off. *First Nat. Bank v. Danser*, 70 W. Va. 529, 74 S. E. 623.

C. PRESUMPTIONS IN HOLDER'S FAVOR.

See post, "Presumptions and Burden of Proof," XI, G, 1.

Every holder of negotiable paper is deemed prima facie to be a holder in due course. *Manchester v. Parsons*, 75 W. Va. 793, 84 S. E. 885.

Possession of a negotiable note, indorsed in blank by the payee, in prima facie proof of title. *Farmers Nat.*

Bank v. Howard, 71 W. Va. 57, 76 S. E. 122.

The holding of a purchaser for value, before maturity, is prima facie bona fide, and the burden is on the party denying the bona fides of the transaction to prove his case, as the law will not presume fraud. Of course, the evidence may be circumstantial, but the proof of the existing circumstances amounting to implied notice must be clear. *Catron v. Bostic*, 123 Va. 355, 96 S. E. 845.

The possession of a note, regular upon its face, is prima facie evidence of ownership, and that it has been taken in good faith for value, but this presumption may be rebutted, and, when rebutted, the burden is upon the holder to show that he is the owner in good faith for value. *Hawse v. First Nat. Bank*, 113 Va. 588, 75 S. E. 127.

Production of Instrument Makes Prima Facie Case.—N. I. L.—Under the negotiable instruments law (Code 1904, § 2841-a [§§ 5563 et seq. Va. Code 1919]) every holder of negotiable paper is deemed prima facie to be a holder in due course, and in an action on said paper, the production of the paper in evidence makes out a prima facie case for recovery, and the plaintiff is entitled to rest his case until rebuttal evidence is offered by the defendant. *Holdsworth v. Anderson Drug Co.*, 118 Va. 359, 87 S. E. 565.

Purchase Presumed Free from Bad Faith.—Under the negotiable instruments law (Code 1904, § 2841-a, subsec. 59 [§ 5621 Va. Code 1919]) the title of a purchaser for value and before maturity of negotiable notes is prima facie free from any taint of bad faith. *Fleshman v. Bibb*, 118 Va. 582, 586, 88 S. E. 64.

D. AMOUNT RECOVERABLE BY HOLDER.

Attorney's Fees.—See ante, "Agree-

ments for Attorney's Fees and Other Costs of Collection," II, C, 3; "Interest," II, H.

E. PRIORITY.

Of Holder in Due Course Over Attachment upon the Negotiable Instrument.—Va. Code 1919, § 6393.

VIII. PRESENTMENT, PROTEST AND NOTICE OF DISHONOR.

A. PRESENTMENT FOR ACCEPTANCE.

Va. Code 1919, §§ 5705-5713; Barnes Code, ch. 98A, §§ 143-151.

B. PRESENTMENT FOR PAYMENT.

Va. Code 1919, §§ 5632-5650; Barnes Code, ch. 98A, §§ 70-88.

1. Presentment of Bills and Notes, etc.

a. Necessity for Presentment.

(½) In General.

Where, by the terms of a collateral note pledging stock as collateral, it is expressly stipulated that the collaterals may be sold without making any demand for the payment of the note, or giving notice of the time and place of sale of the collaterals, no such demand or notice is necessary. *Reid v. Windsor*, 111 Va. 825, 89 S. E. 1101.

(3) To Fix Liability of Indorser.

Indorsement — Presentation and Notice.—To hold an endorser of negotiable paper liable as such, it must be presented for payment at the place of payment, when due. *Rusmisset v. White Oak Stave Co.*, 80 W. Va. 400, 92 S. E. 672.

To Fix Liability of Irregular Indorser.—At common law as interpreted by the courts of this state, presentment for payment is not required in order to fix the liability of those placing their names in blank upon the back of a negotiable note before delivery, for the accommodation of the makers, since the payee or his indorsee could, under common law principles, elect to hold them as joint makers or as guarantors or indorsers. *Thomp-*

son v. Curry, 79 W. Va. 771, 772, 91 S. E. 801, citing *Peters v. Nolan Coal Co.*, 61 W. Va. 392, 56 S. E. 735.

Same.—Under the negotiable instruments law (Code 1913, ch. 98a, § 109), in order to fix the liability of one who is deemed an indorser because of an irregular signature, presentment for payment at the time and place designated in the paper is essential, unless waived. *Thompson v. Curry*, 79 W. Va. 771, 91 S. E. 801.

b. Time of Presentment.

See ante, "To Fix Liability of Indorser," VIII, B, 1, a, (3); "Time of Presentment," VIII, B, 2, b.

Holidays.—Va. Acts 1918, p. 121.

c. Place of Presentment.

See ante, "To Fix Liability of Indorser," VIII, B, 1, a, (3).

2. Presentment of Checks.

a. Necessity of Presentment.

(1) To Fix Liability of Drawer.

Failure to present a check does not bar recovery from the drawer, if the time intervening between delivery thereof and the failure of the bank, is not sufficient for presentment by the exercise of such diligence as the law requires. *Lewis, etc., Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 77, 52 S. E. 1017.

b. Time of Presentment.

See ante, "Time of Presentment," VIII, B, 1, b; Va. Code 1919, § 5748; Barnes Code, ch. 98 A, § 186.

Reasonable Diligence.—A person receiving a check, on a fund in the hands of a bank, for the amount of a demand against the drawer thereof, is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid risk of loss by insolvency of the drawee. (*Lewis, etc., Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1017; *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 260, 69 S. E. 1012), or to avoid risk of discharging an indorser

thereof. *Nuzum v. Sheppard*, 87 W. Va. 243, 104 S. E. 587.

Inexcusable delay in presenting a check for payment will discharge an endorser from liability thereon if the check is not paid, whether he is in fact injured or not. *Nuzum v. Sheppard*, 87 W. Va. 243, 104 S. E. 587.

When a check is received in conditional payment of a debt, the failure to present it for payment and give notice of dishonor within a reasonable time after its receipt operates to make such conditional payment absolute. *Nuzum v. Sheppard*, 87 W. Va. 243, 104 S. E. 587.

As to what constitutes reasonable diligence in the presentment of a check for payment to the bank upon which it is drawn, where the facts are conceded, is a question of law for the court. *Nuzum v. Sheppard*, 87 W. Va. 243, 104 S. E. 587.

Payee and Drawee of Same Domicile.—If the payee of the check and the drawee reside, or have their places of business, in the same city or town, presentment must be made before the expiration of business hours of the day next after the day of the receipt thereof. *Lewis, etc., Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1017; *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 260, 69 S. E. 1012.

When Person Receiving Check and Bank Are in Different Places.—If the person receiving a check and the bank on which it is drawn are in different places, it must be forwarded, for presentment, by mail or other usual mode of transmission, on the next day after the receipt thereof at the place in which the payee resides or does business, if reasonably and conveniently practicable; and, if it is not so practicable, then by the next mail or other similar means of conveyance, leaving after said date. *Lewis, etc., Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1017; *Pinkney v. Kanawha*

Valley Bank, 68 W. Va. 254, 260, 69 S. E. 1012; *Nuzum v. Sheppard*, 87 W. Va. 243, 104 S. E. 587.

And the same must be presented to the bank upon which it is drawn and payment demanded at the latest upon the day after its receipt at the place at which such bank is located. *Nuzum v. Sheppard*, 87 W. Va. 243, 104 S. E. 587.

Neither payee nor his agent is required to transmit such check by the only, or last, mail of the day next after its receipt, if such mail closes or departs at an hour so early as to render it inconvenient for the holder to avail himself of it. What is an unreasonably early hour in such case, depends upon all the circumstances of the transaction and situation of the parties; and, the facts being free from controversy and doubt, is a question of law for the court. *Lewis, etc., Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 76, 52 S. E. 1017; *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 260, 69 S. E. 1012.

Check Sent to Distant Place to Be Forwarded for Presentation.—The parties to a check drawn on a bank and sent to a distant place to be forwarded for presentation, are deemed in law to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent, and to have agreed to suffer any reasonable delay incident to such mode of presentment. *Lewis, etc., Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 76, 52 S. E. 1017; *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 260, 69 S. E. 1012.

When a check is drawn on a bank and sent to a distant place to be forwarded for presentation, the drawer, by allowing his funds to remain in the drawee bank, and the payee, by accepting the check, evince belief in the solvency of the bank, and the former voluntarily takes the risk of its sol-

vency during the reasonable period necessary for presentment of the check in the usual manner. *Lewis, etc., Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 77, 52 S. E. 1017; *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012.

The qualification of the general two-day rule allowed for forwarding paper for presentment is, that if there be more than one mail on the second day it need not go by the first, but, if there be but one, it must go by it, unless it leave or close at an unreasonably early hour. The whole of the second day is not allowed, unless the last mail of that day goes at the close of business. *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. 1012, approving *Lewis, etc., Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1017.

Delivery to Bank for Collection.—In the absence of any agreement to the contrary, and of any circumstance, known to the payee, making it imprudent to do so, he may indorse and deliver the check to a bank for collection; but this does not extend the time within which it must be forwarded for presentment. The bank, however, in such case, is not required to forward it on the next day after its receipt by the payee, if there be no reasonably convenient means of doing so, within the banking hours of that day. *Lewis, etc., Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 76, 52 S. E. 1017.

Implied Agreement of Drawer of Check.—The drawer, in delivering a check to an agent of the payee, having no authority to endorse it, at the place of business of the drawer, impliedly agrees to allow such additional time for presentment as may be necessary for the transmission of the check to the principal of the agent. *Lewis, etc., Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 77, 52 S. E. 1017.

C. PROTEST.

Va. Code 1919, §§ 5714-5722; Barnes Code, ch. 98A, §§ 152-160.

D. NOTICE OF DISHONOR.

Va. Code 1919, §§ 5651-5680; Barnes Code, ch. 98A, §§ 89-118.

1. Necessity of Notice.

d. To Fix Liability of Regular Indorser.

To hold an endorser of negotiable paper liable as such it must be presented for payment, and due notice given to the endorser of such presentment and of its dishonor by non-payment. *Rusmisset v. White Oak Stave Co.*, 80 W. Va. 400, 92 S. E. 672.

e. To Fix Liability of Irregular Indorser.

See ante, "To Fix Liability of Regular Indorser," VIII, D, 1, d.

At common law as interpreted by the courts of this state, notice of dishonor is not required in order to fix the liability of those placing their names in blank upon the back of a negotiable note before delivery, for the accommodation of the makers, since the payee or his indorsee could, under common-law principles, elect to hold them as joint makers or as guarantors or indorsers. *Thompson v. Curry*, 79 W. Va. 771, 772, 91 S. E. 801, citing *Peters v. Nolan Coal Co.*, 61 W. Va. 392, 56 S. E. 735.

Under the negotiable instruments law (Code 1913, ch. 98a, § 109 [Barnes Code, ch. 98A, § 109]), in order to fix the liability of one who is deemed an indorser because of an irregular signature, notice of dishonor is essential, unless waived. *Thompson v. Curry*, 79 W. Va. 771, 91 S. E. 801.

2. Upon Whom Notice May Be Served.

A notarial notice of protest of non-payment of a note addressed to an endorser as if living, when the endorser is dead, if actually received by his administrator, is good to charge such endorser's estate. *Bank v. Wetzel*, 58 W. Va. 1, 50 S. E. 886.

Notice to and Silence of Stranger.—Mere silence by one whose name is

purported to be signed to a note but who has in fact never signed the same, after receiving notice of protest thereof, will not amount to ratification. *Ritchie County Bank v. Bee*, 62 W. Va. 457, 59 S. E. 181.

3. Time and Manner of Giving Notice.

c. Service by Mail.

(1) Right to Serve Notice by Mail.

(b) Where Parties Reside in Different Towns.

If notice of protest of a negotiable note be regularly mailed, as prescribed by § 8, chapter 99, Code 1906, it is immaterial that such notice may not have been in fact received by the endorser thereon. He is nevertheless legally bound by such notice. *Board v. Angel*, 75 W. Va. 747, 84 S. E. 747.

Proof that notice of protest, properly addressed and stamped was deposited in the post office at the place of protest, in time to go by mail on the day following the day of dishonor, establishes due notice. *Farmers Nat. Bank v. Howard*, 71 W. Va. 57, 76 S. E. 122.

(2) Time within Which Notice Should Be Mailed.

Where a note was protested on Dec. 27th, notice of protest mailed to the last indorser and received by him on the 28th, and notice sent by the last indorser to previous indorsers on Dec. 29th, and these notices were received on Dec. 30th, the protesting of this note and the giving of notices of dishonor were in all respects regular under secs. 107 and 108 of the Negotiable Instruments Law (see Va. Code 1919, § 5666). *Hutchinson v. Hutchinson*, 17 Va. Law Reg. 763.

(6) Address.

Addressing the person as "Treasurer" does not affect the validity of notice of protest to him as an individual, if he is individually bound on the dishonored paper. *Farmers Nat.*

Bank v. Howard, 71 W. Va. 57, 76 S. E. 122.

E. WAIVER AND EXCUSES.

1. Waiver.

Express or Implied Waiver before or after Maturity—N. I. L.—Under the negotiable instruments law (Code 1913, c. 98a, § 109 [Barnes Code, ch. 98A, § 109]), to render an indorser liable, presentment for payment at time and place designated in paper and notice of dishonor are ordinarily essential, but he may waive those requirements, expressly or impliedly either before or after maturity. *Thompson v. Curry*, 79 W. Va. 771, 91 S. E. 801.

Effect of Waiver.—Protest and notice of dishonor is intended for the protection of the indorser, and it is a right which he can waive. By waiver he makes his liability just as absolute as if the paper indorsed by him had been formally protested, and his relation to the holder and all other indorsers becomes the same in every respect as in the case of protest. *Bank v. Lowther-Kaufman Oil, etc., Co.*, 66 W. Va. 505, 507, 66 S. E. 713.

Must Be Clear.—In *Tardy v. Boyd*, 26 Gratt. (67 Va.) 631, 637, the supreme court said: "Although a promise to pay by an endorser with full knowledge of all the facts and of the laches of the holder may be held in point of law to amount to a waiver of the right to notice, yet this rule must be taken with this qualification: The promise to be obligatory must be deliberately made in clear, explicit language, and must amount to an admission of the right of the holder, or of a duty and willingness of the endorser to pay. If, therefore, the conduct or acts of the endorser be equivocal, or the language used be of a qualified or uncertain nature, the endorser will not be held responsible. *Story Prom. Notes*, 363." *Security Loan, etc., Co. v. Fields*, 110 Va. 827, 832, 67 S. E. 342.

No consideration is necessary to make effectual an indorser's waiver of presentment for payment or notice of dishonor. *Thompson v. Curry*, 79 W. Va. 771, 780, 91 S. E. 801.

Indication of Intention to Be Bound. — "Where an indorser, who knows a note on which he is liable has not been paid and not presented for payment, by language indicates an intention to be bound by his contract notwithstanding the laches of the holder, accompanied by a request that he try to collect of the maker, this will operate as a waiver." *Thompson v. Curry*, 79 W. Va. 771, 781, 91 S. E. 801.

Drawer's Promise to Pay Holder. — "The supreme court of Virginia, in *Walker v. Laverty*, 6 Munf. (20 Va.) 487, a decision binding on this court, held that if a drawer of a protested bill of exchange, being applied to in behalf of the holder for payment, acknowledges the debt to be just and promises to pay it, saying nothing about his having received notice, the holder in an action of debt upon the bill against such drawer is not bound to prove that notice was given to him of the protest. This decision was followed in *Pate v. McClure*, 4 Rand. (25 Va.) 164." *Thompson v. Curry*, 79 W. Va. 771, 779, 91 S. E. 801.

Signatures under Printed Waiver Clause—**N. I. L.**—Both at the common law and under the negotiable instruments law (Code 1913, ch. 98A [Barnes Code, ch. 98A]), where a negotiable instrument contains on the back thereof a printed waiver of protest and notice of dishonor, and several persons before its delivery to the payee, at the same time and in regular order sign their names in blank beneath such printed form, the waiver binds alike all, and not merely the first, of such indorsers. *Central Nat. Bank v. Sciotoville Milling Co.*, 79 W. Va. 782, 91 S. E. 808.

The correspondence of an indorser's attorney with the payee of a note and the correspondence of a fellow indorser, with the knowledge of the first indorser, with the payee, showed that the first indorser not only admitted his liability as an indorser to pay the note, but authorized and suggested a plan of settlement by curtail and renewal. Held: That the indorser's conduct was tantamount to an implied waiver of formal notice of dishonor under section 2841-a, subsection 109, Code of 1904 (§ 5671 Va. Code 1919). *First Nat. Bank v. Anderson*, 125 Va. 102, 99 S. E. 561.

Waiver of Notice of Nonpayment as Waiver of Presentment.—A waiver of notice of nonpayment of a note also constitutes a waiver of presentment for payment in accordance with the implied provisions of the contract of indorsement. *Thompson v. Curry*, 79 W. Va. 771, 780, 91 S. E. 801.

IX. LIABILITY OF PARTIES.

Va. Code 1919, §§ 5622-5631; Barnes Code, ch. 98A, §§ 60-69.

Personal Representative Jointly Liable.—Va. Code 1919, § 5762.

A. MAKER OF NOTE.

1. In General.

See post, "In General," IX, L, 1.

Signature in Blank on Back of Non-negotiable Note.—Where a person signs his name in blank, on the back of a nonnegotiable note before delivery, he may be held liable as maker or guarantor, at the election of the holder, in the absence of a special agreement. *Brown v. Cook*, 77 W. Va. 356, 359, 87 S. E. 454. See also. *Thompson v. Curry*, 79 W. Va. 771, 772, 91 S. E. 801.

Maker in Representative Capacity.—Under the provisions of section 20 of the negotiable instruments law (section 20, ch. 98A, Code 1913 [Barnes Code, ch. 98A, § 20]), where an instrument contains, or a person adds to his signature, words indicating that

he signs in a representative capacity, he is not personally liable thereon if he was duly authorized to execute it. *First Nat. Bank v. Jacobs*, 85 W. Va. 653, 102 S. E. 491.

Defenses — Authority to Indorse.—

In a suit by the indorsees of negotiable notes the maker can not defend on the ground that one bank without authority to do so, indorsed them for the accommodation of another that discounted them. *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400.

In a suit by the indorsees against the maker of negotiable notes made payable to a corporation in consideration for capital stock to be issued to the maker, it is no defense that the treasurer who indorsed them for his corporation lacked authority, the corporation itself not complaining and having no right to complain of his act. *Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400.

2. Joint and Joint and Several Notes.

Indorsement in Blank by Joint Payee.—Where a negotiable note payable to the maker and another jointly, not partners, is indorsed in blank by the maker, the legal import of such indorsement is implied authority to the other payee to negotiate the note by completing the indorsement and passing title to a third person. *Dotson v. Skaggs*, 77 W. Va. 372, 87 S. E. 460.

F. INDORSER.

Bills in Sets.—Va. Code 1919, § 5742; Barnes Code, ch. 98A, § 180.

1. General Nature of Indorser's Contract.

One who places his name upon the back of a negotiable promissory note without qualification expressed in the writing, and delivers it to a third party for value, thereby agrees to pay to the holder of such note the amount thereof in case the maker fails to do so upon presentment when due and due notice to him of its dishonor by non-

payment. *Cole v. George*, 86 W. Va. 346, 103 S. E. 201.

Under the negotiable instruments law (Code 1913, ch. 98a, §§ 17 (6), 63, 64 [Barnes Code, ch. 98a §§ 17 (6), 63, 64]), contract of one who otherwise than as maker, drawer or acceptor indorses in blank a negotiable instrument before delivery, is that of an indorser, who, as at common law, agrees that he will pay the obligation if the maker fails to pay it when due, if proper steps are taken and notice given. *Thompson v. Curry*, 79 W. Va. 771, 91 S. E. 801.

Common-Law Liability Remains unless Changed by Statute.—See ante, "The Negotiable Instruments Law in General," 1½.

Extent of Liability — Illustrative Case.—M. was endorser for the firm of S. B. & Co. of which firm L. was a member. Said firm as well as L. individually became insolvent, and M. being required as such endorser to pay near \$2,000, and not being able to raise all the money for the purpose himself, L. loaned him \$805, for which M. executed to L. the following writing: "805—Due W. H. Lipscomb eight hundred and five dollars, borrowed money, to be paid when collected off of Stone, Bowman & Co., out of drafts which I have had to pay for them. This March 9th, 1888. Witness my hand and seal. W. B. Maxwell, (seal)." M. recovered a decree against S. B. August 2, 1890, for \$956.06 interest and costs. Held, M. could only be held liable to L. or his assignee, upon said note to the extent of his actual collections from said S. B. & Co. *Allen & Co. v. Maxwell*, 56 W. Va. 227, 49 S. E. 242.

2. Implied Warranties Made by Indorser.

By the terms of the negotiable instruments act, by his endorsement, an endorser warrants: That the instrument is genuine and in all respects what it purports to be; that he has

good title to it; and that all prior parties had capacity to contract. *Main St. Bank v. Planters Nat. Bank*, 116 Va. 137, 81 S. E. 24.

Forgery.—The endorser of a check upon which there is a prior forged endorsement is obliged to make it good to a subsequent innocent holder for value. *Main St. Bank v. Planters Nat. Bank*, 116 Va. 137, 81 S. E. 24.

3. Order of Liability.

Successive. — The long and universally established rule at common law is that “* * * the liability of indorsers, in the absence of special agreement, is successive and not joint.” This rule has become a part of our statute law (subsection 68 of section 2841-a of the Code of 1904 [§ 5630 Va. Code 1919]). *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

Same—Agreement. — “Section 68 of the negotiable instruments law (§ 5630 Va. Code, 1919), establishes the prima facie order in which endorsers are to be held liable, but among themselves they are permitted to show that they have agreed otherwise. The clause with respect to joint payees or joint endorsees was added, not to deprive them of the right to prove by evidence aliunde that they have made an agreement among themselves which varied the liability imposed by law, but out of abundant caution to negative the conclusion that they were to be liable in the order in which they became endorsers, for when there are two or more joint endorsers, it is, of course, apparent that the mere affixing of their signatures must have been successive one after the other.” *Alpin v. Lowman*, 115 Va. 441, 444, 79 S. E. 1029.

Accommodation Indorsers — Agreement for Equal Liability.—Accommodation indorsers are prima facie liable to one another in the inverse order of the indorsements, but, if they indorse under an agreement to be equally liable, in case of default on the part of the maker, they are treated

as his sureties in the adjustment of ultimate rights and liabilities among themselves. *Plumley v. First Nat. Bank*, 76 W. Va. 635, 87 S. E. 94.

G. IRREGULAR INDORSER.

Irregular Indorser Prima Facie Liable.—“The doctrine of our cases, it is said is that one who thus irregularly (by placing his name in blank upon it before delivery) endorses commercial paper renders himself prima facie liable as maker.” *Kidd v. Beckley*, 64 W. Va. 80, 84, 60 S. E. 1089; *Quesenberry v. Wood*, 64 W. Va. 5, 60 S. E. 881, quoting *Burton & Co. v. Hansford*, 10 W. Va. 470.

Common-Law Rule — Election of Holder. — Where defendants placed their names in blank upon the back of a negotiable note before delivery, for the accommodation of the makers, the payee or his indorsee could, under common-law principles, elect to hold them as joint makers or as guarantors or indorsers. *Thompson v. Curry*, 79 W. Va. 771, 772, 91 S. E. 801; *Quesenberry v. Wood*, 64 W. Va. 5, 9, 60 S. E. 881, quoting *Burton & Co. v. Hansford*, 10 W. Va. 470; *Brown v. Cook*, 77 W. Va. 356, 359, 87 S. E. 454; *Golding Sons Co. v. Cameron Pottery Co.*, 60 W. Va. 317, 55 S. E. 396; *Peters v. Nolan Coal Co.*, 61 W. Va. 392, 394, 56 S. E. 735.

The right of election of the payee to hold irregular indorsers as joint makers is determined by the contract made before or at the time of the making and delivery of the paper to the payee, unaffected by the subsequent dealings of the payee with the paper; and such right extends to renewals of such paper by the same parties, unless a new contract is shown. *Peters v. Nolan Coal Co.*, 61 W. Va. 392, 56 S. E. 735.

Election to Hold Indorser Liable.—The fact that the maker and irregular endorsers on such paper are sued thereon jointly in an action of debt, is sufficient to show that the plaintiff

has elected to hold such endorsers as original promissors. *Quesenberry v. Wood*, 64 W. Va. 5, 60 S. E. 881; *Kidd v. Beckley*, 64 W. Va. 80, 60 S. E. 1089.

The status of an irregular indorser of a negotiable promissory note is to be determined by the intention of the parties at the time of the transaction. If there is an agreement, that must govern; but if there is no such agreement, the law presumes that such irregular indorser intended to bind himself as joint maker, or as guarantor, as the payee, at any time, may elect. *Golding Sons Co. v. Cameron Pottery Co.*, 60 W. Va. 317, 318, 55 S. E. 396.

Must Be Signed before Delivery.—"Our cases relating to such irregular endorsements hold that, in order to render one who thus endorses a note liable as maker, it must have been signed by him before delivery." *Kidd v. Beckley*, 64 W. Va. 80, 83, 60 S. E. 1089.

Under N. I. L.—Intention.—Under the negotiable instruments law (Code 1913, ch. 98A, §§ 63, 64 [Barnes Code, ch. 98A, §§ 63, 64]) one, who otherwise than as maker, drawer or acceptor places his name upon a negotiable instrument, before delivery, otherwise than for the purpose of transferring title, is deemed to be an indorser only, unless by appropriate words he indicates an intention to be bound in some other capacity. *Thompson v. Curry*, 79 W. Va. 771, 91 S. E. 801; *Farmers, etc., Bank v. Kingwood Nat. Bank*, 85 W. Va. 371, 101 S. E. 734.

Payee's Right of Election—Instruction.—Instructions to juries on the trial of actions by payees against the maker and the irregular indorsers of negotiable paper, which ignore the element of contract between payee and such indorsers necessary to deprive him of such prima facie right of election are properly refused. *Peters v. Nolan Coal Co.*, 61 W. Va. 392, 56 S. E. 735.

I. GUARANTORS AND SURETIES.

See ante, "Irregular Indorser," IX, G, "Parties Plaintiff," XI, C, 1.

"Sureties who sign a negotiable instrument and leave it in the hands of the principal, who delivers it, can not be heard to say that they signed it upon conditions which were not fulfilled, yet * * * this principle has no application to nonnegotiable instruments." *Kidd v. Beckley*, 64 W. Va. 80, 86, 60 S. E. 1089. See post, GUARANTY; SURETYSHIP.

Signer of Note without Authority.—"Though it has been held that a person who has signed the name of another to a note or other contract without authority is liable thereon as promisor or covenantor, *Eddings v. Brown*, 1 Rich, Law (S. C.) 255, *Dusenbury v. Ellis*, 8 Wend. 3 Johns. Cas. 70, reason and the weight of authority are to the contrary, and make him liable, not on the instrument, as a party to it, but only as a warrantor of the signature, against whom assumpsit, sounding in damages, lies, or as a wrongdoer, making him liable in trespass on the case for fraud and deceit." *Haupt v. Vint*, 68 W. Va. 657, 660, 70 S. E. 702. See ante, AGENCY.

A suggestion as to the construction of § 20 (Barnes Code, ch. 98A, § 20) of the negotiable instruments law. *Haupt v. Vint*, 68 W. Va. 657, 70 S. E. 702.

Signature to Waiver and Guaranty Clause on Back of Note.—A waiver of presentment and demand for payment and of protest and notice of dishonor and nonpayment and a guaranty of payment, written or printed on the back of a negotiable note and signed by persons described in such waiver as indorsers, makes them liable as both indorsers and guarantors. *Toler v. Sanders*, 77 W. Va. 398, 87 S. E. 462.

K. ACCOMMODATION PARTIES.

See ante, "Order of Liability," IX,

F, 3; post, "Agreements Changing Ordinary Liability," IX, L.

L. AGREEMENTS CHANGING ORDINARY LIABILITY.

See ante, "Agreements for Attorney's Fees and Other Costs of Collection," II, C, 3; "General Rule as to Equities," VII, B, 1; "Order of Liability," IX, F, 3.

1. In General.

Consideration for Holder's Promise to First Exhaust Maker's Property.

—An agreement by the endorser of a negotiable promissory note made after the said note has become due and has been duly protested for nonpayment, and due notice thereof given to him, that he will pay the past due interest installments, and make payment of the subsequent interest installments as the same become due, and pay the protest fees, is not a good consideration for a promise by the holder of said note to forbear suing the endorser thereon until the property of the maker has been exhausted. *Cole v. George*, 86 W. Va. 346, 103 S. E. 201.

2. Parol Evidence to Show Agreement.

a. Maker and Other Original Parties.

An agreement among the original parties to a negotiable instrument, contrary to that imported by the relation of the names on the paper may be deduced from the facts and circumstances, and it does not violate the rule inhibiting variation of a written agreement by parol evidence. *Burton & Co. v. Hansford*, 10 W. Va. 470; *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 515; *Haupt v. Vint*, 68 W. Va. 657, 662, 70 S. E. 702; *Huffman v. Manley*, 83 W. Va. 503, 98 S. E. 613.

c. Indorser.

As a general rule, the endorser of a negotiable note will not be permitted to show by parol that he was not to be bound by his endorsement. Parol contemporaneous evidence is

not admissible to vary, alter or contradict the terms of a valid written instrument. *Lynch v. O'Brien*, 115 Va. 350, 79 S. E. 389; *Cole v. George*, 86 W. Va. 346, 103 S. E. 201.

Agreement to Be Liable as Guarantor.—One who has endorsed a negotiable promissory note in blank without qualification expressed in the writing cannot show by parol, as against the person to whom he delivered it, a contemporaneous agreement between them that he was to be liable only as guarantor and not as endorser, where no mistake or fraud in procuring the endorsement is alleged. *Cole v. George*, 86 W. Va. 346, 103 S. E. 201.

Agreement by Accommodation Indorsers.—An agreement between accommodation indorsers that they will be equally liable upon default by the maker need not be in writing nor formal. It may be inferred from facts, circumstances and conduct attending the transaction and shown by parol evidence. *Plumley v. First Nat. Bank*, 76 W. Va. 635, 87 S. E. 94.

X. PAYMENT AND DISCHARGE.

See post, "Presumptions and Burden of Proof," XI, G, 1. Va. Code 1919, §§ 5681-5687; Barnes Code, ch. 98A, §§ 119-125.

A. PAYMENT.

See post, PAYMENT.

Payment for Honor. — Va. Code 1919, §§ 5733-5739; Barnes Code, ch. 98A, §§ 171-177.

Bills in Sets. — Va. Code 1919, §§ 5744, 5745; Barnes Code, ch. 98A, §§ 182, 183.

2. To Whom Payment May Be Made.

"If the bill is payable to order, it is an authority to pay the bill to any person who becomes holder by a genuine indorsement. If the bill is originally payable to bearer it is an authority to pay the bill to the person who is the holder." *Bank v. Mc-*

Dowell County Bank, 66 W. Va. 545, 559, 66 S. E. 761.

Payment to a prior holder does not discharge a negotiable instrument in the hands of subsequent holder in due course. Subsection 4 of § 119 (Barnes Code, ch. 98A, § 119, cl. (4)), negotiable instrument act does not apply in such case. *Manchester v. Parsons*, 75 W. Va. 793, 84 S. E. 885.

6. Application of Payments.

Memorandum on Note as to Application of Payments.—The holder of a note has the right to apply a partial payment received thereon, first to a discharge of the interest then due, and the balance, if any, to the payment of the principal pro tanto. A memorandum made by him on the note, at the time of receiving the partial payment, "Endorsement on principal," followed by the amount received, does not estop him from afterwards applying enough of the payment to discharge the interest then due. *Dollar Sav., etc., Co. v. Crawford*, 69 W. Va. 109, 70 S. E. 1089.

8. Presumptions in Regard to Payment.

Found among Deceased Maker's Papers.—Where an action is brought upon a promissory note, and on the trial it is admitted that the note was found among the papers of the maker, after his death, there arises from this admission a presumption that the note was paid, but not such a presumption as changes the burden of proof to show payment—the fact of the note having been so found being a matter which can be given in evidence by the defendant to show payment. *Dodrill v. Gregory*, 60 W. Va. 118, 53 S. E. 922.

B. DISCHARGE OF PARTIES SECONDARILY LIABLE.

See ante, "Time of Presentment," VIII, B, 1, b.

1. Change or Alteration of Contract.

Where the maker of a negotiable

note assigned it to a bank as collateral security for overdrafts, but subsequently gave the bank written instructions to place the note to its credit, it was held that this in no way invalidated the endorsement previously made by the assignment, since the original endorsement completed the title of the bank as a bona fide holder of the note, and it was perfectly competent for the maker and the bank to thereafter agree to change the original purpose for which the transfer was made. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979.

2. Extension of Time to Principal.

By the common law and the negotiable instruments law (Code 1904, § 2841-a, subsec. 120, subdiv. 6 [§ 5682 Va. Code 1919]) a party secondarily liable on a negotiable instrument is released, "By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved." *Cape Charles Bank v. Farmers Mut. Exch.*, 120 Va. 771, 92 S. E. 918.

A cashier of a bank has no implied power, merely by virtue of his office, to receive money for interest in advance on a note owned by the bank and agree to extend time of payment and thus discharge an endorser from liability. *Bank v. Wetzel*, 58 W. Va. 1, 50 S. E. 886.

3. Notice to Sue.

A notice to sue under § 2890 of the Code (§ 5774 Va. Code 1919), in order to release an endorser on a note, must comply substantially with the statute and must show a clear, unequivocal and distinct demand upon or command to the creditor "forthwith to institute suit" upon the note. A notice to take such action as is necessary to get the endorser's name off the note, or to sue

one of the parties to the note, is not a sufficient compliance with the statute. *Edmonson v. Potts*, 111 Va. 79, 68 S. E. 254.

X½. PROMISSORY NOTES AND CHECKS IN GENERAL.

Va. Code 1919, §§ 5746-5751; Barnes Code, ch. 98A, §§ 184-189.

XI. ACTIONS.

B. FORM OF ACTION, AND REMEDIES IN GENERAL.

Va. Code 1919, §§ 5777-5760, 6242; Barnes Code, ch. 99, §§ 10, 11, 14, 16.

The object of the statute, § 11, chapter 99, Code (Barnes Code, ch. 99, § 11), providing that debt, or assumpsit, may be maintained and a joint judgment rendered against the maker and indorser of negotiable paper, "if the same be protested," is to give the payee, or holder of the paper, a surer and quicker remedy to collect his money than he formerly had, which was by a proceeding against each indorser in the inverse order of their indorsement; and also to avoid a multiplicity of actions. *Bank v. Lowther-Kaufman Oil, etc., Co.*, 66 Va. 505, 507, 66 S. E. 713.

Note Payable to One Maker.—The fact that no action at law can be maintained on a negotiable note made by two or more makers payable to one of them, while in the hands of the payee and all of the parties are living, does not render the paper invalid. The reason why an action at law can not be maintained upon it is because a man can not be both plaintiff and defendant in such action. The rule of law is technical and applies to the remedy and not to the right, and may be obviated by a resort to a court of equity. *Reid v. Windsor*, 111 Va. 825, 69 S. E. 1101.

C. PARTIES.

1. Parties Plaintiff.

See generally, post, PARTIES. See

also Va. Code 1919, § 5768; Barnes Code, ch. 99, § 4.

2. Parties Defendant.

See generally, post, PARTIES. See also Va. Code 1919, § 5760; Barnes Code, ch. 99, § 11.

Motion for Judgment.—Under Code § 2853 (§ 5760 Va. Code 1919), a proceeding by motion for a judgment may be maintained against all, or any one or any intermediate number of those bound on negotiable paper, regardless of whether they are joint makers or indorsers. *Colley v. Summers Parrott Hdw. Co.*, 119 Va. 439, 89 S. E. 906.

Former Practice. — "The making of a negotiable note, and each subsequent indorsement and transfer thereof constitute separate promises, or undertakings; and formerly the holder's remedy was against the maker and indorsers separately. He could bring several suits at the same time, but, of course, was entitled to but one satisfaction." *Farmers Nat. Bank v. Howard*, 71 W. Va. 57, 58, 76 S. E. 122.

D. DECLARATION.

1. Necessity and Sufficiency of Averments.

½a. In General.

Legal Effect.—"It is undoubtedly a general rule that only the legal effect of the instrument sued on need be alleged." *Kidd v. Beckley*, 64 W. Va. 80, 84, 60 S. E. 1089.

Time of Irregular Endorsement.—It is not necessary, in a suit by the holder or payee against the maker and irregular indorser of a promissory note, to render such irregular endorser liable as maker, that the declaration should allege either that such irregular endorsement was prior to the delivery of the paper or that the plaintiff had elected to treat him as maker—such prior endorsement being an evidential fact provable under a declaration

charging such endorser as maker, and institution of suit being sufficient evidence of such election. *Kidd v. Beckley*, 64 W. Va. 80, 60 S. E. 1089.

Execution of Instrument. — Good pleading and approved forms require that the declaration allege that defendants made and signed the note, where the action is upon a note. *Kidd v. Beckley*, 64 W. Va. 80, 81, 60 S. E. 1089.

But where the declaration purports to be upon a writing under seal, the making and signing thereof do not seem necessary averments. *Kidd v. Beckley*, 64 W. Va. 80, 81, 60 S. E. 1089.

Intention of Indorser in Blank of Nonnegotiable Note. — When the payee of a nonnegotiable note seeks to charge an endorser thereon who signs his name, in blank, on the back of the note before delivery, such indorser may be held as maker or guarantor, at the election of the holder, in the absence of a special agreement, but it must be alleged that the defendant indorsed the same with intent to become liable as guarantor or maker, according to the fact. *Brown v. Cook*, 77 W. Va. 356, 87 S. E. 454.

Same—Defendant Charged as Joint Maker.—In a declaration by the payee of a nonnegotiable note, the note was set out in haec verba, and it was alleged that the note was signed on the back thereof by L. B. C., "whereby the said W. G. C. (the maker) and L. B. C. jointly and as coobligors agreed to pay," "and being so liable the said W. G. C. and L. B. C., in consideration thereof, on the said 8th day of August, 1907 (the date of said note), undertook and promised the said plaintiff that they would pay him the said sum of six hundred dollars" (the sum named in the note). Held, a sufficient allegation to charge L. B. C. as joint maker of such note. *Brown v. Cook*, 77 W. Va. 356, 87 S. E. 454.

Negotiable Note Described as Prom-

issory Note.—In a proceeding by notice and motion for judgment on a negotiable note, the court said: "The notice described the paper sued on as 'a promissory note.' The point sought to be made out of a distinction between such a note and one which is negotiable is without merit." *Colley v. Summers Parrott Hdw. Co.*, 119 Va. 439, 441, 89 S. E. 906.

Mention of Indorsers.—The declaration in an action on a negotiable note against the makers thereof only need not mention such indorsers as have placed their names on the back of it. *Bank v. Lowry & Co.*, 81 W. Va. 578, 94 S. E. 985.

a. Title or Ownership.

Necessity. — "In an action upon a negotiable note it is essential that the declaration show that the plaintiff has title, and, therefore, a right to maintain his action." *Bank v. Hysell*, 22 W. Va. 142." *Farmers Nat. Bank v. Howard*, 71 W. Va. 57, 58, 76 S. E. 122.

Sufficiency.—In an action against the guarantor of a note, an averment in the declaration that the note was payable to the defendant, and that "the defendant for a valuable consideration, in writing, undertook, promised and guaranteed the payment" (of the note) "to the plaintiff," necessarily implies that the plaintiff had become and was the owner or legal holder of the note, the payment of which to the plaintiff the defendant had guaranteed, though it would have been better pleading to have averred in terms how the plaintiff became the owner or holder of the note. *Bowman v. First Nat. Bank*, 115 Va. 463, 80 S. E. 95.

The averment in question is not only sufficient to show title in plaintiff, but is a complete deraignment of its title from the maker down through all the different holders. *Farmers Nat. Bank v. Howard*, 71 W. Va. 57, 59, 76 S. E. 122.

A declaration on a negotiable note payable to the maker and another jointly, not partners, indorsed in blank by the maker, by one joint payee holding the note, indorsed in blank by the other who is also the maker, is bad on demurrer. *Dotson v. Skaggs*, 77 W. Va. 372, 87 S. E. 460.

c. Promise to Pay.

In a declaration upon a promissory note seeking to hold irregular endorsers, whose names were found on the back of the note upon its delivery to the payee, as original promissors, a failure to allege a promise to pay renders the declaration bad on demurrer. *Quesenberry v. Wood*, 64 W. Va. 5, 60 S. E. 881.

The clause "whereby he promised and agreed, for a valuable consideration * * * to pay," etc., in a declaration in assumpsit on a promissory note, is a sufficient averment of a promise, and is not merely descriptive of the note. It is affirmative and narrative as well as descriptive and yet not violative of the rule against duplicity. *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235.

f. Nonpayment.

In an action by the holder of a negotiable note against the indorsers only, it is not necessary to aver non-payment by the maker. *Farmers Nat. Bank v. Howard*, 71 W. Va. 57, 76 S. E. 122.

4. Use of Several Counts.

A declaration in debt in four counts on a promissory note, the several counts varying in terms to meet questions likely to arise on the trial as to which of defendants were makers and which were merely indorsers, which is good on any phase of the case presented by the several counts, is a good declaration. *Mellon & Sons v. Grafton Gas, etc., Co.*, 71 W. Va. 649, 77 S. E. 141.

5. Amendments.

Departure.—A plaintiff may, by dif-

ferent counts in his declaration, declare on the same notes against the defendants both as endorser and as guarantor, hence there is no departure where the original declaration declares against him as endorser, and the amended declaration declares against him as guarantor. *Bowman v. First Nat. Bank*, 115 Va. 463, 80 S. E. 95.

E. PLEA AND DEFENSES IN GENERAL.

1/2. In General.

To Require Proof of Protest.—To require proof of protest and notice of nonpayment when the same are averred in a declaration, they must be put in issue by a plea such as will call for such proof. *Bank v. Wetzel*, 58 W. Va. 1, 50 S. E. 886.

Assignment.—In a suit on a promissory note by an assignee the bill simply stating that the note was assigned to the plaintiff by its payee, not alleging a written assignment, and an answer denies the assignment, the plaintiff must prove it, though such answer is unsworn. *Horner v. Amick*, 64 W. Va. 172, 61 S. E. 40.

Plea that Two of Defendant Co-Makers Were Sureties Only.—The plea did not allege that the plaintiff had any notice of such suretyship relation of the parties before he endorsed the note. Held: That there was no error in the action of the court below in sustaining the general objection to the plea. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

Plea that Makers Were Indorsers.—The plea in question would have been a good plea if it had contained the further allegation that the plaintiff and defendants had agreed at the time of their execution or indorsement of the note that they should be jointly liable as sureties for the true makers and principal obligors, or allegations to that effect; as the plea, however, contained no such allegation, it was

fatally defective. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

In the special plea referred to there was no allegation that the plaintiff indorsed the note prior to the signing of it by the defendants setting up the plea. Hence taking the allegation of the plea to be true that the defendants were mere indorsers of the note, still on the face of the record they were prior indorsers to the plaintiff. And in the absence of any allegation in the plea of an actual agreement between the parties that their liability should be the prima facie order of liability negatives the conclusion of the plea and renders it bad. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

Liability of Makers, Indorsers or Sureties to Subsequent Indorser Who Takes Up Note.—It being immaterial whether the co-makers, indorsers or sureties, who filed the pleas in question were makers, indorsers or sureties on the note, the pleas alleging they were merely sureties, etc., were properly rejected. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

Attorney's Fees.—The defense in an action by an indorser, who has taken up and paid the note at maturity against the makers, that the amount claimed by plaintiff as attorney's fee under the obligation sued on and provided for therein is unreasonable in amount or unconscionable, can be made by special plea under section 3299 of the Code of 1904 (§ 6145 Va. Code 1919), although there is no necessity therefor. As the contract in suit is not under seal and the defendant seeks no recovery of any excess over the plaintiff's demand, the defense can be set up under the general issue of non-assumpsit, if the action be one in assumpsit, and the issue made by a general denial of the facts alleged in the notice of motion for judgment is not less comprehensive. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

If in an action by an indorser

against the maker of a note, defense by way of special plea under section 3299, Code of 1904 (§ 6145 Va. Code 1919), be adapted to plaintiff's claim for attorney's fee, the plea should allege the amount to the extent of which the defendant claims the attorney's fee in question is unreasonable or unconscionable, and should also allege the facts on which such claim is based with sufficient detail and certainty to apprise the plaintiff of the nature of the defense and to enable the court, on the facts being found or admitted, to decide whether the matter relied on constitutes a valid claim to the relief sought. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

1. General Issue.

Nil Debet.—If an action of debt be brought on a negotiable note against the maker thereof, and the defense is that there was annexed to the note, as a part and parcel thereof, an agreement in writing, stipulating that the note should only be payable on certain conditions, which had not been fulfilled, the defense may be made under the plea of nil debet. No special plea is necessary. *Nottingham v. Ackiss*, 107 Va. 63, 57 S. E. 592.

Failure of Consideration.—Held, that this defense, if sound, could be availed of under the general issue. *Brenard Mfg. Co. v. Brown*, 120 Va. 757, 92 S. E. 850.

Whenever failure of consideration is a proper defense in an action of assumpsit upon a negotiable note, it need not be specially pleaded, but may be proven under the general issue. *Dollar Sav., etc., Co. v. Crawford*, 69 W. Va. 109, 70 S. E. 1089.

Attorney's Fees.—In an action by an indorser who has taken up the note against the makers, there was no error in refusing to allow a special plea to be filed alleging that the plaintiff was entitled to recover only such costs of collection as he in fact paid and was

legally bound to pay his own attorney, as that defense could have been as well made under a plea of the general issue as by special plea. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

2. Denial of Execution.

Where a bill alleges that a person made a promissory note, and an answer, verified by affidavit, denies that such person made the note, the plaintiff must prove the signature and execution of the note. *Horner v. Amick*, 64 W. Va. 172, 61 S. E. 40.

In an action on a note the defendant has no right to prove that he did not execute the note, where no affidavit is filed denying the execution of the note, as required by § 3279 (§ 6125 Va. Code 1919), Code of Virginia. *Chestnut v. Chestnut*, 104 Va. 539, 52 S. E. 348.

In an action on a promissory note, in which forgery is relied upon as a defense, it is not error for the trial court to refuse to strike out a plea of non est factum, denying the handwriting of the signature and verified by affidavit. *First Nat. Bank v. Barker*, 75 W. Va. 244, 83 S. E. 898.

4. Incapacity of Parties.

See ante, "In General," IX, A, 1.

5. Fraud in Procurement.

It is essential that the fraud be distinctly alleged in the pleadings so that it may be put in issue and evidence thereof given. This rule is applicable as well to the pleadings of the plaintiff as those of the defendant. *Interstate Finance Co. v. Schroder*, 74 W. Va. 67, 71, 81 S. E. 552.

"Under a special plea by § 5, chapter 126, serial § 4825, Code 1913 (Barnes Code, ch. 126, § 5), fraud would be provable even as against the holder of a note in due course, for the purpose of shifting on him the burden of proving that he was a bona fide purchaser for value in the usual course of business, without notice of equities as between the original par-

ties to the contract." *Interstate Finance Co. v. Schroder*, 74 W. Va. 67, 70, 81 S. E. 552.

6. Illegality, Want or Failure of Consideration.

See ante, "General Issue," XI, E, 1.

Want.—In an action of assumpsit by the payee against the maker of a note, the latter may file a special plea setting up facts showing that the note was made for the payee's accommodation and was without consideration, even though such matters are provable under the general issue which he has also pleaded. *First Nat. Bank v. Freeman*, 83 W. Va. 477, 98 S. E. 558.

Failure.—The defense of a failure of consideration may be made, in an action of assumpsit upon a promissory note, either under the plea of nonassumpsit or a special plea under § 5, ch. 126, Code of West Virginia (Barnes Code ch. 126, § 5). *McClanahan v. Caul*, 63 W. Va. 418, 60 S. E. 382.

A plea which in fact avers that land was the real consideration for the note, and that the defendant did not get by his purchase of stock the number of acres that he was to have thereby, sufficiently shows that the real consideration for the note failed. The plea is good under Code 1106, ch. 126, § 5 (Barnes Code, ch. 126, § 5). *Belcher v. Dickinson*, 70 W. Va. 750, 751, 75 S. E. 78.

8. Payment or Satisfaction.

A. instituted his action against S. & Bros. only, upon two joint promissory notes, made by S. & Bros. and H. Judgment was recovered by him in the action against S. & Bros. for the full amount due upon the notes, which judgment remained in full force and effect. At a subsequent term, A. caused the action to be reinstated upon the docket, remanded to rules, summons to be issued thereout, and served on H. who appeared at the next term and plead the judgment against S. & Bros. as a bar to the suit against him. The

court sustained the plea and dismissed the suit, at the costs of the plaintiff. Held, no error. *Armentrout v. Smith*, 56 W. Va. 356, 49 S. E. 377.

9. Verification.

See generally, post, PLEADING. See also Va. Code 1919, § 6133.

Special plea under section 6145 Va. Code 1919, should be verified by affidavit. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

Necessity.—In an action of debt on a promissory note, an affidavit being filed with the declaration as authorized by W. Va. Code, chapter 125, § 46, the clerk cannot receive an issuable plea in bar at rules without the affidavit of the defendant required by § 46. Though he does receive such plea, and omits to enter judgment against the defendant, and no plea is filed by leave of the court at the first term, no plea can be filed by the defendant thereafter, but the plaintiff has right to have judgment recorded by the court for his demand. *Hansford v. Snyder*, 63 W. Va. 198, 59 S. E. 975.

A sworn plea under Code, § 3279 (§ 6125 Va. Code 1919), is equivalent to a plea of non est factum. *Holds-worth v. Anderson Drug Co.*, 118 Va. 359, 362, 87 S. E. 565.

10. Amendments.

See generally, ante, AMENDMENTS.

In an action upon a renewal note, unless accepted in absolute payment of the original by express agreement, the plaintiff may of right, upon the filing of a plea of non est factum by the defendant, accept such plea and so amend the pleadings as to set up the original note. *Ritchie County Bank v. Bee*, 62 W. Va. 457, 59 S. E. 181.

The notice for a judgment against an indorser of a negotiable note containing a waiver of notice of presentment and dishonor on its face should allege that fact, but the fact being un-

disputed, an amendment at the bar would have been proper, and the error of omitting it is harmless. *Colley v. Summers Parrott Hdw. Co.*, 119 Va. 439, 89 S. E. 906.

11. Waiver and Estoppel.

One who has repeatedly renewed his endorsement of a note after full knowledge that a part of the collateral put up by the maker with the original note had been withdrawn by him must be held to have waived that defense, and to be estopped from availing himself of it as to the renewal. *Lynch v. O'Brien*, 115 Va. 350, 79 S. E. 389.

G. EVIDENCE.

1. Presumptions and Burden of Proof.

See ante, "Presumption of Consideration," II, B, 1; "Presumptions in Holder's Favor," VII, C.

a. Presumptions.

Accommodation Makers — Co-Sureties.—As between accommodation makers of a promissory note the presumption is that they are co-sureties, and as such liable to contribution to one of their number discharging the obligation, but this presumption may be rebutted by parol evidence showing that the one last signing was and is a surety for the prior accommodation makers, and not their co-surety. *Huffman v. Manley*, 83 W. Va. 503, 98 S. E. 613.

Consideration—Notes and Deed of Trust—N. I. L.—Under the negotiable instruments law (Code 1904, sec. 2841-a, subsec. 24 [§ 5586 Va. Code 1919]) a deed of trust and notes secured by it are prima facie evidence of a valuable consideration, in the absence of affirmative evidence of lack of consideration. *Murphy's Hotel Co. v. Herndon*, 120 Va. 505, 518, 91 S. E. 634.

The acceptance of a check containing the words "in full of all demands," raises a prima facie presumption that it is in full payment and discharge of all previously existing liabilities, and

the burden of overcoming this presumption by direct or circumstantial evidence rests upon the payee. *Lurty v. Lurty*, 107 Va. 466, 59 S. E. 405.

Indorsement by One Joint Payee as Indorsement for Others.—Where negotiable paper is payable to two or more persons, there is no presumption that one indorses and transfers it for the others, and if the title is to be transferred, it must be by the indorsement of all. *Dotson v. Skaggs*, 77 W. Va. 372, 374, 87 S. E. 460.

Possession by Joint Payee as Possession by Both.—Possession of a negotiable note payable to the maker and another jointly, not partners, indorsed in blank by the maker, by either joint payee is presumptively possession by both, and does not import exclusive ownership by the possessor. *Dotson v. Skaggs*, 77 W. Va. 372, 87 S. E. 460.

Mistaken, Unintentional or Unauthorized Cancellation.—Under paragraph 123, section 2841-a of the Code, being section 123, Art. 8 (§ 5685 Va. Code 1919), of the negotiable instruments law, which is in accord with an established rule of evidence, the presumption is that the burning of an instrument was intentional and done for the purpose of canceling the instrument. This presumption can only be overcome by showing that such burning was done "unintentionally, or under a mistake, or without authority." *Jones v. Coleman*, 121 Va. 86, 92 S. E. 910.

Under the negotiable instruments law, Code of 1904, section 2841-a, paragraph 123 (§ 5685 Va. Code 1919), where the date and signature on a promissory negotiable note had both apparently been destroyed by burning, the presumption is that the burning was intentional and done for the purpose of cancelling the instrument. *Jones v. Coleman*, 121 Va. 86, 92 S. E. 910. See post, "Burden of Proof," IX, C, 2.

Presumption as to Negotiability of Lost Note.—See post, LOST INSTRUMENTS AND RECORDS.

b. Burden of Proof.

Necessity for Proof of Handwriting.—Va. Code 1919, § 6125.

Execution and Negotiation.—In an action on promissory notes proof of their execution and negotiation is essential, and their mere production in court is not sufficient. "The common-law rule requiring proof of the signature of the maker remains unaltered by § 40, c. 125 (Barnes Code ch. 125, § 40), Code. It dispenses with such proof only where the declaration or other pleading alleges that 'any person made, indorsed, assigned or accepted the writing in controversy, and the fact averred is not denied by an affidavit filed with the plea which puts it in issue.' The statute applies only where there is a pleading, not traversed, expressly averring the due execution of the instrument, sought to be enforced against the apparent maker. *Kelly v. Paul*, 3 Gratt. (44 Va.) 191; *Shepherd, etc., Co. v. Frys*, 3 Gratt. (44 Va.) 442; *Horner v. Amick*, 64 W. Va. 172, 61 S. E. 40; *Central Land Co. v. Calhoun*, 16 W. Va. 361." *Williams v. Smith Ins. Agency*, 75 W. Va. 494, 84 S. E. 235.

Burden of Proving Execution, Contents and Loss of Note.—See post, LOST INSTRUMENTS AND RECORDS.

Holder in Due Course.—In an action upon notes, where fraud in their procurement is established, the burden is upon the plaintiff to show that he, or some other person under whom he claims, acquired the title as a holder in due course. *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

Same — Agent of Payee Filling Blanks and Misreading Note to Payee — Holder's Burden of Proof.—It was held: That the difference in question in the due date of the notes

was a very material departure from the agreement actually made for the benefit of the maker, and that whether the notes were void or voidable, a holder of the notes could not recover unless he showed that he obtained them bona fide for value in the usual course of business, before maturity, and under circumstances which created no presumption that he knew of the facts which impeached their validity. *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

Completion of Instrument within Reasonable Time—*N. I. L.*—"It has been held that the burden of proof under the negotiable instruments law, is upon the plaintiff—the subsequent holder of the note for value—to show that the instrument was completed within a reasonable time. (*Madden v. Gaston*, 137 App. Div. 294, 121 N. Y. Supp. 952). It is unnecessary, however, for us to pass on such question in the case before us." *Brown v. Thomas*, 120 Va. 763, 769, 92 S. E. 977.

Actual Contract Must Be Shown.—If the contract between the maker and the indorsers and the payee is different from that which the form of the note implied, it is necessary to show it in evidence. *Peters v. Nolan Coal Co.*, 61 W. Va. 392, 398, 56 S. E. 735.

Payment.—In an action upon a promissory note, where payment is relied on as a defense, the burden is on the defendant to prove such defense by a preponderance of the testimony. *Dodrill v. Gregory*, 60 W. Va. 118, 53 S. E. 922.

Failure of Consideration.—See *Bernard Smith Co. v. Bernard*, 124 Va. 518, 98 S. E. 677.

Plea of Nil Debet—Effect at Common Law.—"At common law the plea of nil debet puts in issue every material allegation of the declaration, or other pleading, with respect to which it is interposed. Hence, in the present case, under that procedure, in or-

der to recover, the burden would have devolved upon the plaintiff to prove that the defendant made the note sued on, that the payee indorsed and negotiated it to the plaintiff, before maturity, for a valuable consideration, and that plaintiff was the holder in due course, without notice, and that it was still due and unpaid. *Clason v. Parrish*, 93 Va. 24, 24 S. E. 471. See, also, note to that case by Judge Burks, 2 Va. L. R. 191; *Burks' Pl. & Pr.*, p. 99, and citations in note." *Holds-worth v. Anderson Drug Co.*, 118 Va. 359, 360, 87 S. E. 565.

Holder's Extension of Time to Principal.—Where the defense to an action on a negotiable instrument is a release of a party secondarily liable by the holder's agreement extending the time of payment by the principal without expressly reserving the right of recourse against others, the burden of proving the existence of the agreement rests upon the defendant. *Cape Charles Bank v. Farmers Mut. Exch.*, 120 Va. 771, 92 S. E. 918.

3. Competency of Witnesses.

See generally, post, WITNESSES.

Upon the trial of an issue between the holder of a negotiable note and one who has assumed its payment, to ascertain whether or not the holder was in good faith the holder and owner for value, and, therefore, involving the validity of a subsequent payment to the payee, no question is involved as to the execution of the note or its original validity, nor any other question in which the payee has, or can have, an interest, and such holder is a competent witness, notwithstanding the death of the payee. *Morgan v. Booker*, 106 Va. 369, 56 S. E. 137.

4. Admissibility.

See generally, post, EVIDENCE; PAROL EVIDENCE. In addition, see ante, "Parol Evidence to Show Agreement," IX, L, 2.

Relations of Parties—Want of Con-

consideration.—"It is permissible, in an action between the original parties to a note, to show the relation between them, or that the note was executed purely for the payee's accommodation." *First Nat. Bank v. Freeman*, 83 W. Va. 477, 479, 98 S. E. 558.

Illegal Consideration.—In an action on a promissory note the defendant may introduce evidence to show that the note was but a cloak to hide an advance of money in consideration of illicit sexual intercourse. *Ianham v. Meadows*, 72 W. Va. 610, 78 S. E. 750.

Fraud in Action by Bona Fide Holder.—See ante, "Fraud," VII, B, 2.

Other Similar Endorsements. — In an action against a son as endorser of notes made by and discounted for his father, where the facts and circumstances tend to show that the son had full knowledge of the use his father was making of his name, fifty-odd other notes, similarly made, endorsed and negotiated, are admissible in evidence as tending to show that the father had authority to endorse the son's name on the note sued on. *Bowman v. First Nat. Bank*, 115 Va. 463, 80 S. E. 95.

Declarations and Admissions.—In an action on a note the trial court permitted an attorney to testify that after the date of an alleged receipt by the payee for a part payment upon the note, the payee sent the note to the attorney for collection. It was claimed that this evidence should have been excluded upon the ground that the self-serving declarations of the payee would have been excluded, and that it was tantamount to admitting the payee's statement that the debt had not been paid. Held: That the fact testified to was not a declaration of the payee, but was a fact explaining the attorney's possession of the note, and tending to prove his principal's ownership. Even if considered a declaration by the payee that the note belonged to him at that time, it was

admissible, for declarations and conduct as to the ownership of property, made by a person in possession thereof, are generally admissible in evidence upon an issue as to such ownership as part of the *res gestae*. *Keister v. Philips*, 124 Va. 585, 98 S. E. 674.

Minutes and Correspondence of Corporation Maker.—In a suit to cancel a judgment by confession upon a negotiable note, the minutes of the meetings of the board of directors of a farmers exchange, a corporation, and copies of correspondence obtained from its files, relating directly or indirectly to the note in question, were admissible against the indorsers, all of whom were stockholders or directors of the exchange. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979.

Harmless Error.—In a suit by the holder in due course against the maker of a negotiable note, the genuineness of the indorser's signature is not material if he has either authorized or subsequently ratified such indorsement, and, therefore, the exclusion of certain testimony was immaterial. *Manchester v. Parsons*, 75 W. Va. 793, 84 S. E. 885.

Amount of Note. — Where the amount of a negotiable note is expressed in the margin but not in the body of the note, the note cannot be used in evidence to support an averment in the declaration of the making of a note for the sum stated in the margin. *Chestnut v. Chestnut*, 104 Va. 539, 52 S. E. 348.

Unauthorized Statements of Director of Plaintiff Bank. — Testimony as to statements made by a director of a bank, the holder of a note, to an indorser was properly excluded in an action against the drawer and indorser of the note. There being no suggestion that the director had any authority from the bank to make any special contract or agreement with the indorser, the unauthorized statements

of the director could not affect the rights of the bank. *Triplett v. Second Nat. Bank*, 121 Va. 189, 92 S. E. 897.

5. Weight and Sufficiency.

Execution.—In order to entitle the plaintiff to recover on a note, upon an issue of non est factum, it is incumbent upon him to prove either that the defendant signed the note, or that his name was signed thereto by some person duly authorized, or that, having knowledge of the fact that his name was so signed and of all the material facts, he subsequently ratified the same. *Ritchie County Bank v. Bee*, 62 W. Va. 457, 59 S. E. 181.

Same — Cross-Examination. — Evidence of the execution of a note, elicited by cross-examination of a witness, suffices to prove it. *Bank v. Lowry & Co.*, 81 W. Va. 578, 94 S. E. 985.

Evidence to show failure of consideration in a promissory note must clearly show that the thing on which the failure rests entered into consideration of the note. *Guthrie v. Huntington Chair Co.*, 69 W. Va. 152, 71 S. E. 14.

Same—Defense Authorized by Section 5590 Va. Code 1919.—The evidence failed to show failure of consideration for the note of a corporation, endorsed by its stockholders (the defendants) and given to its manager for his stock or that defendants were misled to their injury by certain misrepresentations by the manager. *Bernard Smith Co. v. Bernard*, 124 Va. 518, 98 S. E. 677.

To Show that Plaintiff Is Holder in Due Course.—Where the burden has been cast upon the plaintiff to show that he is holder in due course, proof that he purchased the paper before maturity and paid value therefor fully discharges that burden. *Manchester v. Parsons*, 75 W. Va. 793, 84 S. E. 885.

Notice of Infirmary—Bank Officer.

—The mere existence of a personal relationship between the cashier of one bank and the president of another, to which it sends commercial paper, regular on its face, in the usual course of business, is not proof of such notice of infirmity in the paper, to the receiving bank or its president, as the cashier of the sending bank may have had. *Hartley v. Ault Woodenware Co.*, 82 W. Va. 780, 97 S. E. 137.

Bad Faith in Purchasing Notes.—In an action on negotiable notes evidence held insufficient to raise any question for the jury as to the good faith of the plaintiff in his purchase of the notes. *Fleshman v. Bibb*, 118 Va. 582, 586, 88 S. E. 64.

Prima Facie Evidence of Liability on Draft.—In absence of evidence to the contrary, proof showing a draft as part consideration for the purchase of real estate, drawn by the purchaser, at the instance of the seller, to one negotiating the sale, is prima facie sufficient, with the draft itself, to warrant recovery in any proper action by the payee against the drawer. *Middle Atlantic, etc., Co. v. Stout*, 72 W. Va. 23, 77 S. E. 358.

Waiver of Steps by Indorser.—Evidence in a suit on a note held sufficient to show indorser's waiver, after maturity, of presentment after payment. *Thompson v. Curry*, 79 W. Va. 771, 91 S. E. 801.

Interest in Advance as Extension of Time—Prima Facie Case.—While payment and acceptance of interest in advance is not in itself an agreement to extend the time of payment of the obligation on which the interest is paid, yet it is evidence tending to prove the existence of such an agreement, and in the absence of any other evidence bearing upon the negative of the question, such payment and acceptance of interest affords prima facie evidence of the existence of such an agreement. However, when there is other evidence such as the acts, situation of and cir-

cumstances which surround the parties, slight evidence to the contrary will rebut the prima facie case made by the evidence of payment and acceptance of interest in advance. *Cape Charles Bank v. Farmers Mut. Exch.*, 120 Va. 771, 92 S. E. 918.

Same—Rebuttal by Other Evidence.

—In an action on a note defended against on the ground of an extension of time to the principal, where the case was not submitted on the bare facts of payment and acceptance of interest in advance, but all the officers of the plaintiff and its assignor bank testified in rebuttal of the prima facie case which such payment and acceptance might otherwise have made out, it was held that such testimony and the evidence as to the situation of the parties, their relation to each other and the surrounding circumstances warranted the jury in finding that there was not in fact any meeting of the minds of the maker and holders of the note sued on upon any agreement to extend the time of payment or to postpone the right to enforce the note. *Cape Charles Bank v. Farmers Mut. Exch.*, 120 Va. 771, 92 S. E. 918.

Judgment for Plaintiff — Unexplained Mutilation of Note by Burning.—Held, that the evidence was insufficient to sustain a judgment for plaintiff. *Jones v. Coleman*, 121 Va. 86, 92 S. E. 910.

H. VARIANCE AND PROOF.

If the plaintiff, who is the payee of a note in which the amount is left blank in the body thereof, has not lost the evidence that the blank was left by mistake, he can fill the blank in the body of the note with the amount agreed on with the maker, and so make the note conform to the averments of his declaration. *Chestnut v. Chestnut*, 104 Va. 539, 52 S. E. 348.

Evidence Admissible under Declaration.—The declaration in an action on a negotiable note against the mak-

ers thereof only need not mention such indorsers as have placed their names on the back of it, and the indorsed note is admissible under the declaration so drawn. *Bank v. Lowry & Co.*, 81 W. Va. 578, 94 S. E. 985.

I. QUESTIONS OF LAW AND FACT.

Attorney's Fee.—In every case, the facts being admitted or found, the determination of what may be recovered as an attorney's fee under a provision in the note in suit creating the obligation of payment of such a fee, is for the judge of the trial court in an action at law, and, of course, is also for such judge where the question arises in a suit in equity. *Cox v. Hagan*, 125 Va. 656, 100 S. E. 666.

Good Faith.—Where, in an action on a negotiable note, the defendant sets up by his plea that the note was procured by the fraud of the payee, and that the title of the plaintiff is colorable merely, and that the payee is still the real owner, the failure and refusal of the plaintiff, while being examined as a witness in the case, to answer questions which will throw light on the issue, without any satisfactory explanation or reason for such refusal, raises a presumption against the bona fides of the transaction by which he became the holder of said note, and it is for the jury to say whether or not the plaintiff is a holder in good faith, or connived with the payee to purchase the note as their agent. *Aragon Coffee Co. v. Rogers*, 105 Va. 51, 52 S. E. 843.

Credibility of plaintiff's testimony that he acquired title to notes as holder in due course was for jury, though undisputed. *Duncan v. Carson*, 127 Va. 306, 103 S. E. 665, 105 S. E. 62.

Reasonable Time for Filling Blanks.

—What is a reasonable time for filling blanks in an incomplete negotiable instrument is usually a question for the jury, when the facts are doubtful or disputed, but when the facts

are clearly established, or undisputed, or admitted, the reasonable time is a question of law, as where the facts ascertained by a demurrer to the evidence are such that reasonable minds could draw but one conclusion therefrom, it is for the court to draw that conclusion as a matter of law. *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977.

Existence of Agreement Extending Time to Principal.—Where the existence of an agreement by the holder of a negotiable note extending the time of payment by the principal is relied on by a person secondarily liable as a discharge of such liability under the negotiable instruments law (Code 1904, § 2841-a, subsec. 120, subdiv. 6 [§ 5682 Va. Code 1919]), the question of the existence of such an agreement is a mixed question of law and fact; and when the mutual agreement is to be gathered from the acts of the parties, their situation and the surrounding circumstances, it is for the jury to determine what were the intention and understanding upon which the minds of the parties met, but if the facts and circumstances are all ascertained, whether they constitute such an agreement is, of course, a question for the court. *Cape Charles Bank v. Farmers Mut. Exch.*, 120 Va. 771, 92 S. E. 918.

Interest in Advance—Circumstances

—Intention of Parties.—Where, in addition to the fact of payment and acceptance of interest in advance, there is other evidence as to the situation of the parties, their relations to each other and the surrounding circumstances, it is a question of fact for the jury to ascertain with what intention the interest was paid and accepted in advance. *Cape Charles Bank v. Farmers Mut. Exch.*, 120 Va. 771, 782, 92 S. E. 918.

1½. DAMAGES, CHARGES AND INTEREST.

See ante, "Amount Recoverable by Holder." VII, D. See also Va. Code 1919, § 5760.

J. JUDGMENT.

Against All Defendants.—Va. Code 1919, § 5760.

Actions on Instruments Waiving Homestead.—Va. Code 1919, § 6551.

Action on Lost Instrument.—Va. Code 1919, § 6242.

Joint Judgment against Maker and Indorsers.—A joint action may be maintained by the holder of a negotiable note and a joint judgment recovered against the maker and all the indorsers, if the note has been protested or if protest and notice has been waived by the indorsers. *Bank v. Lowther-Kaufman Oil, etc., Co.*, 66 W. Va. 505, 66 S. E. 713.

BILLY.—See *State v. Lett*, 63 W. Va. 665, 60 S. E. 782. See, also, post, WEAPONS.

BINDING RECEIPT OR SLIP.—Where the insurance is to become effective or the risk attach before the application has been formally accepted by the insurer, frequently a limited acceptance known as a **binding receipt** or **binding slip** is given stating such fact. *Hallauer v. Fire Association*, 83 W. Va. 401, 98 S. E. 441.

BIRTHS.—As to registration of births, see post, STATE.

BLACK JACK.—See *State v. Lett*, 63 W. Va. 665, 60 S. E. 782. See, also, post, WEAPONS.

BLACKMAILING.—See post, EXTORTION.

BLANKS.—See ante, ALTERATION OF INSTRUMENTS; BILLS, NOTES AND CHECKS.

BLASPHEMY.—See post, PROFANITY.

BLEND.—See Va. Code, 1919, sec. 1182.

BLIND.—See post, DEAF, DUMB AND BLIND.

BLOODHOUNDS.—Raising and Training for Police Purposes.—See Va. Code, 1919, sec. 5048.

Blood Stains.

See the title BLOOD STAINS, vol. 2, p. 501, and references there given.

BLUDGEON.—"Bludgeon" is defined as "a short club commonly loaded at one end, or bigger at one end than the other; used as a weapon." State v. Lett, 63 W. Va. 665, 666, 60 S. E. 782.

BLUE SKY LAWS.—See Va. Code, 1919, sec. 4465; Va. Acts, 1918, p. 676. Acts 1920, p. 535; Pollard's Code, 1920, p. 647; Barnes Code, ch. 55B.

BOARDING HOUSES.—See post, INNS AND INNKEEPERS.

BOARDS.—As to board of bar examiners, see ante, ATTORNEY AND CLIENT. As to board of directors, see ante, BANKS AND BANKING, post, CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS. As to board of visitors, see post, COLLEGES AND UNIVERSITIES. As to board of county commissioners, see post, COUNTIES, and references there given. As to board of supervisors, see post, COUNTIES; ELECTIONS; STREETS AND HIGHWAYS. As to board of state canvassers, see post, ELECTIONS. As to board of health, see post, HEALTH. As to board of pension commissioners, see post, PENSIONS. As to board of medical examiners, and board of pharmacy, see post, PHYSICIANS AND SURGEONS. As to board of education, see post, SCHOOLS. As to board of control, board of public works, and board of regents, see post, STATE.

Board of Charities and Corrections.—Va. Code 1919, secs. 1888-1904.

BOILER ACT.—See post, MASTER AND SERVANT.

BOILERMAKER.—In *First Nat. Bank v. Trigg Co.*, 106 Va. 327, 336, 56 S. E. 158, the court citing *People v. Morgan*, 63 N. Y. Supp. 76, 79, says: "A **boilermaker** is a manufacturer, although he purchases the boiler plates rolled into form and purchases also the tubes and rivets."

BONA FIDE.—As to bona fide holder, see ante, BILLS, NOTES AND CHECKS. As to bona fide purchaser, see ante, ADVERSE POSSESSION; ATTACHMENT AND GARNISHMENT; BILLS, NOTES AND CHECKS; post, FRAUDULENT AND VOLUNTARY CONVEYANCES; JUDICIAL SALES; RECORDING ACTS; SALES; TAXATION; VENDOR AND PURCHASER.

Who is a **bona fide claimant**, in the sense that he may prevent a forfeiture by paying taxes? The claim need not be under a deed, will, decree or other paper apparently free from defects and imperfections. In this instance, as in the law of adverse possession, honest belief of the claimant, as to what the law is, as applied to the instrument under which he claims, entitles him to the status of a **bona fide claimant**, however mistaken his judgment may be. He may also have notice of the existence of an adverse claim to the same title. The

supreme court has said that a *bona fide* claimant in the law of adverse possession need not believe his claim to be a good or valid one. He may know that some other person has a better right, and it is not necessary that he should think his claim good in its inception, for it generally begins in, and presupposes, wrong. The only qualification is that it must not be fraudulent nor involve any breach of trust, and as to this latter, there are some few exceptions. *State v. West Branch Lumber Co.*, 64 W. Va. 673, 693, 63 S. E. 372, see ante, ADVERSE POSSESSION; post, TAXATION.

BONDS.

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CROSS REFERENCES.

See the title BONDS, vol. 2, p. 507, and references there given. In addition, see ante, BENEFICIAL AND BENEVOLENT ASSOCIATIONS; BILLS, NOTES AND CHECKS; post, LACHES; LIFE INSURANCE; MERGER; SCHOOLS; WORKING CONTRACTS. As to bonds of executors and administrators, see post, EXECUTORS AND ADMINISTRATORS. As to forthcoming and delivery bonds, see post, FORTHCOMING AND DELIVERY BONDS. As to injunction bonds, see post, INJUNCTIONS. As to municipal, state and county bonds, see post, MUNICIPAL, STATE AND COUNTY SECURITIES. As to bonds of public officers in general, see post, PUBLIC OFFICERS. As to bonds of sheriffs and constables, see post, SHERIFFS AND CONSTABLES. As to statutory bonds, see post, STATUTORY BONDS. As to sureties on bonds, see post, SURETYSHIP. As to blue sky law, see Va. Acts 1918, ch. 408; Pollard's Code Biennial, p. 647; W. Va. Acts 1921, p. 240, ch. 99, amending Barnes Code, ch. 55B, §§ 1, 11, 12, 13, 18; Barnes Code ch. 55B, §§ 2-10, 14-17, 19-21.

II. DEFINITION AND NATURE.

A. DEFINITIONS AND DISTINCTIONS.

A common-law bond is a bond not executed pursuant to any statute. *Penn Iron Co. v. Trigg Co.*, 106 Va. 557, 558, 56 S. E. 329.

III. FORM, REQUISITES AND VALIDITY.

C. CONSIDERATION.

1. Imported by Bond.

Where an instrument is under seal, a consideration is presumed. *Bolyard v. Bolyard*, 79 W. Va. 554, 91 S. E. 529.

As between the parties to a bond a valuable consideration is conclusively presumed, and neither the obligor nor his personal representative will be permitted to offer evidence to the contrary, either at law or in equity; and such consideration is prima facie presumed as against third persons. *Woody v. Schaaf*, 106 Va. 799, 56 S. E. 807.

4. Illegality of Consideration.

A condition of a penal bond binding a husband to resume and maintain his marital and family relations is founded on a valid consideration not forbidden by positive law or public policy. *Bolyard v. Bolyard*, 79 W. Va. 554, 91 S. E. 529.

D. EXECUTION.

2. Authority to Execute.

Bond for Obtaining Any Writ or Order.—Va. Code 1919, § 6375; Barnes Code, ch. 136, § 2.

8. Preparation of Bonds by Clerks of Court.

Barnes Code, ch. 117, § 7. See post, CLERKS OF COURT.

9. Incomplete Bonds.

"Incompleteness of a bond on its face, when tendered to the obligee, is sufficient to put him upon inquiry as to whether those whose signatures it bears intended to be bound by it in such condition. This is particularly and universally true when the names of per-

sons, apparently contemplated as additional sureties appearing in the body of the bond or elsewhere, have not been signed to it. *Wendlinger v. Smith*, 75 Va. 309; *Nash v. Fugate*, 32 Gratt. (73 Va.) 595; *Ward v. Churn*, 18 Gratt. (59 Va.) 801; *Hicks v. Goode*, 12 Leigh (39 Va.) 479." *Star Grocery Co. v. Bradford*, 70 W. Va. 496, 497, 74 S. E. 509.

K. UNAUTHORIZED BOND TAKEN BY OFFICER FOR PERSON IN HIS CUSTODY.

Barnes Code, ch. 41, § 12.

L. BOND OF PERSON DEAD AT TIME OF EXECUTION.

Barnes Code, ch. 99, § 12.

IV. ENDORSEMENTS ON BONDS.

As to endorsement and delivery as transferring property in bonds, see post, "In General," VI, A, 1.

V. INTERPRETATION, CONSTRUCTION AND EFFECT.

B. AS TO LIABILITY OF OBLIGORS.

2. In Joint Bonds.

c. Effect of Death of One Obligor.

Liability of Estate of Dead Obligor.

—Barnes Code, ch. 99, § 13.

B½. WHO IS THE OBLIGEE.

A bond executed by a bank cashier, reciting his previous election as such, and stating the condition to be that he "shall well and faithfully apply and account for all monies which may come into his hands as such cashier," is, when properly construed, an indemnity to the bank against loss by his default, although its officers are therein named as obligees as president and as directors of the bank in its corporate name. *Clark v. Nickell*, 73 W. Va. 69, 79 S. E. 1020.

D. CONCLUSIVENESS.

The fair and voluntary execution of a bond is conclusive, upon all who seal it, of everything admitted therein.

Point Pleasant *v.* Greenlee, 63 W. Va. 207, 60 S. E. 601.

VI. NEGOTIABILITY AND TRANSFER.

A. HOW TITLE TRANSFERRED.

1. In General.

Presumption of Ownership from Indorsement and Possession after Obligee's Death.—Where two bonds and a certificate of deposit payable to the decedent, but endorsed by him to his wife, were in the possession of his wife at the death of the decedent, the presumption is that the bonds and the certificate of deposit had been delivered to and were the property of the wife. Slater *v.* Slater, 124 Va. 370, 98 S. E. 7.

2. Assignment.

See ante, ASSIGNMENTS.

VI½. WHAT CONSTITUTES A BREACH.

"A bond to save harmless against judgment is broken the moment a judgment is recorded against the obligee." 16 Am. & Eng. Ency. L. 177. Even though by default. Payment is not necessary. 4 Am. & Eng. Ency. L., bottom p. 695." Carr *v.* Davis, 64 W. Va. 522, 527, 63 S. E. 326.

VII. INTEREST.

See post, "Under Statutory Provisions," IX, N, 2, b; INTEREST.

IX. ACTIONS ON BONDS.

½A. RIGHT TO SUE.

The common law right to sue upon a bond is not affected by the remedies provided in the mortgage given for its security, unless the provisions of the mortgage exclude such right in express terms or by necessary implication. Fleming *v.* Fairmont, etc., R. Co., 72 W. Va. 835, 79 S. E. 826.

A. JURISDICTION.

1. How Determined Where Proceeding on Penal Bond.

Va. Code 1919, § 6374; Barnes Code, ch. 136, § 1.

2. Equity Jurisdiction.

See post, "Proceedings in Equity for Enforcement of or Relief against Bonds," X.

B. LIMITATION OF ACTIONS.

Under the provisions of § 2938 of the Code of Virginia (Code 1919, § 5830), the limitation to an action on a bond dated and due prior to May 1, 1888, and upon which no action was then pending, is twenty years from its maturity, notwithstanding the death of the obligor in 1889. Davis *v.* Davis, 104 Va. 65, 51 S. E. 216. See post, LIMITATION OF ACTIONS.

C. PARTIES.

1. Parties Plaintiff.

a. Who May Sue.

Where Obligee Was Dead at Time of Execution.—Barnes Code, ch. 99, § 12.

D. FORM OF ACTION.

1. Assumpsit.

Assumpsit Maintainable upon Bond Undertaking to Pay Money.—Barnes Code, ch. 99, § 10.

3. Debt.

Debt Maintainable upon Bond Undertaking to Pay Money.—Barnes Code, ch. 99, § 10.

3½. Motion for Judgment.

Money due on a bond with collateral condition may be recovered by motion, under ch. 121, § 6 of the Code. Stuart *v.* Carter, 79 W. Va. 92, 99 S. E. 537. See post, MOTIONS.

4. Suits in Equity.

See post, "Proceedings in Equity for Enforcement of or Relief against Bonds," X.

G. DECLARATION.

4½. Averments as to Interested Parties.

In a suit on a penal bond in which the county and a district are both in-

terested, the declaration should show whether the suit is for an injury or loss suffered by the county or by the district and in what such loss or injury consists, and if it fails to do so it will be held to be bad on demurrer. *State v. Turnpike Co.*, 56 W. Va. 550, 49 S. E. 454.

7. Setting Out Conditions and Assigning Breaches.

b. Methods of Declaring on Bonds with Collateral Conditions.

A declaration in debt on a bond with collateral condition which alleges the obligation sued on, the debt due under the terms of the obligation, and the refusal of the obligors to pay, is sufficient. *Burton v. Seifert & Co.*, 108 Va. 338, 61 S. E. 933.

c. Assignment of Breaches.

(2) Assignment of Several Breaches.

In Action on Annuity Bond or One Payable by Installments.—Va. Code 1919, § 6262; Barnes Code, ch. 131, § 17.

G½. NOTICE OF MOTION FOR JUDGMENT.

Though the plaintiff's notice of a motion for judgment on a bond with collateral condition constitutes his pleading in the proceeding, analogous to a declaration in debt, as well as his process against the defendant, he need not aver nonpayment of the penalty of the bond. The proceeding being informal, it suffices to base the notice on the bond and advise the defendant of the nature of the breach and the amount of the plaintiff's demand. *Stuart v. Carter*, 79 W. Va. 92, 90 S. E. 537.

If the bond is one given to insure faithful performance of a working contract and the date of the contract is wrongly stated in the condition, the error need not be averred in the notice, and, upon proof thereof, the contract is admissible in evidence. *Stuart v. Carter*, 79 W. Va. 92, 90 S. E. 537.

H. PLEAS.

2. Form, Sufficiency and Effect of Pleas.

a½. Plea of Nul Tiel Record.

The plea of nul tiel record is a proper plea to test the existence of a judgment, in a suit on a bond with collateral conditions the breach of which assigned is the nonpayment of such judgment. *Point Pleasant v. Greenlee*, 63 W. Va. 207, 60 S. E. 601.

K. PROFERT AND OYER.

See post, PROFERT AND OYER.

L. PROOF.

2½. Presumptions and Burden of Proof.

Date of Issue of Mortgage Bonds.

All of a series of valid mortgage bonds, though issued at different times, are conclusively presumed to have been issued at the date of the recordation of the mortgage. *Kelley v. Wellsburg, etc., Co.*, 74 W. Va. 130, 81 S. E. 712.

3. Admissibility of Evidence.

a. Parol Evidence.

Varying Terms of Bond.—In an action against the principal and surety in a penal bond conditioned for the erection of a building of a designated value on a certain lot, although the bond recites the terms upon which a loan is to be made by the obligee to the principal for the purpose of enabling him to erect said building, it is permissible for the plaintiff to show that the loan was to be made upon somewhat different terms from those set out in the recital of the bond, if it appears that the difference in the terms was known to the surety at the time the bond was executed. *Atlantic Trust, etc., Co. v. Union Trust, etc., Co.*, 111 Va. 574, 69 S. E. 975.

3½. Weight and Sufficiency of Evidence.

Admission by Husband That Bond Was Wife's Property.—A decedent endorsed a bond payable to him as payable to his wife. The bond was taken by the decedent to a bank for collection, and a witness testified that decedent

dent told him that it was his wife's money. Decedent deposited the bond in the bank for collection, re-assigning the bond to himself by signing his wife's name. Held, that the evidence showed that at the time of this transaction decedent was acting as agent for the benefit of his wife, and that the bond was the property of his wife. *Slater v. Slater*, 124 Va. 370, 98 S. E. 7.

N. JUDGMENT.

2. Amount of Recovery.

b. Under Statutory Provisions.

(2) Provisions of Virginia Code.

Bond with Condition for Payment of Money.—Va. Code, § 6261.

Annuity Bond or One Payable by Installments.—Va. Code 1919, § 6262.

(3) Provisions of West Virginia Code.

Annuity Bond or One Payable by Installments.—Barnes Code, ch. 131, § 17.

X. PROCEEDINGS IN EQUITY FOR ENFORCEMENT OF OR RELIEF AGAINST BONDS.

A. PROCEEDINGS TO ENFORCE.

1. As to Jurisdiction.

See post, "Proceedings on Lost Bonds," X, A, 2. Barnes Code, ch. 99, § 16.

2. Proceedings on Lost Bonds.

Courts of equity have jurisdiction to

enforce payment of a lost bond, and although courts of law are given jurisdiction over such bonds by § 3377a of the Code (see as amended, Code 1919, § 6242), it is well settled that courts of equity having once acquired jurisdiction never lose it because jurisdiction of the same matters is given to courts of law, unless the statute conferring such jurisdiction uses prohibitory or restrictive words. *Kabler v. Spencer*, 114 Va. 589, 77 S. E. 504; *Filler v. Tyler*, 91 Va. 458, 22 S. E. 235; *Kerney v. Kerney*, 6 Leigh (33 Va.) 478; *Shields v. Com.*, 4 Rand. (25 Va.) 541; *Vathir v. Zane*, 6 Gratt. (47 Va.) 246; *Thornton v. Stewart*, 7 Leigh (34 Va.) 128; *Lyttle v. Cozad*, 21 W. Va. 183.

If after diligent and unavailing search therefor plaintiff sues, when allowable, in equity, upon a lost bond, its discovery and production thereafter is immaterial upon his right to relief in a suit then pending. *Clark v. Nickell*, 73 W. Va. 69, 79 S. E. 1020.

4. Proceedings against Personal Representatives.

A suit in equity to enforce the obligation of a joint bond should be brought jointly against the surviving, and the personal representatives of the deceased, obligors. *Clark v. Nickell*, 73 W. Va. 69, 79 S. E. 1020.

XI. REVIEW.

See ante, APPEAL AND ERROR.

BOOK ACCOUNTS AND ENTRIES.—See post, DOCUMENTARY EVIDENCE.

BOOKKEEPER.—"While a bookkeeper may be, and often is, the agent of his employer, the word does not, ex vi termini, import that relation, and in the absence of averment in the affidavit that it exists, the court cannot by intentment enlarge the ordinary signification of the word so as to bring it within a class to which it may or may not belong." *Taylor v. Sutherlin-Meade Co.*, 107 Va. 787, 790, 60 S. E. 132. See, generally, ante, AGENCY; post, CORPORATIONS; MASTER AND SERVANT.

BOOKS.—As to a devise of books, see post, WILLS.

BOOKS OF ACCOUNT.—See West Virginia, etc., *Builders v. Stewart*, 68 W. Va. 506, 509, 70 S. E. 113. See, also, post, EVIDENCE.

BOOMS AND BOOM COMPANIES.—See post, LOGS AND LOGGING.

BOSS OF GANG.—See post, FELLOW SERVANTS.

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CROSS REFERENCES.

See the title BOUNDARIES, vol. 2, p. 79, and references there given. In addition, see ante, ABUTTING OWNERS; ADJOINING LANDOWNERS; ADVERSE POSSESSION; post, COUNTIES; DEEDS; EASEMENTS; EJECTMENT; ESTOPPEL; EVIDENCE; EXPERT AND OPINION EVIDENCE; FENCES; FORCIBLE ENTRY AND DETAINER; LAKES AND PONDS; NAVIGABLE WATERS; PAROL EVIDENCE; PARTY WALLS; PUBLIC LANDS; STREETS AND HIGHWAYS; VENDOR AND PURCHASER; WATERS AND WATERCOURSES. As to ancient deeds as evidence of boundaries, see ante, ANCIENT DEEDS. As to county boundaries, see post, COUNTIES. As to boundaries constituting a lawful fence, see post, FENCES. As to boundaries of riparian owners, see post, NAVIGABLE WATERS; WATERS AND WATERCOURSES. As to injuring or removing oyster boundary marks, see post, OYSTERS. As to state boundaries, see post, STATE. As to establishment of street lines, see post, STREETS AND HIGHWAYS.

I. MANNER OF INDICATING AND ASCERTAINING.

A. IN GENERAL.

It is a general rule that, in locating boundaries of land, resort is to be had first to natural landmarks, next to artificial monuments, then to adjacent boundaries, and last to courses and distances. *Matheny v. Allen*, 63 W. Va. 443, 60 S. E. 407; *Wiley v. Hatcher*, 70

W. Va. 92, 73 S. E. 245; *Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 77 S. E. 525; *Stewart v. Parr*, 74 W. Va. 327, 332, 82 S. E. 259.

"There is no rule of identification universally applicable to the facts of all controversies affecting the subject matter in litigation in any particular form of action. This difficulty appears in *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400, wherein 'some of the rules

resorted to' in the location of lands are said to be '(1) natural boundaries; (2) artificial marks; (3) adjacent boundaries; (4) course and distance—course controlling distance, or distance course, according to the circumstances. Neither rule, however, occupies an inflexible position; for when it is plain there is a mistake, an inferior means of location may control a higher.'" *Stewart v. Parr*, 74 W. Va. 327, 329, 82 S. E. 259.

Descriptive Calls Yield to Locative Calls.—The descriptive calls in a survey such as, "near the land" of a named person, must yield in locating a survey to establish corners as well as to locative calls. This is only an application of the reasonable and sensible principle that the more fixed and certain is to control over that which is less fixed and certain. *Matheny v. Allen*, 63 W. Va. 443, 447, 60 S. E. 407.

General Description by Street and Number Prevails Over Metes and Bounds.—If a will devising an unnumbered part of a city lot, on which there is a house bearing a certain number, describes it by the number of the house and name of the street on which it fronts, calling the property a "house and lot," and then describes the lot by metes and bounds so as not to include all of the ground covered by the house, the general description conforming to the manifest intent of the testator, to give the house for comfortable use and enjoyment, prevails over the particular description. *Gilbert v. McCreary*, 87 W. Va. 56, 104 S. E. 273.

The location of a boundary line between a private lot and a city street left in a state of uncertainty by the title papers and dependance upon dedication and acceptance of the street by mere conduct, is determinable by the rules applicable in other cases of disputed and uncertain boundary lines. *Bent v. Elkins*, 69 W. Va. 11, 70 S. E. 768.

Virginia and West Virginia Line.—The line between the states of Virginia and West Virginia is, of course, well

established, and when a boundary is described by metes and bounds, and is shown to be crossed by that line, it is a simple undertaking to determine where the line enters and where it leaves the boundary, even though neither point of intersection be given. It would only be necessary to run the outside lines of the boundary and then follow the state line through it. *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225.

B. MONUMENTS.

1½. Monuments and Natural Objects as Controlling Other Elements in General.

Statement of Quantity.—See post, "Importance," III, E, 1.

Intention.—Ordinarily the call for the tree or other object will prevail, but, if the adoption thereof would make the deed include land the grantor did not own and omit land owned by him which would pass under the other interpretation, the case falls within an exception to the general rule, by force of a strong presumption against intent on the part of either party to include in the deed land to which the grantor had no title. *State v. Herold*, 76 W. Va. 537, 85 S. E. 733, cited in *Myers v. Bland*, 77 W. Va. 546, 549, 87 S. E. 868.

A monument called for in a deed for a tract of land and erroneously described as being the corner of another tract, or as being in the line thereof, if identified, is controlling, and the line stops at the monument, unless it is apparent from the character of the land, the situation and purposes of the parties and the surrounding circumstances, that the call for the monument is erroneous and the corner or line mentioned was contemplated as the terminus of the line. *Myers v. Bland*, 77 W. Va. 546, 87 S. E. 868.

2. Monuments and Natural Objects as Controlling Courses and Distances.

a. General Rule.

In locating the boundaries of land,

natural land marks take preference over courses and distances. *Woolfolk v. Graves*, 113 Va. 182, 69 S. E. 1039, 73 S. E. 721; *Patterson v. Overbey*, 117 Va. 345, 348, 84 S. E. 647.

In surveys, course and distance yield to monuments, especially where called for in a deed. *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135; *State v. King*, 64 W. Va. 546, 63 S. E. 468. See *Winding Gulf Colliery Co. v. Campbell*, 72 W. Va. 449, 78 S. E. 384.

If there is inconsistency between the calls in the deed for courses and distances, on the one hand, and, on the other, an artificial monument, or its ascertained location when it has been removed or destroyed, the latter prevails. *Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 77 S. E. 525.

In locating land from the description set forth in the deed or patent, natural monuments and marked lines must be allowed, ordinarily, to control courses and distances, if there is conflict; but, in such case, the evidence must be sufficient to identify, with reasonable certainty, the monuments in question as the monuments called for in the description. *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073.

In ascertaining the boundaries of surveys or grants, if natural or permanent objects are called for as a boundary of the land, they control, and courses and distances must yield. A water boundary, though run by course and distance, will be controlled by the actual course of the shore, and the grant giving such boundary passes the right to the property to low-water mark. *Fentress v. Pocahontas Fowling Club*, 108 Va. 155, 60 S. E. 633.

Where a deed defines the boundaries of land conveyed by calls for marked trees as corners, and further describes the trees as being in the line of another survey, and the two descriptions are discovered to be inconsistent, the call for the marked trees will prevail over the call for the line, in the absence of any circumstance indicating a different

intent. *Curtis v. Meadows*, 84 W. Va. 94, 99 S. E. 286.

Presumption against Conflict.—While courses and distances yield to monuments where there is a conflict, the evidence must show a conflict, and, in the absence of evidence, the presumption is that no such conflict exists. In the case at bar, it is held that, upon a proper construction of the conveyances, the true dividing line between the properties in controversy is the center line of the party wall between said properties, and that to the extent, if any, that the defendant's structures extend beyond the dividing line and upon the premises of the plaintiff the latter is entitled to recover, and that the jury should have been so instructed. *Hatcher v. Richmond, etc., R. Co.*, 109 Va. 357, 63 S. E. 999.

b. Description of Monument Uncertain.

Where a monument corner is called for which is not found, and the place where such monument stood can not be satisfactorily ascertained, the course and distance called for must govern. *Mays v. Hinchman*, 57 W. Va. 602, 50 S. E. 823.

Mere conflict in the evidence, as to the identity of monuments, does not preclude the application of the rule that quantity, courses and distances, mentioned in the description of land, must yield to identified monuments, when there is conflict; it being the duty of the court or jury, as the case may be, to determine, from the evidence, whether the objects in question are the monuments called for. *State v. King*, 64 W. Va. 546, 63 S. E. 468.

One or More Monuments Ascertained.—One or more monuments of a tract of land having been ascertained, the courses and distances are entitled to controlling effect in the location of others as to the identity of which the evidence is slight, circumstantial and conflicting. *Lewis v. Yates*, 72 W. Va. 841, 79 S. E. 831; *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073.

Commencing at One Monument Running to Another.—A line of a survey described in a patent as commencing at one natural object, such as a tree, and running without further locative calls to another object, such as a tree, is governed in its location by the monuments called for, if they can be found, although an uncalled for marked line different therefrom is disclosed by extraneous evidence. *Winding Gulf Colliery Co. v. Campbell*, 72 W. Va. 449, 78 S. E. 384.

c. Supplying or Modifying Calls.

A call in an ancient deed for "two white oaks on Cooper's Point" must control over a course given for the line which will not take it to Cooper's Point, when the location of that place is definitely established, though the trees are not found there. *Wiley v. Hatcher*, 70 W. Va. 92, 73 S. E. 245.

d. Omission of Incongruous Calls.

See post, "Conflicting Calls and False Description," III, C.

A call irreconcilable and incongruous with another call of a grant, which appears to have been inserted by mistake, may be wholly rejected and disregarded. *Matheny v. Allen*, 63 W. Va. 443, 444, 60 S. E. 407.

In construing a general and indefinite description of land contained in a deed in determining the boundaries of a tract, a call therein plainly appearing to be a mistaken one, from its irreconcilability with another call, with the intention of the parties as viewed from the situation and circumstances surrounding them when the deed was made, and with the acts of the parties under the deed, may be wholly rejected. *State v. Hicks*, 76 W. Va. 508, 85 S. E. 665.

g. When Monuments Do Not Control.

"Ordinarily, a call in a deed for an identified monument or marked line controls and prevails over an inconsistent call for course or distance; but this rule and its application are generally declared in cases in which no

additional circumstance indicating contrary intention of the parties, is disclosed by the deed or admissible extraneous evidence. Monuments do not always control. *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. 42; *Clayton v. County Court*, 58 W. Va. 253, 52 S. E. 103; *Western Min., etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406." *Day v. Wood Lumber Co.*, 78 W. Va. 19, 23, 88 S. E. 452.

"The general rule subordinating calls for course and distances to calls for monuments, has for its purpose only the ascertainment of the extent and meaning of the parties, and exceptions to it are numerous. *State v. Herold*, 76 W. Va. 537, 85 S. E. 733." *Day v. Wood Lumber Co.*, 78 W. Va. 19, 23, 88 S. E. 452.

Calls for monuments or marked lines in a decree yield to inconsistent and ordinarily inferior calls for length of lines, aided by the plat and specifications of quantity in contiguous parcels of the land divided and prior claims of title in conformity with the plat and specifications of quantity. *Day v. Wood Lumber Co.*, 78 W. Va. 19, 88 S. E. 452.

C. ORIGINAL LINES AS ACTUALLY RUN.

The location of the lines of a survey is to be determined by the lines as actually run upon the ground, where this can be ascertained. *Matheny v. Allen*, 63 W. Va. 443, 448, 60 S. E. 407.

Where a deed defines the boundaries of land conveyed by calls for marked trees as corners, and further describes the trees as being in the line of another survey, if a marked line is shown to exist, answering to the description, although not the true line of the survey referred to, such marked line will be taken as the one called for, thus harmonizing the apparently conflicting descriptions of the corner. *Curtus v. Meadows*, 84 W. Va. 94, 99 S. E. 286.

"The Virginia cases have given much weight to marked lines, corre-

sponding in age as near as may be with the date of the deed, and in the main agreeing with courses and distances, found on the ground, though corner trees, not to be found or ascertained by evidence, are called for in the instrument, though inconsistent with points in a plat referred to, especially if comporting with natural objects mentioned.' 2 Enc. Dig. Va. & W. Va. 585." *Tolley v. Pease*, 72 W. Va. 321, 323, 78 S. E. 111.

Effect of Monuments.—A line designated in a deed or other given muniment of title by its course and distance only must yield to an inconsistent marked line, run as the line intended by the parties, but if the deed calls for a line by monuments as well as by course and distance, such marked line referred to in the deed must be ignored, if the monuments called for are ascertainable. *Winding Gulf Colliery Co. v. Campbell*, 72 W. Va. 449, 451, 78 S. E. 384.

Control Given to Identified Lines and Corners.—In the trial of an action, involving title to land, dependent upon the location of boundary lines and application of the title papers to their subject matter, it is not error to instruct the jury to give controlling influence to lines and corners marked upon the ground and identified, in so far as the lines were actually surveyed, and to courses and distances, in those instances in which the lines were not actually surveyed nor marked upon the ground. *Mylius v. Raine-Andrew Lumber Co.*, 69 W. Va. 346, 71 S. E. 404.

Identified Lines Prevail over Unidentified.—Marked lines and reputed boundaries of adjoining tracts, called for in the deed or patent, and the location of which are not disputed, must be observed by both court and jury. Other lines and corners, as to the location whereof the evidence is uncertain, must be located from them. **Monuments and lines identified or admitted must prevail and govern in finding those not identified.** *Lewis*

v. Yates, 62 W. Va. 575, 586, 59 S. E. 1073.

When certain lines and corners of a survey are reasonably well identified or admitted and others are not, courses and distances must be allowed controlling force in determining the location of the latter, when the description by quantity is in substantial agreement with the area of the tract so located, even though there be slight evidence tending to show marked lines, differing from those determined by the courses and distances. *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073.

D. LINES AND CORNERS OF ADJOINING TRACTS.

The metes and bounds of an identified tract, may be ascertained by reference to the boundaries of adjacent lands. *Davis Colliery Co. v. Westfall*, 78 W. Va. 735, 90 S. E. 328.

Where the description in a deed conveying a tract of land calls for the line of an adjoining tract, the location of which is undisputed or clearly established, it will control in locating such tract of land. *Vandall v. Casto*, 81 W. Va. 76, 93 S. E. 1044.

Calls in a deed for an adjoining tract of land are calls for a monument, and where the location of such adjoining tract of land is certain it becomes a monument of the highest dignity. *Vandall v. Casto*, 81 W. Va. 76, 93 S. E. 1044.

Calls for adjoiners must yield, generally, to calls for monuments, where there is repugnancy between them, in a description of land. *Matheny v. Allen*, 63 W. Va. 443, 444, 60 S. E. 407.

A call of a deed for the line of an adjoiner can not make an interlock between the land conveyed by the deed and the land of the adjoiner. *Cummings v. Hamrick*, 74 W. Va. 406, 82 S. E. 44.

A tract of land, supposed to lie between older grants, the patent for which, in describing it, calls for lines and corners of the older grants on one

side, but makes no references to those supposedly lying on the other side, must be so located by the jury in finding a verdict, as not to ignore the location of the older grants, lines and corners, called for in the patent, even though the location of the tract in question, as determined by observance of said monuments, cause an interlock with the older grants on the other side, not called for in the description. *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073.

A call in the deed for a tract of land as one of its boundaries, designating it by the use of the names of the parties to the deed for the adjacent tract, as the A-B land, will not as matter of law, be extended over such tract to the A land, which it was the intention of the parties to said deed to convey, and made to exclude the A-B tract or a large part of it, because the A-B deed does not confer title to the land it purports, by the metes and bounds used in the description, to convey, and does confer good title to the A land or would have done so; under an accurate description thereof; and facts and circumstances tending to show intent to limit it to the land as described in the deed, if sufficiently probative will sustain a verdict so limiting it. *Mylius v. Raine-Andrew Lumber Co.*, 73 W. Va. 674, 81 S. E. 823.

Call for Adjoining Tract as Monument.—A deed is to be interpreted and construed as of its date and a call in the descriptive portion thereof for an adjoining tract of land, as a monument, is a call for the true location of such adjoining tract at the date of the deed; and the location of the adjoining tract, though not involved in the litigation, may be ascertained for the purposes of the interpretation of the deed calling for it. *State v. Herold*, 76 W. Va. 537, 85 S. E. 733.

E. COURSES AND DISTANCES.

See ante, "Monuments and Natural Objects as Controlling Courses and Distances," I, B, 2.

Where, in the determination of a disputed boundary, there is a conflict between the distance of one line and the true course of another, there is no arbitrary rule that distance shall yield to course, or vice versa, but one or the other should be preferred according to the manifest intent of the parties and the circumstances of the case. *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

The course and distance called for in the grant must govern in respect of each line except so far as they may be controlled by calls for natural objects or artificial monuments proven to have been made or adopted for the survey itself, and in fixing those of any one line no reference can legitimately be had to the variation from the patent calls that may be found necessary in determining the course and distance of any other line according to natural or other controlling objects found upon the ground. *Lewis v. Yates*, 62 W. Va. 575, 589, 59 S. E. 1073.

Ascertained Corners.—In fixing the boundaries of land from title deeds, the lines calling for ascertained corners must be run thereto, though this may require a variation of both course and distance.

Controlling Effect of Fixed Terminus of Boundary Line Stated.—If one terminus of a disputed boundary line called for in a deed, is clearly fixed and rendered certain by evidence and the other unidentified and uncertain and a line run from such fixed corner agrees perfectly with the calls of the deed for course and distance, the former governs and controls the location of the other and the distance called for in another line running to it. *Palmer v. Magers*, 85 W. Va. 415, 102 S. E. 100.

F. STREAMS AND BODIES OF WATER AS LINES.

1. Location of Line.

b. Nonnavigable Streams.

Extends to Low Water Mark.—Va. Code 1919, § 3574.

As used in above Code section, the term "low-water mark" means ordinary low water, not spring-tide or neap-tide, but normal, natural, usual, customary or ordinary low water, uninfluenced by special seasons, winds or other circumstances. *Scott v. Doughty*, 124 Va. 358, 97 S. E. 802.

High-water mark of a non-navigable stream, called for as a line in a deed of conveyance, is the line to which the river has wholly or practically destroyed vegetation, by its current, wash or flow, and rendered the land unfit for meadow, pasturage or cultivation. *Ephriam Creek Coal, etc., Co. v. Bragg*, 75 W. Va. 70, 83 S. E. 190.

A division line between two tracts of land, described in deeds as starting at high-water mark of a river at a certain point and then following the meanders of the river and binding thereon to another point at high-water, so as to include the river in one of the tracts, takes in all of the beach and bank, but does not extend beyond the vegetation line. *Ephriam Creek Coal, etc., Co. v. Bragg*, 75 W. Va. 70, 83 S. E. 190.

Where a boundary is given, down a designated stream, with certain courses and distances designated, the presumption is that the boundary is to follow the meanderings of the stream, although it departs from the courses and distances given, and, in case of non-navigable streams, it carries the line to the thread or center of the stream. *Patterson v. Overbey*, 117 Va. 345, 84 S. E. 647.

"Substantially."—An oil and gas lease, describing the premises as all that certain tract of land situated in a certain district on the waters of a designated stream, bounded "substantially" as follows, etc., means bounded "about" or "in the main" as designated and not "wholly" or "completely" so. *South Penn Oil Co. v. Knox*, 68 W. Va. 362, 69 S. E. 1020.

Inland Lake or Pond.—The owner of land adjoining an artificial lake or pond created by damming an ordinary

stream takes to the center of the pond unless excluded from such right by deed or contract. A conveyance of land bounded by such pond extends as far as the title of the grantor extends. It makes no difference that the ordinary terms of boundary, as "along" or "with" the pond are used; the title will nevertheless go to the center if the grantor owns to that point. The age of the pond is immaterial. *Providence, etc., Club v. Miller Mfg. Co.*, 117 Va. 129, 83 S. E. 1047. See post, **WATERS AND WATERCOURSES**.

Stream Not Boundary.—The closing call in a deed from "a large Yellow Pine and Maple, 2 poles West of middle fork of Ugly, thence by protraction with the general course of Ugly down, S. 32 degrees W. 170 poles to the beginning," a "white oak on the bank of Ugly Branch," properly construed with reference to the facts proven, is a call for a straight line between the two termini, and not the water course, as the boundary line. *Halstead v. Aliff*, 78 W. Va. 480, 89 S. E. 721.

c. Navigable Waters.

See post, **NAVIGABLE WATERS**.

2. As Controlling Course and Distance.

The fact that neither corners nor marked trees are called for in the grant under consideration in this cause, but that watercourses are given as boundaries on each side as well as courses and distances, is a pregnant circumstance, to show that the waters called for, and not courses and distances, were intended to define the boundaries of the land, since the statute in force when the grant was made required the surveyor making the survey to see that the same was plainly bounded by marked trees or other objects, except where a watercourse or an ancient marked line is boundary. *Fentress v. Pocahontas Fowling Club*, 108 Va. 155, 60 S. E. 633.

G. PUBLIC ROAD AS LINE.

See post, **STREETS AND HIGH-**

WAYS; "In General—Latitude Therefor," III, A.

I. ARBITRATION OF BOUNDARY.

See ante, ARBITRATION AND AWARD.

J. FENCES.

Evidence as to.—On the question as to the location on the ground of the boundary line between two parcels of land, evidence which tends to show that an old fence was on or intended to be on that line, and that the parties or their predecessors in title had recognized it in whole or in part as the line between the two parcels by the manner in which the said parcels had been used, is admissible. *Hamman v. Miller*, 116 Va. 873, 83 S. E. 382.

K. MAPS AND PLATS.

"It is doubtless true that where lots are conveyed as described on a map of land, and that map shows the southern boundary of the lots conveyed to be a creek, there being in the deed no suggestion of any reservation or of the existence of any land owned by the grantor south of the creek, the grantee acquires the lots bounded by the creek with a right to all the accretions formed in the creek adjacent thereto." *Robbins v. Walker*, 119 Va. 222, 89 S. E. 128.

Description Not Including Marsh in Rear of Lot.—*Robbins v. Walker*, 119 Va. 222, 89 S. E. 128.

Governed by Plat.—It appearing that a large tract of land was subdivided into a number of lots and a plat thereof made, in accordance with which deeds were executed, and which is referred to in the deeds for the description of the lots, and that the exterior lines were only partially surveyed and only a few of the interior lines actually run, and there is inconsistency between the plat and some of the lines so surveyed, the court may properly instruct the jury that, in locating any lot, it is to be governed and controlled by the plat, except in so far as it is in conflict

with the lines actually run and marked upon the ground. *Mylius v. Raine-Andrew Lumber Co.*, 69 W. Va. 346, 71 S. E. 404.

II. ESTABLISHMENT BY AGREEMENT, ACQUIESCENCE, ESTOPPEL, LIMITATIONS, ETC.

B. ESTABLISHMENT BY AGREEMENT.

Parol Agreement.—Disputed boundaries between two adjoining lands may be settled by express oral agreement, executed immediately and accompanied by possession according thereto. *Mays v. Hinchman*, 57 W. Va. 602, 50 S. E. 823; *Lewis v. Yates*, 62 W. Va. 575, 59 S. E. 1073; *Harman v. Alt*, 69 W. Va. 287, 290, 71 S. E. 709; *George v. Collins*, 72 W. Va. 25, 77 S. E. 356. See post, FRAUDS, STATUTE OF.

In the case of disputed boundaries, the parties may agree upon a line, by way of compromise, and if they take and hold possession up to that line for the requisite statutory period the mere possession will, in time, ripen into title; but no mere parol agreement to establish a boundary and thus exclude from the operation of a deed land embraced therein can divest, change, or affect the legal rights of the parties growing out of the deed itself. *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481.

Doubt and Uncertainty.—But to make valid an oral agreement fixing a line between contiguous tracts of land there must be doubt and uncertainty as to the true location of the line in dispute; else the agreement is void. *George v. Collins*, 72 W. Va. 25, 77 S. E. 356, citing *Le Comte v. Freshwater*, 56 W. Va. 336, 337, 49 S. E. 238; *Hatfield v. Workman*, 35 W. Va. 578, 14 S. E. 153; *Mays v. Hinchman*, 57 W. Va. 602, 50 S. E. 823; *Wade v. McDougle*, 59 W. Va. 113, 122, 52 S. E. 1036.

Where there is in fact such doubt and uncertainty, such oral agreement, if at once carried into execution by actual possession, is valid without other

consideration than the settlement of disputed boundary. *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1026; *Le Comte v. Freshwater*, 56 W. Va. 336, 49 S. E. 238.

Necessity of Possession.—A mutual express agreement between adjoining owners fixing their dividing line is of no force, unless actually executed immediately by taking possession actually up to it. *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1026.

To establish a line between adjoining owners, in absence of express agreement fixing it, by acquiescence and recognition there must be actual possession up to the line by the party claiming benefit thereof, for a time sufficient in duration to warrant the inference or presumption of a former agreement establishing a delimitation of the boundary. *George v. Collins*, 72 W. Va. 25, 77 S. E. 356, citing *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1026; *Bent v. Elkins*, 69 W. Va. 11, 70 S. E. 768.

Evidence of Agreement.—Long continued possession by both parties, according to a certain line, is evidence of an agreement as to the location of the line, and, in the absence of circumstances countervailing it, controlling and binding. *Bent v. Elkins*, 69 W. Va. 11, 70 S. E. 768.

Effect on Land Embraced in Deed.—No mere parol agreement to establish a boundary, and thus exclude from the operation of a deed land embraced therein, can divest, change or affect the legal rights of the parties growing out of the deed itself. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

An owner of two adjoining tracts of land having a common line may sell and convey any part of one or both tracts and fix the boundary therefor as he may elect, and if the calls in the deed, promptly recorded, locate the common boundary between the tract sold and that retained on a line slightly different from the old one, the line so fixed will prevail over the calls of a

subsequent recorded deed conveying the tract so retained, though it purport to fix the common boundary line as formerly located. *Canfield v. Collins*, 83 W. Va. 250, 98 S. E. 205.

Effect as Establishing Title.—In a proceeding to determine boundaries under Acts 1912, p. 133, a parol agreement between the parties touching the location of the boundary lines in controversy was proper evidence for the consideration of the jury on the subject of the true location on the ground of the boundary lines, in so far as such boundaries were designated in the evidence of title in evidence, but such agreement could not establish title. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

Effect upon Purchaser Whose Deed Calls for Original Line.—Although two adjacent lot owners agree by parol upon a boundary line between them different from that called for by their deeds, and erect a fence on the new line, a purchaser of one of the lots whose deed calls for the original line is not bound thereby, although he knew of the agreement before his purchase, and saw the fence on the new line. No mere parol agreement to establish a boundary, and thus exclude from the operation of a deed land embraced therein can divest, change, or affect the legal rights of the parties growing out of the deed itself. *Sutherland v. Emswiler*, 111 Va. 507, 69 S. E. 363.

Distinction between Award and Agreement.—In the instant case the question was not whether one of the parties to a dispute as to a boundary line at the time of its submission to arbitration agreed in fact to the location of the line as the same is claimed by the other, nor, indeed, what the arbitrators themselves believed as to the true location, but whether the establishment of the line was a matter embraced in the submission and award. The two questions are vitally different. The authorities in relation to the effect of a valid award in a boundary dispute,

and those in regard to the effect of a verbal admission or agreement by a landowner as to the location of a line, will show that while such an award is probably sufficient to afford a basis for either the prosecution or defense of an action of ejectment between the same parties, such an admission or agreement has not that effect. *Cox v. Heuseman*, 124 Va. 159, 97 S. E. 778.

C. ESTABLISHMENT BY ACQUIESCENCE, ESTOPPEL, ETC.

See ante, ADVERSE POSSESSION; post, ESTOPPEL; LIMITATION OF ACTIONS.

To establish a line between adjoining owners, in absence of express agreement fixing it, by acquiescence and recognition, there must be possession actual up to it by the party claiming the benefit of the line at least for a time prescribed by the statutes of limitation, with acquiescence and recognition of such line by the other party, he knowing of such claim by his adversary. *Wade v. McDougale*, 59 W. Va. 113, 52 S. E. 1026.

Not Independent Source of Title.—

Acquiescence and admissions as to boundaries may become very proper and very important evidence in determining where the true boundaries are, and such acquiescence and admissions may exist or be made under circumstances which will estop a landowner from denying them; but they are not in themselves independent sources of title. No mere parol agreement to establish a boundary, and thus exclude from the operation of a deed land embraced therein, can divert, change, or affect the legal rights of the parties growing out of the deed itself. *Reynolds v. Wallace*, 125 Va. 315, 99 S. E. 516; *Cox v. Heuseman*, 124 Va. 159, 97 S. E. 778.

Long acquiescence by one adjoining proprietor in a boundary established by the other is evidence of such agreement so fixing the division line between them. *Mays v. Hinchman*, 57 W. Va. 602, 50 S. E. 823; *Lewis v. Yates*, 62

W. Va. 575, 59 S. E. 1073; *State v. King*, 64 W. Va. 546, 63 S. E. 468; *Harman v. Alt*, 69 W. Va. 287, 71 S. E. 709.

Long acquiescence by one adjoining proprietor in a boundary may be shown by the adjoining landowners having actual possession and cultivating to such line; or, if the line run through woods, by the proprietor, who established such division line, with the knowledge of the adjoining land proprietor always clearing up to this line and, with his like knowledge cutting timber and peeling bark up to this division, the other landowner making no objection to such claim or such act of ownership, though he was present when such acts were being done. *Mays v. Hinchman*, 57 W. Va. 602, 605, 50 S. E. 823.

Mere Acquiescence Insufficient—Estoppel.—The mere acquiescence of plaintiff in a survey by defendant of the land in controversy in a proceeding under Acts 1912, p. 133, to determine boundaries, at the time of the purchase of the real estate by defendant, does not estop plaintiff from afterwards asserting an adverse claim of title inconsistent with the validity of the survey in the accuracy of which he had acquiesced. Such mere acquiescence alone will not work an estoppel. In order to do so, the acquiescence must have influenced the subsequent conduct of the defendant to his prejudice. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

Acquiescence Ripens into Title.—It was held as long ago as *Harris v. Crenshaw*, 3 Rand. (24 Va.) 14, "that if two coterminous owners of land agree, by parol, to establish a line between them, which they both knew and which in truth was different from the true line, the title does not pass thereby. But if the line was run and marked as a dividing line between them, and it was agreed upon by parol as the line, if there were two processionings of a part thereof, and the parties and

those claiming under them acquiesced in the said line for twenty years, it is equivalent to a surrender of possession of any land which may be cut off by the said line, although it might have belonged, before the line was run, to the other party." *Sutherland v. Emswiller*, 111 Va. 507, 509, 69 S. E. 363.

In *McMurray v. Dixon*, 105 Va. 605, 54 S. E. 481, the supreme court said: "In the case of disputed boundaries, the parties may agree upon a line, by way of compromise, and if they take and hold possession up to that line for the requisite statutory period, the mere possession will, in time, ripen into title; but no mere parol agreement to establish a boundary and thus exclude from the operation of a deed land embraced therein can divest, change, or affect the legal rights of the parties growing out of the deed itself." *Sutherland v. Emswiller*, 111 Va. 507, 510, 69 S. E. 363.

Effect as to Third Parties.—Representations as to the locations of boundary lines, consisting of reports of surveys and maps filed in judicial proceedings, do not estop a subsequent purchaser of the land, on the theory of acquiescence or otherwise, in favor of persons who were not parties to such proceedings, though they may have purchased lands on the faith of such representation. Acquiescence, to fix boundary lines, must be in the nature of an agreement evidenced by acts done upon the land, tending to prove an agreement upon definite lines and corners. *State v. King*, 64 W. Va. 546, 63 S. E. 468.

Presumption of Acquiescence.—In the absence of fraud, if a vendee accept a deed, based upon a survey made pursuant to a contract for the purchase of a boundary of land which was to be surveyed out of a larger tract by a certain surveyor mutually agreed by the parties, and which was surveyed by such surveyor, and rests for nearly five years before making complaint, he will be presumed to have acquiesced in the

boundaries located by such survey and described in his deed. *Reger v. McAllister*, 70 W. Va. 52, 73 S. E. 48.

Even if the boundary lines had been described with sufficient certainty by the contract to enable a court of equity to enforce specific performance, it would seem inequitable to grant relief because of plaintiff's laches. Moreover, between the acceptance of the deed and the bringing of the suit, the land has greatly enhanced in value. If the land had depreciated, instead of appreciated in that time, it is more than probable that plaintiff would have been content. He has delayed so long in bringing his suit, that he must be regarded as having acquiesced in what was done. To grant his prayer would be to give him a great advantage over the other contracting party, in view of the enhanced value of the land. *Reger v. McAllister*, 70 W. Va. 52, 57, 73 S. E. 48.

Request to Compromise.—Where a defendant in a petition to ascertain a boundary between him and the plaintiff has refused to accept an offer of a compromise line made in said petition, and has denied the right of the plaintiff to the line both in his pleadings and proof, he has no right to claim any benefit from such offer. *Hamman v. Miller*, 116 Va. 873, 83 S. E. 382.

Case Not Falling within Doctrine of Estoppel.—In an action of ejectment the entire controversy turned upon the location of the line between the adjoining tracts of plaintiff and defendants. When plaintiff purchased his land his grantor procured a survey thereof with notice to all adjoining landowners, including the defendant's predecessor in title. Defendants' predecessor in title and those claiming under him had apparently acquiesced in the survey for about nine years, when the defendants claimed to have found from an examination of the records in the clerk's office that the survey was not correct. Defendants introduced

certain witnesses whose testimony tended to show that the location of the line as indicated by the survey was not correct. Plaintiff objected to the introduction of this testimony upon the ground that defendants' predecessor in title was present and had acquiesced in the line established by the survey, and that the defendants were estopped from denying the correctness of the line. While defendants' predecessor did not offer any objection to the result of the survey at the time, he subsequently told his wife, who is now one of the defendants, that he was not satisfied and "was going to the courthouse and get it straight." Shortly afterwards he died without having given the matter further attention. There was no evidence to show that plaintiff ever knew that a survey was made, or that he was in any way influenced by the connection of defendants' predecessor in title therewith. Held, that the case did not fall within the influence of the doctrine of estoppel, and that the objection was properly overruled. *Reynolds v. Wallace*, 125 Va. 315, 99 S. E. 516.

II½. ESTABLISHMENT BY JUDICIAL PROCEEDINGS.

A. VIRGINIA STATUTORY PROVISIONS.

1. Code of 1919.

Va. Code 1919, § 5490 providing for the ascertaining and determining "the boundary lines of real estate" is based upon the Act of 1912. See post, "Act of 1912," II½, A, 2.

2. Act of 1912.

Nature of Proceeding.—The remedy given by the Act of 1912 (Acts 1912, p. 133) for ascertaining and determining "the boundary lines of real estate" is a summary proceeding at law, and not in equity, provided by the legislature for settling and determining, without a great deal of technical formality, the true boundary lines between coterminous owners or claimants, and the

trial is to be upon issue or issues joined between the parties as in other actions at law. *Wright v. Rabey*, 117 Va. 884, 86 S. E. 71.

The proceeding to settle and determine boundaries under Acts 1912, p. 133, is an action for the recovery of property. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

Election between Statutory Proceeding and Ejectment.—Where plaintiff's title was a fee, and the controversy was between the owners of coterminous real estate as to the location of boundary lines, plaintiff had the right to proceed under the statute instead of by ejectment. *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

The act required a trial by jury in every case arising under it, unless such trial is waived by the consent of parties both plaintiff and defendant. *Collier v. Hiden*, 120 Va. 453, 91 S. E. 630; *Wright v. Rabey*, 117 Va. 884, 86 S. E. 71.

Plaintiff Must Rely on Strength of His Own Title.—In a proceeding under the statute, a plaintiff, who can not rely upon actual possession, must recover, if at all, upon the strength of his own title. *Griggs v. Brown*, 126 Va. 556, 102 S. E. 212; *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

Paper Title of Plaintiff.—Where there is no evidence in the case even tending to show any actual possession of any part of the land in controversy by the plaintiffs or any of their predecessors in title, the plaintiffs must rely upon their paper title to sustain their claim of ownership of such land. *Griggs v. Brown*, 126 Va. 556, 102 S. E. 212.

Parties, Pleading and Defenses.—Under the statute the petition is to be matured as in any action at law, and defendant is limited to legal defenses. Any person having an interest in real estate, whether in possession or out of possession, may bring an action. *Wright v. Rabey*, 117 Va. 884, 86 S. E. 71.

Under this statute where the petitioner has only a life estate, he must either have the remaindermen unite with him as plaintiffs, or have them made defendants. *Collier v. Hiden*, 120 Va. 453, 91 S. E. 630.

The defense of adverse possession for the statutory period may be set up as a defense to a petition under the act. *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

Under a plea of the statute of limitations, adverse possession is a defense which may be made in the statutory proceedings to fix boundaries under Acts 1912, p. 133. But whether the statute of limitations must or need not be pleaded in order to admit the defense, is not determined in the instant case. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

Evidence.—A judgment in an action of trespass which defendant recovered against plaintiff, while admissible in proceedings to determine boundaries between the parties to show that defendant was in possession or entitled to possession at the time of the action of trespass, is inadmissible on the issue of title, except upon the claim of title by defendant by adverse possession, and in the instant case its exclusion was harmless, because, although defendant claimed title to the land by adverse possession, there was no evidence tending to show such adverse possession for the statutory period. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

Proof of Title.—In a proceeding under Acts 1912, p. 133, to determine boundaries, the same principles are inevitably involved as are involved on the same subject in actions of ejectment. Where the plaintiff, to recover, relies on title to land up to a certain location of its boundary on the ground, although the defendant may in general terms admit by the pleadings that the plaintiff has title to some land claimed by the latter, yet when the defendant denies that the plaintiff's title extends

to such location, the plaintiff is incapable put to his proof of such a title, by evidence of title which the defendant can not be heard to dispute; and such evidence must trace the title either from the commonwealth or other common grantor. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

When plaintiff has never had actual or constructive possession of any part of the land in controversy in a proceeding under Acts 1912, p. 133, to determine boundaries, he must show a complete legal title to the premises in order to recover. If plaintiff had had a prior possession to that of the defendant and the possession of the latter had been obtained by intrusion and trespass without color of title, such prior possession would have raised a presumption of title in the plaintiff which would have been sufficient to show a complete legal title to the premises in him. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

Jurisdiction of Court on Questions of Title.—The act confers upon the court jurisdiction to pass upon the title to the land included in the boundary line or lines fixed by the judgment of the court. *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

Authorizing Court to Make Survey.—The provision of Acts 1912, p. 133, authorizing the court to direct surveys to be made on the application of either party, was not intended to prevent the court of its own motion from ordering such survey or surveys as it might deem necessary to give effect to its judgment as to what constituted the boundary between the parties by locating and marking the line on the ground. It is not only the right, but the duty, of the court to have such survey or surveys made whenever deemed proper. *Hamman v. Miller*, 116 Va. 873, 83 S. E. 382.

Objection to Surveyor's Report Held without Merit.—*Hamman v. Miller*, 116 Va. 873, 83 S. E. 382.

B. REFERENCE TO COMMISSIONER.

See post, REFERENCE.

Reference of a cause to a commissioner, to ascertain and report the location of a disputed boundary line, is proper, when the evidence is conflicting as to the identity of monuments called for in the title papers; the identity of monuments and application of the description found in the deed, patent or other muniment of title to its subject matter being questions of fact, and the rules, applicable to undisputed or clearly established facts, questions of law. *State v. King*, 64 W. Va. 546, 63 S. E. 468.

Effect of Commissioner's Findings.

—"The supreme court of Virginia, in *Tatum v. Tatum*, 101 Va. 77, 43 S. E. 184, held that the trial court was not bound by the findings of the commissioner, but might review and weigh the evidence, and, if not satisfied with the findings, overrule them. See also, *Shipman v. Fletcher*, 91 Va. 473, 22 S. E. 458." *State v. King*, 64 W. Va. 546, 63 S. E. 468.

III. CONSTRUCTION OF DESCRIPTIONS IN DEEDS OR OTHER INSTRUMENTS.

See ante, "In General," I, A; post, DEEDS.

A. IN GENERAL—LATITUDE THEREFOR.

Adequacy of Description in General.

—A description of land is adequate when it is such that any person of reasonable intelligence, whether a surveyor or not, would have no difficulty in definitely locating all of its boundaries. *Carter v. Hook*, 116 Va. 812, 83 S. E. 386.

General Boundaries.—When general boundaries are so given in the description of land that they mean either the inclusion of a parcel or the exclusion of it, and to that extent the description is ambiguous or uncertain, the number of acres which the parties have fixed in describing the land may be

looked to in defining the boundary. *Carnegie Natural Gas Co. v. Carter Oil Co.*, 73 W. Va. 776, 81 S. E. 840.

Construction of Words and Calls.

The word "east," when used in describing a boundary, means "due east," unless other words are used qualifying that meaning; and where a call is from one point or monument to another, the line is presumed to be a straight line, unless a different line is described in the instrument. *Roanoke v. Blair*, 107 Va. 639, 60 S. E. 75.

Effect Given to All Provisions.—In construing a conveyance or in applying it to its subject matter, effect should be given, as far as possible, to all of its provisions. A call to "Hall's line, and with his lines to Indian Creek," is not answered by running the line to the point where Hall's line crosses Indian Creek. This would entirely ignore the call for running with Hall's lines. *Pilkerton v. Roberson*, 110 Va. 136, 65 S. E. 835.

Statement of Acreage.—Where the description of land by monuments, distances or otherwise is vague and indefinite, by reason of conflicting lines or omission of a line, or from any other cause, the statement of the acreage is an essential part of the description. *Smith v. Owens*, 63 W. Va. 60, 59 S. E. 762.

Highway as Boundary.—In Tyler's *Law of Boundaries*, 127, after laying down the general doctrine where the conveyance calls for a highway as a boundary, the learned author observes: "Indeed, it has been held by high authority that when land is sold bordering on a highway, the mere fact that it is not so described in the deed will not vary the construction. The grantee takes the fee to the middle of the highway, on the line of which the land is situated." *Durbin v. Roanoke Bldg. Co.*, 107 Va. 753, 756, 60 S. E. 86.

In *Gish v. Roanoke*, 119 Va. 519, 89 S. E. 970, it was held that where a tract of land was situated at an angle from northeast to southwest, the des-

ignation in a conveyance of the north side of a road running through it would be construed to refer to the northwest or more westerly course.

B. QUESTIONS FOR COURT AND JURY.

The construction of a deed is for the court, but the location of a disputed boundary line is a question of fact for the jury, under proper instruction from the court. *Mitchell v. Williams*, 114 Va. 420, 76 S. E. 949; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Whealton v. Doughty*, 116 Va. 566, 82 S. E. 94.

Where the description in a deed is ambiguous as to the location of a disputed boundary line the question is one for the jury. *Blacksburg Min., etc., Co. v. Bell*, 125 Va. 565, 100 S. E. 806.

If there is no ambiguity about a boundary line, it is the province of the court to construe it without the aid of extrinsic evidence. *Patterson v. Overbey*, 117 Va. 345, 84 S. E. 647.

Where a deed calls for a line between monuments as well as by course and distance, one of which monuments is standing well marked and unquestioned, while the other has long since disappeared and its location is not definitely ascertained, and surveyors differ in their locations of the latter, with the result that recent surveys purporting to represent such line materially vary, each being supported by measurements to and from other known monuments, thereby enveloping its true location in doubt and uncertainty, the solution of the conflict so presented is peculiarly within the province of a jury, and its finding, in the absence of a clear preponderance of evidence to the contrary and of prejudicial error during the course of the trial, can not properly be disturbed by the trial court upon motion or upon writ of error from this court. *Wilson v. McCoy*, 86 W. Va. 103, 103 S. E. 42.

Where the evidence is conflicting as to the true location of a disputed boundary line, and as to acts of ownership exercised over the land by the claimants and those under whom they claim, the location of the line is peculiarly a question for the jury, under proper instructions from the court, and their verdict will not be set aside unless it is plainly wrong. *Pilkerton v. Roberson*, 110 Va. 136, 65 S. E. 835.

The owner of land sold off a part thereof and put the purchaser in possession. Afterwards X, a surveyor employed by the vendor, surveyed the dividing line between the parties and marked the same by stakes and blazed trees. From this survey and references to surveys formerly made by others, X drew a plat of the vendor's land and gave it to her. The vendor thereafter conveyed to the heir of the purchaser, who died, the land so sold, and the deed provides that the eastern boundary (the dividing line in dispute) is to be fixed as surveyed by X. In an action by the vendor against one claiming under the vendee, the question at issue was the true location of the lines surveyed by X. Upon this question the evidence was conflicting. Held: The lines marked on the ground, and not the plat delivered to the vendor, constitute the actual survey, and it was for the jury to say, from the evidence, where such lines were located. *Mitchell v. Williams*, 114 Va. 420, 76 S. E. 949.

Where Termini of Line Is Known.—

A line of a survey described in a patent as commencing at one natural object, such as a tree, and running without further locative calls to another object, such as a tree, is governed in its location by the monuments called for, if they can be found, although an uncalled for marked line different therefrom is disclosed by extraneous evidence; and, if there is sufficient evidence of the identity of the monuments called for as the termini of the line, the trial court may properly sub-

mit to the jury the location of the line by the monuments called for or by the marked line, according to their judgment as to the weight of the evidence tending to prove the respective locations claimed. *Winding Gulf Colliery Co. v. Campbell*, 72 W. Va. 449, 451, 78 S. E. 384. See post, "To Locate Descriptive Calls," IV, A, 2.

Where the location of boundary lines are not uncertain or indefinite but depend upon the construction of a deed, calling for the lines of an abutting owner as a part of the boundary, the question is one of law for the court to determine. *Bradley v. Swope*, 77 W. Va. 113, 87 S. E. 86.

Agreement Not to Be Construed by Jury.—A land company the owner of a tract of land subdivided it into blocks, lots and streets and recorded a plat thereof in the manner provided by law. In this plat the lots fronting on a street approached the same obliquely, and the land company decided that it was desirable to change the plat so as to make the lots perpendicular to the avenue. It, therefore, entered into an agreement with the other parties in interest, which recited that it was the desire of all the parties in interest to make a change in the plat, so as to make the lots perpendicular to the streets on which they fronted. This agreement and the amended plat referred to therein were duly recorded. The plat attached to the agreement, adopted and recorded by the land company, was a complete and accurately defined scheme of subdivision, free from any element of uncertainty or ambiguity. *Furcron v. Gurkin*, 123 Va. 93, 96 S. E. 199.

It was an executed, practical and final interpretation of what the land company intended to do, and was expressly declared by the agreement to supercede the original plat and to be binding on all parties. Held, that no room was left for construction, and that it was error for the trial court to permit the jury to consider and con-

strue the agreement along with the plat attached thereto, in determining the true boundary line between two lots, and the recital in the agreement of a desire to make the lots perpendicular became unimportant and immaterial in view of the actual adoption of a plat whose lines are clearly and unmistakably fixed, although not exactly perpendicular. *Furcron v. Gurkin*, 123 Va. 93, 96 S. E. 199.

C. CONFLICTING CALLS AND FALSE DESCRIPTION.

See ante, "Manner of Indicating and Ascertaining," I; post, "Parol Evidence," IV, A, et seq.

A beginning corner of a survey, inconsistent with other portions of the description of the subject matter of the deed, and shown by the situation and purposes of the parties and all the surrounding circumstances, to have been selected by mistake, may be rejected and the subject matter ascertained and determined by the parts of the description that harmonize with the obvious intention of the parties. *State v. Herold*, 76 W. Va. 537, 85 S. E. 733.

A call in a description for a tree or other object as being on one of the exterior lines of the grantor's lands, which is shown by extrinsic evidence only not to be on such line, is latently ambiguous; and, if it appears from the situation and purposes of the parties and the surrounding circumstances, that adoption of such line, as the true monument, and rejection of the tree will make the conveyance conform to their real intention and that the adoption of the tree, as the monument, would defeat it, the former interpretation must prevail. *State v. Herold*, 76 W. Va. 537, 85 S. E. 733.

When a road designed and provided for is described as an extension of an existing road, lying between a portion of the land conveyed and a lot belonging to R., so as to run between the land conveyed and a tract of land be-

longing to O., and at the corner of the lands of R. and O. there is a slight angle, made by their lines running to the corner from nearly opposite directions, the road will follow said two lines and have, at the corner aforesaid, a corresponding angle, notwithstanding the deed, calling for one of the lines of the road as a boundary of the land conveyed, describes that boundary as a single line between two monuments, and as running with "line of alleys." In such case, the use of the word "alleys" will be deemed to refer to the old road, as one alley, and to the extension thereof, as another, and to signify intent to locate the road and the boundary line so as to run with the lines of the two adjacent tracts of land, and leave, between the tract conveyed and the adjacent lands, only sufficient space for the road. *Clayton v. County Court*, 58 W. Va. 253, 52 S. E. 103.

Particular Description Prevails over General One.—As a general rule, a particular description prevails over a general one, and limits the application of the latter. That which is the more certain is entitled to the greater efficacy. *South Penn Oil Co. v. Knox*, 68 W. Va. 362, 69 S. E. 1020.

Where in the original survey of a right of way for a railroad, one of the calls is N. 70° 28' East 535.7 feet, this particular call in the deed is not overcome and shown to be a mistake by some general description in the deed and the measurement and survey thereof by a subsequent surveyor, when the general description is as consistent with the particular description in the deed as with the theory of mistake of such surveyor. *Norfolk, etc., R. Co. v. Christian*, 83 W. Va. 701, 99 S. E. 13.

In a lease for oil and gas producing purposes, general location and description of the land by undefined references to adjoiners will be limited and controlled by particular calls for monuments, courses, and distances contained in a deed especially mentioned and pointed out in the de-

scription as one by which the same land was conveyed. *South Penn Oil Co. v. Knox*, 68 W. Va. 362, 69 S. E. 1020.

D. PRESUMPTION AGAINST RETENTION BY GRANTOR OF NARROW INTERVENING STRIP.

It is not to be presumed that a grantor intended to leave a narrow strip of ground between the water and the imaginary boundary which would be of no use to the grantor, and likely to be a source of great annoyance to the grantee if it does not belong to him. *Patterson v. Overbey*, 117 Va. 345, 84 S. E. 647.

E. DESCRIPTION BY QUANTITY.

1. Importance.

A statement of quantity is never allowed to control defined and reliable calls by monuments, courses and distances. All other elements of description must lose their superior value through ambiguities and uncertainties before resort can be had to quantity. *South Penn Oil Co. v. Knox*, 68 W. Va. 362, 69 S. E. 1020. See *State v. King*, 64 W. Va. 546, 63 S. E. 468.

Definitely established landmarks fixed by the parties, or by the conveyance, will always prevail over acreage. *Gravatt v. Lane*, 121 Va. 44, 92 S. E. 912.

Distance or length of lines called for in the deeds and acreage must give way to fixed and ascertained corners and reputed boundaries established by ancient but distinct landmarks. *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

An instruction that "a correspondence in quantity given by a line in question with the quantity mentioned in the deed, or in the approximation thereto, may be considered as going to establish such line as the true one," gives too great prominence to the mere acreage. It is of less weight than natural monuments, corners or reputed boundaries. *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

Particular Instances.—When an oil and gas lease is clear and unambiguous in its terms, the usual clauses providing against drilling near to buildings and for free gas in a dwelling, not asserting that such buildings are actually on the land leased, can not tend to the overthrow and total disregard of the particular description of the premises adopted by the parties, though there are no buildings on the land embraced by that particular description and a dwelling and other buildings are on adjacent land to which the more general description alone might extend. *South Penn Oil Co. v. Knox*, 69 W. Va. 362, 69 S. E. 1020.

Where the owner conveys to a purchaser one hundred acres of a large tract of land, giving descriptive boundaries, and afterwards conveys to another purchaser for value the residue of the tract, the latter having no notice of the rights of the first purchaser other than that imparted by his recorded deed, the purchaser of the residue of the tract takes all of the tract not embraced within the descriptive boundaries, though the boundary described contains less than one hundred acres. Quantity, being the least certain mode of describing land, must yield to description. *Reid v. Rhodes*, 106 Va. 701, 56 S. E. 722.

Where the boundaries called for in a deed were easily ascertainable and were clearly identified and established by the evidence adduced at the trial, a designation of a certain acreage, more or less, must yield to the definite boundaries described in the deed. *Rose v. Agee*, 128 Va. 502, 104 S. E. 827.

Ambiguity and Uncertainty.—While a call for quantity will never control other definite description of land, yet when all other elements of description lose their superiority through ambiguities and uncertainties the quantity called for in a deed may be considered in ascertaining the land intended to be conveyed. *Lovett v. West Va. Cent. Gas Co.*, 73 W. Va. 40, 79 S. E. 1007;

Virginia Coal, etc., Co. v. Ison, 114 Va. 144, 75 S. E. 782.

G. CALLS OF OTHER DEEDS.

"A claimant under one of two deeds of different dates, made to different parties, contemplating an eight foot road or passage way between the two lots of land conveyed by them, and each calling for the side of the road next to it, as its boundary line, is limited to the line staked out for him along the side of the road, even though the road may thus be given a breadth of more than eight feet. *Holston v. Vaughn*, 74 W. Va. 558, 82 S. E. 390, citing *Snooks v. Wingfield*, 52 W. Va. 441, 44 S. E. 277; *Tolley v. Pease*, 72 W. Va. 321, 78 S. E. 111; *Matheny v. Allen*, 63 W. Va. 443, 60 S. E. 407."

IV. EVIDENCE AS TO BOUNDARIES.

½A. PRESUMPTIONS AND BURDEN OF PROOF.

"It is well settled law that the burden is on the plaintiff to identify and locate the land which it claims, and to show that the same is included within his title papers. See *Wood v. Phillips*, 117 Va. 878, 881, 86 S. E. 101." *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 228, 101 S. E. 225.

Where in an action of ejectment there was evidence tending materially to identify and locate plaintiff's grant in such way as to include the land claimed and held by the defendants under a junior grant, but this evidence was not conclusive; the court properly referred the question to the jury, and the verdict of the jury either way would have been binding upon the court. *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S. E. 225.

Defendant was in possession of a lot as defined by an amended plat recorded in the manner provided by law, and his residence occupied a part of the land in dispute when the plaintiff acquired title to the adjoining lot from the defendant's grantor. Held, that the burden was upon the plaintiff to establish

the location of the line. *Furcron v. Gurkin*, 123 Va. 93, 96 S. E. 199.

A. PAROL EVIDENCE.

See post, PAROL EVIDENCE.

1. In General.

The general rule that when the location of the natural objects, or the lines of a survey, called for, is doubtful or uncertain, resort may be had to extraneous or oral evidence, to show the actual intention of the parties, and that doubtful lines and corners must give way to the more certain courses or monuments called for in the title papers, has no application in a case where the evidence leaves no room for doubt as to the location of the lines or monuments called for. *State v. Thompson*, 77 W. Va. 765, 88 S. E. 381. See *Myers v. Bland*, 77 W. Va. 546, 87 S. E. 868.

If there is no ambiguity about a boundary line, it is the province of the court to construe it without the aid of extrinsic evidence. *Patterson v. Overbey*, 117 Va. 345, 84 S. E. 647.

"If two corners had been shown to exist, either of which might have fitted the description of the corner called for in the deed, then a latent ambiguity would have existed, and parol evidence would have been admissible to prove which one of the two was intended. *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154." *Harman v. Dry Fork Colliery Co.*, 80 W. Va. 780, 785, 94 S. E. 355.

The extent of boundaries of land, and thus the title to land, can not be established wholly by parol evidence, unsupported by written evidence of title, where title by adverse possession is not involved, and where the case is one in which the title claimed is by deed and must have been derived by deed, if derived at all; for, to hold otherwise would be to permit parol evidence to become an independent source of title, which by the weight of authority, and certainly in Virginia, is not permissible. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

In a proceeding under Acts 1912, pp. 133-4 (Va. Code 1919, § 5490) to ascertain and designate the boundary line of real estate, evidence which would have been admissible in an action of ejectment or unlawful detainer involving the boundary line between said parcels of land, is competent and should be received. *Hamman v. Miller*, 116 Va. 873, 83 S. E. 382.

Contents of Lost Title Bond.—Oral evidence is always admissible as to location and boundary, and hence testimony as to the contents of a lost title bond may be received for the purpose of throwing light upon the true location of a disputed boundary line. *Honaker v. Shrader*, 115 Va. 318, 79 S. E. 391.

General reputation on the subject, is admissible in evidence as tending to show the location of boundaries designated by grants, deeds or wills. But such general repute, to be admissible in evidence, must have reference to monuments or other delineation on the ground of the extent of the boundaries designated in some evidence of title. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

2. To Locate Descriptive Calls.

Plaintiff, claiming title by deeds, must rely upon such deeds to define specifically the boundaries of his claim. Extrinsic evidence is admissible to locate on the ground the boundaries thus designated in a general description thereof, so as to identify the land conveyed, and the deeds or grants conveying adjacent lands referred to in such general description and extrinsic evidence applying the boundaries therein designated to their proper subject matter are also admissible in evidence. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

To Prove Monuments.—Parol evidence is sometimes admissible to prove marked trees which are not in the courses or termini of lines to be the true lines intended, yet where the deed plainly calls for the lines by

courses and distances, and distinctly for stakes, not marked trees, as the termini thereof, and there is no such approximation thereto in the courses or the lengths of the lines sought to be established by marked trees as to warrant any presumption that they are boundaries of the land, the jury may properly be instructed to disregard the marked trees and to follow the courses and distances called for in the deed. *Tolley v. Pease*, 72 W. Va. 321, 78 S. E. 111. See *Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 766, 77 S. E. 525.

Ancient Calls.—Parol evidence may be received to prove by general reputation and tradition the location of a corner of a patent more than a hundred years old, but a living witness may not give his individual opinion as to the location of such corner. *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101.

In a controversy over the location of the dividing line between two parcels of land received in the partition of the lands of a common ancestor, where a call in the deed of partition is for a natural monument, witnesses may testify as to the location of the monument and the traditional derivation of its name, in order to identify the monument and locate the call in the partition deed. *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101.

When in a controversy over the title to land, dependent upon the location of a disputed boundary line, there are no monuments at the points in dispute, and these points can not be located by measurements from known and undisputed corners of the tracts between which the line is, so that, to render a verdict for either party, the descriptions of the deed must be departed from in respect to length of lines, a verdict supported by testimony of a witness who swears he saw the monuments called for at the points fixed by the verdict as corners, and evidence of acts of recognition by owners on both

sides of the line and other circumstances, cannot be disturbed by the appellate court as being contrary to the law and the evidence, in the absence of an admitted or clearly established controlling fact. *Stewart v. Doak Bros.*, 58 W. Va. 172, 52 S. E. 95.

3. To Prove Mistake in Course and Distance.

" 'In an action in ejectment parol evidence is admissible to prove that the calls for course and distance in a deed are mistaken, and do not designate the true boundary of the land intended to be conveyed.' *Elliott v. Horton*, 28 Gratt. (69 Va.) 766." *Tolley v. Pease*, 72 W. Va. 321, 78 S. E. 111.

" 'When a deed mentions the course and distance of a line, without any other description thereof, parol evidence is admissible to prove marked trees, not in the course or termination of that line, to be the true line intended.' *Baker v. Seekright*, 1 Hen. & M. (11 Va.) 177." *Tolley v. Pease*, 72 W. Va. 321, 323, 78 S. E. 111, citing *Herbert v. Wise*, 3 Call. (7 Va.) 239, 240.

5. Declarations and Admissions of Owner and Others.

On the question of a disputed boundary, the admission of a former owner against his interest, made while he was owner of the land, is admissible in evidence. *Edmunds v. Barrow*, 112 Va. 330, 71 S. E. 544. See *Wheaton v. Doughty*, 116 Va. 566, 82 S. E. 94.

But such declaration must have reference to monuments or other delineation on the ground of the extent of the boundaries designated in some evidence of title. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

In proceedings founded on a caveat, for the determination of the location of boundary lines of entries and surveys, preparatory to the procurement of patents, the rules of evidence, relating to admission of the parties and locations made by them, are more lib-

eral than those applied in proceedings to determine the location of lines designated in patents; the difference being analogous to that obtaining between proceedings for the enforcement of executory contracts of sale of land and those pertaining to the vindication of legal rights accruing under deeds of conveyance. *State v. King*, 64 W. Va. 546, 63 S. E. 468.

Living Predecessors in Disparagement of Title.—*Stewart v. Doak Bros.*, 58 W. Va. 172, 180, 52 S. E. 95.

Owner of Adjacent Tract.—Where it becomes important to establish the location of a corner of tract of a third person in part adjacent to the lands in controversy, which corner is in the controverted line, the fact that the owner of said tract points out his corner to an agent of one of the parties, who is seeking to establish the true line between the lands in controversy, and that he adopts it and marks it, is relevant evidence when offered against such party, as tending to show the true location of said corner. *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101.

Party in Interest.—Declarations of a party in interest, after a controversy has arisen with reference to a disputed boundary, which are made under suspicious circumstances, should not be received, if objected to; but if received without objection, they must be considered along with the other facts and circumstances tending to establish the boundary. *Pilkerton v. Roberson*, 110 Va. 136, 65 S. E. 835.

If, in an action involving title to land, admissions and conduct of one of the parties, relating to locations and boundary lines, are relied upon, it is not error to permit him to introduce an agreement with a third party, concerning the land, which tends to nullify the effect of such admissions and conduct. *Mylius v. Raine-Andrew Lumber Co.*, 69 W. Va. 346, 71 S. E. 404.

Tenant or Equitable Owner.—If in other respects unobjectionable, a declaration made by a tenant or equitable owner, is admissible, if paper title in the landlord or trustee be shown. *State v. King*, 64 W. Va. 546, 63 S. E. 468.

Former Holder of Deed of Trust.—In a controversy about a disputed boundary line, a deed of trust made by a former owner, giving what he recognized as the true location of the disputed line, is admissible in evidence against those claiming under him. *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742.

Stranger.—The declarations of a person as to the location of a disputed boundary line may not be given in evidence in a controversy between others, to whom he was an entire stranger, where it does not appear that he was a surveyor or chain carrier at the making of the original survey, or that he was the owner of the tract, or of any adjoining tract calling for the same boundaries, or has been a processioner of the land, or that his situation was such in reference to the land as to render it his duty or his interest to make diligent enquiry and obtain accurate information as to the facts, or that he had any peculiar means of knowledge as to such boundary line, but was simply living on the land at the time the declaration was made. *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742.

Agent.—In a controversy over a boundary line, it is admissible to prove that an agent of one of the parties stated that his principal had twice run one of the lines of the tract. It is relevant to show acts done by the party in his efforts to locate the lines. *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101.

Surveyor.—A surveyor who has run a disputed line may, by way of inducement to show why he ran it as he did, testify that it was by direction

of counsel of one of the parties given in the presence of the counsel and general manager of the other, who stated that he could "go ahead and run it." *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101.

6. Declarations of Deceased Persons as to Boundary.

a. In General.

"The law is well settled in Virginia that evidence is admissible to prove the declaration of a deceased person as to the identity of a particular corner, tree or boundary, provided such person has peculiar means of knowing the facts in question." *Hurley v. Shortridge*, 118 Va. 136, 138, 86 S. E. 858.

"In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible unless they were made by persons who, it is shown, had knowledge of that whereof they spoke, and who were on the land or in possession of it when the declarations were made." *State v. King*, 64 W. Va. 546, 574, 63 S. E. 468.

"In *Clements v. Kyles*, 13 Gratt. (54 Va.), 468, 469, it was held, that the statement of a person, living on the land at the time, made many years before the trial, at which time he was dead, pointing out to the witness two of the corners called for in W's patent, is not competent evidence; he not having been the surveyor or chain carrier at the making of the survey, or owner of that or adjoining lands calling for the same boundaries, or having any motive or interest to enquire and ascertain the facts." *Sutherland v. Gent*, 116 Va. 783, 787, 82 S. E. 713.

Declarations of the former owner of land, since deceased, as to the identity or location of a particular corner or boundary of the land are admissible in evidence. *Hurley v. Shortridge*, 118

Va. 136, 86 S. E. 858; *State v. King*, 64 W. Va. 546, 63 S. E. 468.

When a certain corner of an adjoining tract is called for in a deed, as the beginning corner of the land thereby conveyed, proof of its actual location and identity determines the beginning point, and evidence of admissions and declarations by the deceased grantor that another point was intended is not admissible. *Harman v. Dry Fork Colliery Co.*, 80 W. Va. 780, 94 S. E. 355.

Adjoining Owner.—The declaration of a deceased adjoining owner of land as to the location of a corner or line, to be admissible, must relate to a line or corner of his own land, in the ascertainment of which he has an interest. *State v. King*, 64 W. Va. 546, 63 S. E. 468; *Hurley v. Shortridge*, 118 Va. 136, 86 S. E. 858.

Tenants and Processioners.—**Declarations of deceased tenants, processioners, and others**, whose interest or duty would lead them to diligent inquiry or accurate information as to the fact, as to the identity or location of a particular corner or boundary, are admissible; always excluding those declarations which are liable to the suspicion of bias from interest. *State v. King*, 64 W. Va. 546, 573, 63 S. E. 468.

b. Declarations of Surveyor, Chainman, etc., as to Survey.

The declaration of the surveyor or chainman at the making of a survey are admissible to prove the identity or location of a particular corner or boundary. *Hurley v. Shortridge*, 118 Va. 136, 86 S. E. 858; *State v. King*, 64 W. Va. 546, 63 S. E. 468; *Sutherland v. Gent*, 116 Va. 783, 82 S. E. 713.

c. Must Be Particular Not General.

The location of a corner in a disputed boundary can not be shown by proving that twenty years before it had been pointed out to the witness by one since deceased, who was the agent of the owner and also a sur-

veyor, when there was no corner tree standing on the spot at the time nor other monument to mark the corner, and it is not shown that the declarant had identified the corner in question or other lines or corners of the tract in controversy, or adjoining tracts by actual survey, nor upon what knowledge or information the declarations of declarant was founded. While hearsay evidence as to particular facts may, under proper restrictions, be received upon a question of ancient boundaries, such evidence should be carefully watched because from its very character it may, in many or most cases, be utterly impossible to meet or disprove it. It should not be carried further than required by the absolute necessities of the case. *Sutherland v. Gent*, 116 Va. 783, 82 S. E. 713.

8. Family Tradition and Reputation.

In *Cline v. Catron*, 22 Gratt. (63 Va.) 378, as well as in *High v. Pancake*, 42 W. Va. 602, 62 S. E. 536, family tradition and reputation are held to be admissible in evidence on the questions of boundary, but not to prove title. Of course such evidence is not entitled to the same weight as admissions of owners or testimony by adjacent owners to particular facts. It is more uncertain and remote in its nature, but it is admissible. *State v. King*, 64 W. Va. 546, 574, 63 S. E. 468.

9. Opinion as to Identity.

See post, EXPERT AND OPINION EVIDENCE.

Expert Testimony.—In an action of ejectment, the question whether the land in controversy is within the boundaries claimed by the plaintiff's declaration is a question of fact upon which witnesses may state their knowledge, but upon which experts may not express opinions. On such questions expert testimony is not admissible. *Sutherland v. Gent*, 116 Va. 783, 82 S. E. 713. See, also, *Holleran*

v. Meisel, 91 Va. 143, 144, 21 S. E. 658; *Mylius v. Raine-Andrew Lumber Co.*, 69 W. Va. 346, 71 S. E. 404.

Same—Surveyor.—An experienced surveyor, who has surveyed many of the lines of an old survey and who is shown to be familiar with the manner in which the lines and corners were originally marked, is competent to express to the jury his opinion as to whether a certain disputed corner is the true corner of such survey. *Curtis v. Meadows*, 84 W. Va. 94, 99 S. E. 286.

Where there is doubt as to the correct location of a survey, or as to the application of a grant to its proper subject matter, evidence aliunde is always admissible. It is not a question of construction, but of location. It is a question of fact to be determined by the jury by the aid of extrinsic evidence under proper instructions from the court. In the case at bar, the calls in the title papers for the disputed line were ambiguous. One was for "ninth street," and the other for the street "better known as the street south of race track." Either was sufficient, but one was false and the other correct. It is admissible to prove by the surveyor who ran the line which is the true boundary. *Edmunds v. Barrow*, 112 Va. 330, 71 S. E. 544, but see *Mylius v. Raine-Andrew Lumber Co.*, 69 W. Va. 346, 368, 71 S. E. 404.

The opinion of a surveyor, unsupported by other evidence, as to the identity of a tract of land, unless he also states some fact or facts by which the court can determine the location of the land, is clearly insufficient to enable the court to locate the same. In the case in judgment, the physical facts contradict the location of the disputed line where the surveyor for the defendants located it. In addition to this, the location of the line as claimed by the complainants was known of and acquiesced in by

the defendants four or five years prior to the present controversy, and was not controverted in any way until shortly prior to the institution of the present suit. *Woolfolk v. Graves*, 113 Va. 182, 69 S. E. 1039, 73 S. E. 721.

In a proceeding to ascertain the true boundary line between certain coterminous land of the parties, a surveyor, who was one of the witnesses for plaintiffs, testified that his conclusion from the evidence in the case was that the metes and bounds described in deeds under which plaintiffs claimed included the land in controversy. Held: That, although such testimony was admitted before the jury without objection, that circumstances could not give it any probative value. It being itself unsupported by the evidence on which it was based, all of which was before the jury, it could add nothing to the quantum or effect of such evidence. *Griggs v. Brown*, 126 Va. 556, 102 S. E. 212.

B. SURVEYS, ENTRIES AND MAPS.

1. Surveys Generally.

See ante, "In General," I, A; post, "Declarations of Surveyor, Chainman, etc., as to Survey," IV, A, 6, b.

Notes of Survey.—Notes of a survey in the handwriting of a deputy county surveyor, which the evidence tended to show was made for the purpose of locating the division line in controversy, in the presence and under the supervision of the president of the plaintiff and one of the defendants, was admissible in an action of ejectment involving the line. *Blacksburg Min., etc., Co. v. Bell*, 125 Va. 565, 100 S. E. 806.

Private Survey.—While a private survey may be admitted as evidence of boundary between those who were parties to it, or who claim under them, it is not admissible as independent evidence against strangers. *Virginia Coal, etc., Co. v. Ison*, 114 Va. 144, 75 S. E. 782.

Survey Made on Information Received after Loss of Deed.—A survey and map, made, after the deed was lost, by a surveyor who acted only upon information in relation to the boundaries therein contained, is not evidence to prove the boundaries. *Cartright v. Cartright*, 70 W. Va. 507, 74 S. E. 655.

Subsequent Survey as Monument.—A subsequent survey calling for lines of the older one is not a monument thereof, and the call therefor is only a circumstance, admissible under some conditions, as evidence of the location of the lines of the older survey. *Lewis v. Yates*, 72 W. Va. 841, 79 S. E. 831, citing *McMullin v. Lewis*, 5 W. Va. 144; *Clements v. Kyles*, 13 Gratt. (54 Va.) 468; *Overton v. Davisson*, 1 Gratt. (42 Va.) 211.

Survey on Which No Patent Was Issued.—Though a survey on which no patent ever issued is not admissible to prove the identity and locations of boundary lines and corners of an adjacent survey, carried into grant by the issuance of a patent, if both surveys were made by the same surveyor, and the former only a few months later than the other, and the surveyor has long since died, it may be given in evidence to prove the names borne by streams and other natural objects, called for in the surveys and situate in the vicinity thereof, at the dates of the surveys and the surveyor's knowledge of these facts, if such names and knowledge thereof become material, they being mere subsidiary issues, bearing indirectly and resultantly upon the main issue in the case. *State v. King*, 64 W. Va. 546, 63 S. E. 468.

Experimental Surveys.—Experimental surveys and maps thereof, made at the instance of a landowner, endeavoring to find the boundaries of his land, can not be given in evidence against him as admissions as to boundary locations, unless accompanied by evidence appreciably tend-

ing to prove his adoption thereof as being correct. *State v. King*, 64 W. Va. 546, 63 S. E. 468.

2. Contemporaneous and Neighboring Surveys.

The lines of older patents to third persons, which are referred to in a deed of partition between the heirs of an adjacent owner, are relevant evidence to sustain the theory of one of the parties as to the true line between them; and where the patents and deeds in the line of title of the land partitioned refer interchangeably to two tracts in part adjacent to the lands in controversy as the H. and F. land, evidence is admissible to prove that both tracts were sometimes called the H. land. *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101.

Senior and Junior Patents.—Where the lines and corners of a senior patent have become uncertain, a junior patent, calling for these lines and corners, is admissible, and evidence showing the lines of such junior patent may be received for the purpose of identifying the older lines, and also for the purpose of explaining the presence of newly-marked trees in the older lines. *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101.

4. Maps of Contemporaneous Surveys.

In a controversy concerning the location of the dividing line between adjoining city lots, a copy of the original map of the block of lots and adjacent streets and alleys does not, of itself, prove the location of the line, when, tested by the scale on which it was made, it appears that such map is not strictly accurate, and by other evidence in the case that one of the streets bounding the block, in which said lots are located, has been widened since the original survey was made, so as to include a strip off said block. *Ware v. Medley*, 81 W. Va. 25, 93 S. E. 941.

A plat not referred to in or made

a part of the chain of title of either plaintiff or defendants, on the trial of a petition under Acts 1912, p. 133, is not admissible as evidence of the extent or location of the metes and bounds covered by the true title, or of that covered by the color of title of the defendants. *Christian v. Bulbeck*, 120 Va. 74, 90 S. E. 661.

B½. DEEDS AND LEASES.

Whenever deeds or grants conveying adjacent land tend to identify and fix a disputed boundary, the general rule is they are admissible in evidence. *Wright v. Rabey*, 117 Va. 884, 86 S. E. 71; *Hamman v. Miller*, 116 Va. 873, 83 S. E. 382.

Where land has been partitioned between two heirs of the former owner and a part of that assigned to one of the heirs has, through successive conveyances, come to A, and his deed calls for the dividing line between the heirs under whom he claims and the other heirs as the western boundary of A's tract, in a controversy between A and those claiming under the other heir as to the location of said dividing line, the deed to A is relevant evidence, as tending to show that those under whom A holds claimed the location of said dividing line to be the same as now asserted by A. *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101.

In a controversy concerning the boundaries of land, leases not shown to cover any of the land in controversy, or to be otherwise relevant, are not admissible in evidence. *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101.

C. VERDICTS AND JUDGMENTS ON QUESTIONS OF BOUNDARY.

Conclusiveness.—See post, FORMER ADJUDICATION OR RES ADJUDICATA.

A verdict and judgment in ejectment fixing a line are final and conclusive

between the parties and their privies in estate as to the location of such line. *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1026.

A decree dismissing a bill to redeem a mortgage, in a cause in which the pleadings make no definite issue as to the location of the boundary lines, but in which evidence was adduced to identify them upon the ground, is not an adjudication as to the location thereof. *Hudkins v. Crim*, 72 W. Va. 418, 78 S. E. 1043.

Where Defendant Enters Disclaimer.—Where in ejectment the issue is the location of the true division line between the parties, and defendant enters a disclaimer of all beyond a fixed line designated on the map of the official surveyor upon a verdict simply for defendant the court may properly enter judgment establishing as the true division the line beyond which defendant disclaimed. *Tolley v. Pease*, 72 W. Va. 321, 78 S. E. 111.

D. WEIGHT OF EVIDENCE — INSTRUCTIONS.

See post, "Instructions," IV½.

While admissions of a former owner of a tract of land as to the boundaries of the tract are admissible in evidence in determining such boundaries, they are not conclusive. *Whealton v. Doughty*, 116 Va. 566, 82 S. E. 94.

In the case at bar, plaintiff's theory was that the line should be made perpendicular with the street upon which the lots faced. His evidence only went far enough to show that this theory could be carried into effect by either of two ways, and afforded no rational ground for adopting the method which would bring the land he sued for within the boundaries of his lot. Held: That this evidence, as a matter of law, was insufficient to sustain a verdict in plaintiff's favor. *Furcron v. Gurkin*, 123 Va. 93, 96 S. E. 199.

Clerk's Record of Plat. — If it be conceded that in a proper case the

clerk's record of a plat will have to be treated as a verity, this is not so where no question of registry as an element of title is involved, but the decisive question is as to the true subdivision of the property as actually made by the owners. *Furcron v. Gurkin*, 123 Va. 93, 96 S. E. 199.

Verdict against the Evidence.—In a proceeding to determine the true boundary line between certain coterminous land of the parties, where there was no evidence before the jury to sustain a finding that the boundary lines of the land as called for in the deeds in the chain of title of the plaintiffs included the land in controversy, the verdict of the jury for the plaintiffs must be set aside and a new trial awarded to the defendants. *Griggs v. Brown*, 126 Va. 556, 102 S. E. 212.

IV½. INSTRUCTIONS.

Opinion on Evidence.—Where on the trial of the title to land there was only slight variation in the testimony of the witnesses for the plaintiffs as to the exact point where a corner tree not found was in fact located, and the witnesses for defendant tended in some degree to locate the corner at a different place, an instruction to the jury along with other instructions submitting the fact to the jury, and which told them that if they believed the corner stood at the point designated by the plaintiffs' witness and others, was not subject to the objection that it impliedly told the jury that the one witness was corroborated by others as to the location of the corner. *Billups v. Woolridge*, 80 W. Va. 13, 91 S. E. 1082.

Instruction Held Not Prejudicial.—Where on the trial of the title to land the patent and deeds of plaintiffs call for corners or lines of a senior patent under which defendant claims, and only the junior patent is offered in evidence, and the line in controversy is a common line between the lands of the conflicting claimants, the de-

fendant is not prejudiced by an instruction to the jury telling them that in endeavoring to locate the land described in the patent they should search for the footsteps of the surveyor in locating the survey upon which the patent was based. *Billups v. Woolridge*, 80 W. Va. 13, 91 S. E. 1082.

Courses Give Way to Calls for Marked Lines.—Where the deeds in evidence, contained calls for natural and artificial monuments, the trial court properly refused to instruct the jury that "courses and distances must give way to calls for line of adjoiners" and in lieu thereof instructed them "that courses and distances must give way for calls for marked lines and natural objects." The condition upon which calls for adjoiners will prevail did not arise. *Hurley v. Charles*, 112 Va. 706, 707, 72 S. E. 689.

Instruction as to Location of Corner.—An instruction, by which the jury was informed that, "in ascertaining the true boundaries of a tract of land described in a grant or deed, course and distance yield to marked trees and other permanent monuments identifying corners and lines," while not universally true, is nevertheless appropriate where the identity of some of the corners and monuments is admitted or clearly established by proof, though the identity and location of other lines and monuments is in fact in issue, as to which the evidence is voluminous and conflicting. *Stewart v. Parr*, 74 W. Va. 327, 82 S. E. 259.

Instructions Held Erroneous.—On the question of determining a boundary an instruction requiring the jury, in locating the last line and the last corner, to adhere to the course and fix the corner without regard to the topography of the ground at the corner as described in the title papers, is erroneous. *Green v. Pennington*, 105 Va. 801, 54 S. E. 877.

In a controversy concerning the di-

viding line between two parcels of land, both of which had belonged to one person and been divided by commissioners between his heirs, an instruction which ignores the theory of defendants that the parties had acquiesced in the line for which they contended, and, without qualification, yields precedence to the supposed intention of the commissioners, without regard to what they may have done in establishing the line in controversy, is erroneous. *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101.

In a proceeding to determine the boundaries of lands under Acts 1912, p. 133, the refusal of an instruction that plaintiff could not recover by showing a conflict of claims between himself and defendant, but must show that his claim to the premises is positive, valid, and complete, was error and harmful as to a parcel of land as to which there was no evidence as to plaintiff's title, but harmless as to another parcel as to which there was evidence of title in the plaintiff defining the boundary. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

Misleading Instructions as to Adjacent Lines.—In an action to recover marsh land, it is misleading, in an instruction, to speak of a boundary of marsh land which does not touch the plaintiff's upland but is a part of a body of marsh that does touch his upland as "adjacent" to the upland of the plaintiff. *Whealton v. Doughty*, 116 Va. 566, 82 S. E. 94.

In an action of ejectment to recover marsh lands adjacent to highlands on the seacoast, an instruction which assumes that the marsh land in controversy is "adjacent" to the upland of the plaintiff, and then tells the jury that as a matter of law the plaintiff is presumed to be the owner to low water mark and that a description of the land to the high water mark carries the ownership to the ordinary low water mark, unless this ownership is ex-

pressly excluded by the terms of the deed conveying the same, but fails to state in what direction the line dividing the uplands of the plaintiff and the defendant runs when it leaves the uplands and is to be continued until it reaches low water mark, is misleading and constitutes reversible error. *Wheaton v. Doughty*, 116 Va. 566, 82 S. E. 94.

Refusal to Instruct.—In a proceeding to determine boundaries under Acts 1912, p. 133, the refusal to instruct the jury that the plaintiff must show a complete legal title to the land in controversy, accompanied by an instruction that the jury were to determine the true line from all the evidence in the case, was harmless as to the parcel of land in dispute as to which there was evidence in the case of title in the plaintiff defining the boundary. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

In a proceeding under Acts 1912, p. 133, to determine boundaries, the refusal to instruct the jury that plaintiff must prove a complete legal title to the premises and the right to the possession thereof before he could recover, accompanied by an instruction that the jury were to determine the true line from all the evidence in the case, was prejudicial to the defendant as to a parcel of land as to which there was no evidence of title in the plaintiff, whatsoever in the record, because the jury were left wholly without guidance on the subject and free to fix the location of the line without any evidence of title. *Bradshaw v. Booth*, 129 Va. 19, 105 S. E. 555.

A peremptory instruction to the jury in an ejectment suit to find for plaintiff, and motion for a new trial, both predicated on the theory that the boundary line in question had been definitely and surely established by the surveyor with reference to natural land marks, marked lines and reputed boundaries, when the title papers call

for no such marks, lines and boundaries, and the evidence of the defendant tends to discredit the existence and location of any such monuments, are rightfully refused and overruled by the trial court. *Norfolk, etc., R. Co. v. Christian*, 83 W. Va. 701, 99 S. E. 13.

V. EQUITABLE RELIEF IN CONTROVERSIES AS TO BOUNDARY.

A. JURISDICTION OF EQUITY GENERALLY.

Equity does not have jurisdiction to determine disputed boundary lines where that is the only matter involved. *Barth v. Shepherd*, 80 W. Va. 218, 92 S. E. 317; *Gamble v. Kennedy*, 80 W. Va. 694, 697, 93 S. E. 807; *Lockwood v. Carter Oil Co.*, 73 W. Va. 175, 80 S. E. 814; *Pardee, etc., Lumber Co. v. Odell*, 71 W. Va. 206, 76 S. E. 343.

In the location of a boundary line, the parties are governed by considerations of reason, fairness and practicality, and in the event of their inability to agree upon the location, either may resort to a court of equity for a decree establishing the line. *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9.

Equity has jurisdiction to locate a boundary line, not determinable otherwise than by the quantity of the land conveyed by the deed. *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9.

Relief Incidental.—Though equity will not entertain a suit only to settle boundary and title to land, yet when there is an independent ground giving equity jurisdiction, it will entertain the suit and pass on the title or boundary as incidental to other relief. *Le Comte v. Freshwater*, 56 W. Va. 336, 49 S. E. 238.

Reformation of Lease.—Where a decree directs the lease of a tract of land for oil and gas, and the lease under it contains a line or boundary different from that authorized by the decree, omitting a part of the tract, either from fraud or mistake, the lessee being ig-

norant of the physical effect of the line as a fact, equity will reform the lease. *Le Comte v. Freshwater*, 56 W. Va. 336, 49 S. E. 238. See post, RESCISION, CANCELLATION AND REFORMATION.

B. SOME PECULIAR EQUITY NECESSARY.

• "The general rule is that in the absence of some peculiar equity arising out of the conduct, situation or relation of the parties, courts of equity are without jurisdiction to settle disputes as to title and boundaries of land. *Deane v. Turner*, 113 Va. 236, 74 S. E. 165; *Litz v. Rowe*, 117 Va. 752, 86 S. E. 155, L. R. A. 1916 B, 799." *Cumbee v. Ritter*, 123 Va. 448, 451, 96 S. E. 747; *Le Comte v. Freshwater*, 56 W. Va. 336, 49 S. E. 238; *Goff v. Goff*, 78 W. Va. 423, 430, 89 S. E. 9; *Eakin v. Taylor*, 55 W. Va. 652, 47 S. E. 992.

But where the act done or threat-

ened to be done would be destructive of the substance of the estate, or if repeated acts of wrong are done or threatened to be done, or the injury is or would be irreparable, whenever, indeed the remedy at law is or would be inadequate, a court of equity will put forth its restraining hand and enjoin the perpetration of the wrong and prevent the injury. *Cumbee v. Ritter*, 123 Va. 448, 96 S. E. 747.

Equity has no jurisdiction to settle title and boundaries when plaintiff fails to aver and prove other valid grounds for equitable relief against those in possession of the land. *Harman v. Lambert*, 76 W. Va. 370, 85 S. E. 660.

VII. REMOVAL OF LANDMARK AS CRIME.

Va. Code 1919, § 4479.

VIII. SURVEYORS.

Va. Code 1919, §§ 2839-2849, 3479.

BOUNTIES.

CROSS REFERENCES.

See the title BOUNTIES, vol. 2, p. 611, and references there given. In addition, see post, PENSIONS. As to bounty lands, see post, PUBLIC LANDS.

Bounties for Killing Predatory Birds and Animals.—Va. Acts 1920, p. 231; Pollard's Code 1920, p. 724; W. Va. Acts 1919, p. 212, ch. 52.

BOWLING ALLEYS—Licenses.—Va. Code, 1919, sec. 2373, 4653, appendix, p. 3140; Barnes Code, ch. 32, secs. 1, 98.

BOYCOTT.—See the title BOYCOTT, vol. 2, p. 612, and references there given.

BOYS.—A provision in a will directing "my boys" to sell testator's farm and divide the proceeds among "the boys," in the absence of some other controlling factor, will be construed to refer to the male children of the testator. *Hinerman v. Hinerman*, 85 W. Va. 349, 101 S. E. 789.

It is argued that the term 'boys' in its ordinary meaning signifies the male youth of the land, or of the neighborhood, as the case may be, and in another and more qualified sense it is said to be a designation of those companions of the party using it with whom he spends his convivial or social hours. But we are too familiar with the forms of paternal expression to think for a minute that a father uses the word in any such sense as this in his will. *Hinerman v. Hinerman*, 85 W. Va. 349, 101 S. E. 789.

BRANCH RAILROAD.—See post, RAILROADS.

BRANDS AND MARKS.—See ante, ANIMALS; post, FOOD; LOGS AND LOGGING; TREES AND TIMBER.

BRANDY.—See post, INTOXICATING LIQUORS.

BRASS.—See post, RECEIVING STOLEN GOODS.

BREACH OF PROMISE OF MARRIAGE.

III. When Right of Action Accrues.

IV. Contract Illegal When Consideration Contra Bonos Mores.

V½. Defenses.

VII. Pleading and Practice.

VIII. Evidence.

IX. Damages.

CROSS REFERENCES.

See the title BREACH OF PROMISE OF MARRIAGE, vol. 2, p. 613, and references there given. In addition, see post, DURESS. As to release of action as consideration for note, see ante, BILLS, NOTES AND CHECKS.

III. WHEN RIGHT OF ACTION ACCRUES.

Renunciation of a contract of marriage alters the status of the parties ipso facto and a right of action accrues at once. *Connolly v. Bollinger*, 67 W. Va. 30, 67 S. E. 71.

IV. CONTRACT ILLEGAL WHEN CONSIDERATION CONTRA BONOS MORES.

Though a promise of marriage, made in consideration of the allowance of illicit sexual intercourse, is void for illegality and immorality of the consideration, what the consideration was is a question for the jury, when the evidence concerning it is inclusive, but tends to prove mutual promise to marry, as well as immoral conduct at or about the same time. *Connolly v. Bollinger*, 67 W. Va. 30, 67 S. E. 71.

Proof of indulgence, by the parties to a contract of marriage, in illicit sexual intercourse at the time and place of the making of the promise, does not, as matter of law, preclude a verdict in an action for breach of the contract.

Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71.

V½. DEFENSES.

Letter Not Showing Condonation.—

Where a woman writes a letter to a man who has broken his engagement to marry her and in the letter refers to his statement in a previous letter to her that "we will never get married" and she says "I hope you may marry alright some day and get someone to be kind to you because you know that I will give you lots of trouble and would not be affectionate towards you and you have told me that I am too jealous for you." This statement taken with the remainder of the letter, which protests against his action, does not show that she intended to condone his conceded breach of promise, nor to release him from his engagement, but conveys a distinct protest against his refusal to observe his promise to marry her. *Mickens v. Phillips* (Va.), 51 S. E. 354.

Sufficient Offer of Performance.—

Where defendant's breach of the con-

tract for marriage is complete and plaintiff has thereafter signified intention to treat the contract as terminated except for action thereon, an offer by defendant to renew and perform constitutes no defense to the action. *Kendall v. Dunn*, 71 W. Va. 262, 76 S. E. 454; *Connolly v. Bollinger*, 67 W. Va. 30, 67 S. E. 71.

VII. PLEADING AND PRACTICE.

A justice has no jurisdiction of a action for breach of promise of marriage. *Barnes Code*, ch. 50, § 12.

Declaration—Dates of Promise and Request for Performance.—In a count on a promise to marry generally in a declaration in assumpsit for breach of the contract, the dates of the promise and request for performance need not be so stated as to show the lapse of a reasonable time between them for performance. Being immaterial and merely formal, the dates may be laid under a *videlicet*, and the proof may vary therefrom. *Connolly v. Bollinger*, 67 W. Va. 30, 67 S. E. 71.

Harmless Error in Instruction.—In an action for breach of promise of marriage where the instruction contains words of surplusage, the appellate court will not reverse. *Kendall v. Dunn*, 71 W. Va. 262, 76 S. E. 454.

VIII. EVIDENCE.

Sufficiency.—Indefinite and indirect conversation between the plaintiff and defendant in an action for breach of a promise of marriage, capable of being interpreted as relating to marriage and aided by a course of conduct, indicative of betrothal, is sufficient to sustain a finding of the marriage contract, without proof of an express or formal engagement. *Connolly v. Bollinger*, 67 W. Va. 30, 67 S. E. 71.

IX. DAMAGES.

Elements of Compensation.—In an action for damages for breach of a

promise of marriage, where the facts and circumstances and the reasonable inferences therefrom warrant, the jury may properly be instructed to take into consideration, in assessing the damages, the financial circumstances and social position of defendant; the rights and privileges plaintiff would have acquired pecuniarily and socially if defendant had performed his contract; the worldly advantage of the marriage as giving plaintiff a permanent home and advantageous establishment; the station in life plaintiff would have occupied as a result of the marriage; the injuries and wounds to plaintiff's feelings, affection, and pride; the disappointment, humiliation, mortification, contempt, pain and distress of mind plaintiff suffered at the loss of the marriage; and the injury to plaintiff's reputation and future prospects of marriage. *Kendall v. Dunn*, 71 W. Va. 262, 76 S. E. 454.

In case of a breach of promise of marriage courts of law give redress and award damages for injured feelings, because such damages are direct and immediate results of the breach. *Bolyard v. Bolyard*, 79 W. Va. 554, 91 S. E. 529, 531.

Mitigation of Damages.—An offer by defendant to renew and perform the contract for marriage, made after action is begun on the breach, can not be heard in mitigation of the damages or as bearing on the amount of the same. *Kendall v. Dunn*, 71 W. Va. 262, 76 S. E. 454.

An offer to renew and perform, a marriage contract, if made before suit brought, may usually be given such weight by the jury, whereby as bearing on the amount of damages, as they may deem the facts and circumstances in connection therewith to warrant. *Kendall v. Dunn*, 71 W. Va. 262, 76 S. E. 454.

BREACH OF THE PEACE.

½I. Definition.

I½. Insulting or Abusive Language.

III. Recognizance to Keep the Peace and Be of Good Behavior.

½A. Statutory Provisions.

C. Warrant and Its Execution.

D. Appeal.

CROSS REFERENCES.

See the title **BREACH OF THE PEACE**, vol. 2, p. 615, and references there given. In addition, see post, **RIOTS**. As to arrest without a warrant for breach of the peace, see ante, **ARREST**. As to recognizance to prevent violations of liquor laws, see post, **INTOXICATING LIQUORS**. As to breach of the peace before justices of the peace constituting contempt, see post, **JUSTICES OF THE PEACE**. As to prevention of breach of the peace at fairs, see post, **THEATRES AND SHOWS**.

½I. DEFINITION.

The phrase "breach of the peace" is generic and includes every act of violence of which tends to disturb that sense of security which every person feels necessary to his comfort and to secure which government is instituted and maintained. *Marcuchi v. Norfolk, etc., R. Co.*, 81 W. Va. 548, 94 S. E. 979.

I½. INSULTING OR ABUSIVE LANGUAGE.

See post, **LIBEL AND SLANDER**.

III. RECOGNIZANCE TO KEEP THE PEACE AND BE OF GOOD BEHAVIOR.

½A. STATUTORY PROVISIONS.

Va. Code 1919, §§ 4789-4796; Barnes Code, ch. 153, § 910; ch. 162, § 3.

The punitive character and effect of the requirement of a bond conditioned for good behavior, pending the grand jury inquest, may be conceded, without admission of conflict between the statute providing for it and the constitution. *Ex parte Glass*, 81 W. Va. 111, 114, 93 S. E. 1036.

C. WARRANT AND ITS EXECUTION.

Sufficiency of Warrant.—A peace warrant alleging no facts or circumstances from which the justice, or the court on appeal, can determine whether the fear of the complainant is well founded, should be quashed. *State v. Cowger*, 83 W. Va. 153, 98 S. E. 71; *State v. Moyer*, 87 W. Va. 137, 104 S. E. 407.

Failure to Obey Officers or Orders of Conservators of Peace on View of Breach of Peace to Bring Forward the Offenders.—Va. Code 1919, § 4512; Barnes Code, ch. 147, §§ 14, 15.

D. APPEAL.

The validity of a warrant on which a defendant has been required to give bond to keep the peace for a period of six months, being certified to the court of appeals, does not become a moot question because the period covered by the bond expires before the question can be decided by the court. *State v. Cowger*, 83 W. Va. 153, 98 S. E. 71.

BREAKING AND ENTERING.—See post, **BURGLARY & HOUSE-BREAKING**.

BREWERIES.—See post, **LICENSES**.

BRIBERY.

CROSS REFERENCES.

See the title BRIBERY, vol. 2, p. 621, and references there given. In addition, see post, COURTS; ELECTIONS; NEW TRIALS; STATE.

Elements of Offense.—To constitute the offense of attempted bribery, it is immaterial whether the official action thereby sought to be influenced was officially right or wrong. *Weil v. Black*, 76 W. Va. 685, 86 S. E. 666.

Bribes to Executive, Legislative or Judicial Officers or Candidates for Office—**Acceptance — Punishment — Evidence.**—Const. of W. Va., Act. VI, § 45; Va. Code 1919, §§ 4496-4498; Acts 1920, p. 486; Pollard's Code Biennial 1920, p. 208, § 4497; Barnes Code, pp. 1210, 1211, ch. 147, §§ 4-6.

"Executive Officer"—Public Service Commission.—Members of the public service commission are executive officers within the meaning of § 5a, ch. 147, Code 1913, making it a felony to attempt to bribe any executive or judicial officer of the state, or any member of the legislature, by offering or proposing to give him money, testimonial, or other valuable thing, in order to influence him in the performance of his official or public duties. *Weil v. Black*, 76 W. Va. 685, 86 S. E. 666.

The individual members of the public service commission should be sued in their official capacity, in any court having jurisdiction, for the purpose of having the enforcement of their order enjoined, and the same declared null and void. It then becomes their official duty to make defense thereto, by all proper and lawful means: and an offer to give money to one of them in order to induce him to give testimony in such case, whether such testimony be true or false, is an attempt to influence a public officer in the performance of his official duty. All the acts of such a public service commissioner to be performed in relation to such suit, whether employing counsel, procuring evidence

or giving personal testimony, are official, and not private or personal acts. *Weil v. Black*, 76 W. Va. 685, 86 S. E. 666.

Same—Policeman.—A policeman is an executive officer within the meaning of Virginia Code, § 3744 (Code 1919, § 4496), making it a felony to offer any gift or gratuity "to any executive, legislative, or judicial officer." This section embraces all inferior executive officers, whose duties are for the most part ministerial. The most important powers and duties of a policeman—to execute the laws—are executive, though if they were chiefly ministerial, he would still be within the meaning of the statute. *Haynes v. Com.*, 104 Va. 854, 52 S. E. 358.

A policeman who had accepted a pecuniary gift in return for a promise not to interfere with the unlawful storage and sale of ardent spirits by a certain person, was indicted for that form of bribery described in § 3745 of the Code of 1904 (Va. Code 1919, § 4497), which makes it an offense "for any executive, legislative or judicial officer to accept

* * * any gift or gratuity * * * under an agreement or with an understanding that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may by law be brought before him in his official capacity." A demurrer to the indictment was sustained, and it was held that the language of § 3745, unlike that of § 3744, applies only to those officers who, acting in a judicial capacity must render a decision or give an opinion in some cause brought before them, and does not include police officers whose sole duty is to act on matters brought to their attention. *Commonwealth v. Worrell*, 5 Va. Law Reg. N. S. 836.

Attempt to Bribe.—Barnes Code, p. 1210, ch. 147, § 5a (2).

Bribery by Candidates and Others.—Va. Code 1919, §§ 251-252; Barnes Code, p. 98, ch. 5, §§ 8a (1)-8a (7).

Bribery of Election Officers.—Va. Code 1919, § 195.

Giving or Receiving Bribe to Vote—How Punished.—Va. Code 1919, § 4727; Barnes Code, p. 92, ch. 3, § 100; p. 97, ch. 5, § 8.

Bribing Commission, Auditors, Arbitrator or Jurors.—Va. Code 1919, § 4503; Barnes Code, p. 1211, ch. 147, § 7.

Bribes to Officers to Prevent Service of Process—How Punished.—Va. Code 1919, § 4502; Barnes Code, p. 1211, ch. 147, § 6.

Bribery of Board of Control.—Barnes Code, p. 209, ch. 15m, § 12.

Indictment.—An indictment under § 145a of the Code (1904) (forbidding certain acts for the purpose of influencing voters at elections or certain expenditures in their behalf) is not sufficient when it does not contain any averment that the things the accused was charged with doing were done for the purpose of influencing a voter or voters in behalf of the designated candidate for office, nor that they were done for him as a candidate for office. Even if it may be inferred that the acts were done in his behalf, it would not be sufficient, for an inference from facts alleged can never supply a total want of averment of an essential part or element of the offense. *Rose v. Commonwealth*, 116 Va. 1023, 82 S. E. 699. See post, ELECTIONS.

Allegation in Indictment for Bribery in Receiving Promise to Pay \$900—Proof of Promise to Pay \$800.—*Commonwealth v. King*, 9 Va. Law Reg. 653.

Defenses.—It is no defense to an indictment for attempted bribery of a public officer, that he was not a de jure officer; his official character can not be thus collaterally assailed; it is sufficient that he was a de facto officer. *Weil*

v. Black, 76 W. Va. 685, 86 S. E. 666.

Evidence.—On an indictment for attempting to bribe an officer by offering to pay him a sum of money to release the accused and drop the case, it is not admissible to show that a young girl had been given whiskey to drink, and had had intercourse with a man at the house of the accused the previous night. Such evidence is entirely collateral to, and has no connection with, the alleged attempt to bribe the officer. *Haynes v. Com.*, 104 Va. 854, 52 S. E. 358.

Venue—Offer by Agent of Non-Resident.—A person who, without the state, counsels and procures a responsible agent to offer money to a public officer within the state, in order to influence him in the discharge of his public and official duties, is guilty of a felony under the law of this state, and is punishable in the county where the agent made the offer. *Weil v. Black*, 76 W. Va. 685, 86 S. E. 666.

Conviction Disqualifies to Hold Public Office.—Va. Code 1919, § 4497; W. Va. Const., Art. VI, § 14; Barnes Code, p. 104, ch. 5, § 8b (14); p. 112, ch. 7, § 4.

Conviction of Bribery Disqualifies to Register a Vote.—Va. Const., § 23; Va. Code 1919, §§ 82, 93; W. Va. Const., Art. IV, § 1; Barnes Code, p. 50, ch. 3, § 16; p. 104, ch. 5, § 104.

Conviction of Bribery as Disqualifying Juror.—Va. Code 1919, § 5984.

Contest for Judicial Office.—Before bribery in an election can be used as a basis of contest for a judicial office, or removal therefrom, the accused party must have been convicted of bribery at the election, upon an indictment by a grand jury, and a regular trial before a court and petit jury. *Morrison v. McWhorter*, 57 W. Va. 614, 52 S. E. 394.

Injunction against Bribery.—Bribery is not only unlawful, but criminal, and when resorted to with a malicious purpose to injure a third person in his business, property or personal liberty is ground for equitable interposition by

injunction, if practiced in such a manner and to such an extent that the party injured, or intended to be injured, has not an adequate remedy at law for his injuries. *Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 189, 53 S. E. 273.

BRIDGE COMPANIES.—In *First Nat. Bank v. Trigg Co.*, 106 Va. 327, 337, 56 S. E. 158, a bridge company was held to be a manufacturing corporation. See post, BRIDGES.

BRIDGES.

I. Definitions and Distinctions, 789.

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CROSS REFERENCES.

See the title BRIDGES, vol. 2, p. 623, and references there given. In addition, see ante, APPEAL AND ERROR; BOUNDARIES; post, CANALS; COUNTIES; CROSSINGS; DAMAGES; EASEMENTS; EMINENT DOMAIN; FERRIES; INSTRUCTIONS; MUNICIPAL CORPORATIONS; NAVIGABLE WATERS; NUISANCES; PUBLIC SERVICE COMMISSIONS; RAILROADS; SPECIAL ASSESSMENTS; STREETS AND HIGHWAYS; TURNPIKES AND TOLLROADS; WATERS AND WATERCOURSES; WORKING CONTRACTS. As to dedication of bridges and approaches thereto, see post, DEDICATION. As to condemnation for bridge purposes, see post, EMINENT DOMAIN. As to bridge in interstate commerce, see post, INTERSTATE COMMERCE. As to issuances of county bond for construction of bridge, see post, MUNICIPAL, STATE AND COUNTY SECURITIES. As to right of street railway to use bridge, see post, STREET RAILROADS. As to toll bridges, see post, TURNPIKES AND TOLLROADS. As to construction of terms used in bids and contracts for building bridges, see post, WORKING CONTRACTS.

I. DEFINITIONS AND DISTINCTIONS.

Are Parts of Street.—As a general proposition bridges, constituting extensions of streets, or connecting streets,

are to all intents and purposes part of such streets. *Richmond v. Virginia R., etc., Co.*, 120 Va. 802, 92 S. E. 898; *Cavender v. Charleston*, 62 W. Va. 654, 59 S. E. 732. See *Hedrick v. County*

Court, 71 W. Va. 732, 77 S. E. 359. See post, **STREETS AND HIGHWAYS**.

A public bridge is an essential part of a road, and the erection of a bridge is but laying out of a highway. The approach to the bridge and the bridge itself are both parts of the highway. *Cavender v. Charleston*, 62 W. Va. 654, 59 S. E. 732.

The approach to a bridge is an essential and inseparable part of it. *Richmond v. Mayo Land, etc., Co.*, 120 Va. 545, 551, 91 S. E. 615.

1½. STATUTORY PROVISIONS.

General Provisions Relating to Roads and Bridges.—Va. Code 1919, §§ 1976-2018. See also Pollard's Code 1920, pp. 454, 679; W. Va. Acts 1921, ch. 112. See post, **STREETS AND HIGHWAYS**.

II. ESTABLISHMENT AND MAINTENANCE.

B. PUBLIC BRIDGES.

½. In General.

Authority to Construct.—Where a bridge has been built over a navigable stream under authority of an act of the legislature, the expediency of building the bridge is not thereafter an open question. *Peek v. Hampton*, 115 Va. 855, 80 S. E. 593.

Authority of County under General Law.—Under the general law a county has no power to unite with a city in the purchase of a bridge. *Lynchburg v. Amherst County*, 115 Va. 600, 80 S. E. 117.

Under the general law a county has no right to expend money in caring for and guarding a bridge outside of its territorial limits. *Lynchburg v. Amherst County*, 115 Va. 600, 80 S. E. 117.

Authority of County under Special Act.—While a county has no power to expend money on the maintenance of a bridge outside of its territorial limits, yet where a special act authorizes a county and a city to purchase

a bridge connecting the two, and "to determine and fix the terms and conditions on which the bridge was to be used," an agreement between them for the purchase of the bridge, and to make it a free bridge, and fixing the terms and conditions on which repairs are to be made, is not beyond the powers of the county. *Lynchburg v. Amherst County*, 115 Va. 600, 80 S. E. 117.

Authority of County to Pay for Expenditures Not Authorized by Agreement.—A county and a city having entered into an agreement, pursuant to a special act of assembly, that the expense of keeping in repair a connecting bridge shall be borne by them equally, but also providing that repairs in excess of \$100.00 at any one time shall be made as may from time to time be agreed on by the county and city, the county is not bound for repairs in excess of \$100.00 at any one time made by the city without the consent and approval of the county. The county had no authority to expend any money on the bridge outside its territorial limits, except as conferred by the special act of assembly and the agreement made in pursuance thereof, and its representatives are not only under no obligation to pay any part of the expense of repairs paid by the city not authorized by said agreement, but they have no authority to pay the same or any part thereof. *Lynchburg v. Amherst County*, 115 Va. 600, 80 S. E. 117.

Ratification of Previous Appointment of Watchman.—A county having agreed to pay one-half of the expenses of a watchman for a bridge connecting the county with an adjacent city, if it shall be deemed necessary by the council of the city to employ a watchman, the necessity for the employment of the watchman must be determined by the council before his employment. A resolution of the council passed years after the expense had been in-

curred is not sufficient. The fact that members of the council knew that the watchman was being employed is immaterial. A city council can only act at authorized meetings duly held, and not separately and individually. *Lynchburg v. Amherst County*, 115 Va. 600, 80 S. E. 117.

Special Road Law of Giles County.

—The special road law for Giles county (Acts 1908, page 611) does not expressly repeal § 944-a, Va. Code of 1904, so far as applicable to the taking of initial action for the establishment and location of new bridges in Giles county by the board of supervisors; nor does it do so by necessary implication; such action of the board of supervisors not undertaking or purporting to extend to the condemnation of land for use for the location of the bridge, or for its approaches, jurisdiction over which matters is conferred on boards of supervisors by said § 944-a as the general law of the state. The latter jurisdiction was taken away from the board of supervisors of Giles county and conferred on the road commission. *Snidow v. Board*, 123 Va. 578, 96 S. E. 810.

Under the special road law of Giles county (Acts 1908, p. 611) and the general statute law of the state as to roads and bridges, the initial determination that a bridge should be established and its location, the determination of the plans and specifications for the bridge and its approaches, the erection of the bridge and its approaches, are left under the jurisdiction of the board of supervisors, subject to the limitation that the erection or supervision of the work of the erection of the bridge and its approaches, must be under the road commissioner, or commissioners, in whose district the work is located, whereas the location of the approaches as they recede from the bridge, the acquisition or condemnation of the right of way for the bridge and its approaches, are transferred to the jurisdiction of the road commission. *Snidow v. Board*, 123 Va. 578, 96 S. E. 810.

Company Required to Build Bridge.

—Under the fifteenth clause of § 2, Acts 1879-1880, ch. 139, p. 124, requiring the Richmond and Alleghany Railroad to "furnish to the people on the south side of the James river, for the transportation of persons and produce across James river to the line of their Railroad, facilities the same, or at least equal to those now afforded by the James River and Kanawha Company," the duty rests upon the Chesapeake and Ohio Railway Company, as successor of the aforesaid Richmond and Alleghany Railroad, to furnish to the people on the south side of James river, who would naturally use Maidens Station, on the line of their railway, facilities the same or, at least, equal to those formerly afforded by the James River and Kanawha Company, and under all the circumstances of the case, this can only be done by the Chesapeake and Ohio Railway Company's erecting, at its own expense, a suitable and proper bridge, for passengers and vehicles, at a convenient point opposite to, and connecting with, Maidens Station. *Virginia State Corp. Comm. v. Chesapeake, etc., R. Co.*, 11 Va. Law Reg. 562.

3. Bridge or Causeway between Adjacent Counties.

Va. Code 1919, §§ 1991, 1992; Acts 1918, p. 431; Pollard's Code 1920, p. 438; W. Va. Acts 1921, ch. 112, §§ 140-144.

III. CONTROL AND MANAGEMENT.

See ante, "Statutory Provisions," 1½.

IV. LIABILITY FOR INJURIES RESULTING FROM DEFECTIVE BRIDGES.

B. PUBLIC BRIDGES.

See ante, "Statutory Provisions," 1½.

The administrator of an employee of a county court, killed by the falling of a public county bridge, under the weight of a traction engine and stone crusher on which he was riding, while

acting within the scope of his employment, has a statutory right of action under § 53 of chapter 43 of the Code, and need not ascertain or show any defect in the bridge, causing it to give way. *Shipley v. Jefferson County*, 72 W. Va. 656, 78 S. E. 792.

C. BRIDGES MAINTAINED BY MUNICIPAL CORPORATIONS.

1. In General.

It is the duty of a city to use reasonable care to keep and maintain a bridge, which forms part of one of the city streets, in good and sufficient repair to render it reasonably safe for all persons exercising ordinary care and prudence in passing on or over it. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

Where by the extension of the corporate limits of a public bridge, owned and controlled by a county, comes to be within such city it becomes the duty of the city to keep the bridge in repair. *Cavender v. Charleston*, 62 W. Va. 654, 59 S. E. 732.

The legislature has power to enlarge the corporate limits of a city or town and transfer the duty of maintenance and repair of a public bridge within such limits from the county to the town or city. *Cavender v. Charleston*, 62 W. Va. 654, 59 S. E. 732.

The city of Charleston is under the duty to repair the bridge over Elk river connecting Lovell and Charleston streets, called the Suspension Bridge, and is liable for damage to persons and property arising from injury to the same caused by defect or want of repair of the bridge. *Cavender v. Charleston*, 62 W. Va. 654, 59 S. E. 732.

2. Actions for Injuries.

a. Evidence.

Proximate Cause—Contributory Negligence.—In the case at bar, the evidence established that the negligence of the city in not providing a handrail on

one side of the bridge was the proximate cause of plaintiff's injury, while plaintiff was not guilty of contributory negligence. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

Defect Causing Injury—Handrail—

In the instant case, there had been a handrail on the north side of the bridge for many years, as was known to the plaintiff, but for about three weeks prior to and at the time of the accident, unknown to the plaintiff, such handrail was absent. Held: That the fact that the defendant city allowed the handrail to remain off the bridge for this period, without any excuse being shown therefor, was sufficient evidence to warrant the jury in finding the city guilty of negligent breach of its duty, and the verdict of the jury for the plaintiff, therefore, concluded that question. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

b. Instructions.

In an action for injuries sustained by a pedestrian when he fell from a bridge owing to the absence of a handrail, an instruction that the city was "bound to use reasonable care and precaution to keep and maintain its streets, bridges and sidewalks in good and sufficient repair to render them reasonably safe for all persons exercising ordinary care and prudence, passing on or over the same, and if the jury believe from the evidence that the defendant, the city of Charlottesville, failed to use all reasonable care and precaution to keep its bridges and sidewalks in such repair and that the injury complained of resulted from that cause," they should find for plaintiff, is not defective in the use of the word "all" as descriptive of the "reasonable care and precaution," which the instruction mentions. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

In an action against a city by a pedestrian for injuries sustained from a fall from an unguarded bridge, de-

defendant requested an instruction that if the jury believe that it was obvious to a reasonable man that the rail on the bridge referred to in the evidence was missing then it became the duty of the plaintiff to look out for and guard against the occurrence of any accident to him at that point. The court modified this instruction by inserting the words "if he knew or ought to have known of this" after the word "plaintiff." Held: That these words were properly inserted. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

In an action for injury to a pedestrian who fell from a bridge, an instruction that if the jury believed that the plaintiff had been permanently injured by reason of the accident he had the right to recover prospective as well as past damages, is not erroneous because the scope of the jury's inquiry in ascertaining prospective damages was in no way defined, where another instruction directed that if the jury should find for the plaintiff they might take into consideration any bodily injuries which he might have sustained and any physical pain he might have suffered. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

In an action against a city for injuries sustained from falling from a bridge defendant requested the court to instruct the jury that while the burden of proof of contributory negligence is in general upon the defendant, yet if the plaintiff's evidence discloses his own contributory negligence or it may be inferred from all the circumstances in the case, it bars his recovery no matter where the burden rests. The court modified this instruction and it was claimed by defendant that as modified the instruction failed to tell the jury that contributory negligence barred recovery and left defendant with no general instruction on that point. Held: That there was no merit in this contention, as the court gave other instructions, not general instructions it is true,

but specific instructions having reference to all the evidence in the case on which the defendant relied, or could rely, to show contributory negligence of the plaintiff, and which specifically told the jury that if they found certain facts that the plaintiff was guilty of contributory negligence and could not recover. Hence, the giving of a general and abstract instruction on the subject of contributory negligence was unnecessary. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

In an action against the city for injuries incurred by a pedestrian in a fall from a bridge, an instruction that where a railing on the side of a bridge upon one of the streets of a city is necessary for the safety of travelers, the want of such railing is a defect in the highway for which the city is liable, is not erroneous as imposing upon the city an absolute duty to provide all things necessary for the safety of travelers, where when read together with another instruction there could have been no misconception of it by the jury. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

Prior Knowledge of Locality.—In an action for injuries caused by a fall from a bridge, the court instructed that if the jury believed that the injury complained of resulted from a failure of a city to use reasonable care and precaution to keep its bridges and sidewalks in good and sufficient repair, and that the plaintiff sustained damage thereby, whilst exercising such a degree of care and caution as under the circumstances might reasonably be expected from a man of reasonable care and prudence, then plaintiff was entitled to recover. Held: That this instruction was not erroneous in that it allowed the jury to ignore the prior knowledge of the plaintiff of the situation and permitted the plaintiff to recover as if he were in the position of an ideal man exercising reasonable care and prudence, who is referred to in

this instruction, although such ideal man may have had no prior knowledge of the situation. The words, "under the circumstances," confined the jury to the consideration of the instant case in which there was no dispute that the plaintiff had prior knowledge of the locality. Whether he had prior knowledge of the defect in the bridge—the absence of the handrail—which rendered the crossing of the bridge in the night time dangerous, was a question for the jury and was or was not one of the "circumstances" in the case as they might find to be the fact. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

Inattention or Forgetfulness.—An instruction in an action for injuries caused by a fall from a bridge, due to the absence of a handrail, which, in effect, told the jury that there could be no legal excuse for a failure of memory, or for inattention, to a once known fact, would be error. In the instant case it was a question of fact for the jury to determine whether the plaintiff was negligent in his inattention to or forgetfulness of the absence of the handrail, if they believed from the evidence that he had prior knowledge of its absence. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

Age and Activity of Party Injured.—In an action for injuries against a city occasioned by a fall from a bridge, defendant asked for an instruction that the old age of the plaintiff did not relieve him of his duty to use ordinary care in passing along the streets, but if by old age his activity has been impaired, that fact imposes upon him the duty of using greater precaution than he would otherwise have to use. Held: That as there was no evidence in the case tending to show that any want of activity on the part of the plaintiff contributed to the accident, it was not error to refuse the instruction. Even if there had been such evidence it might have been error to have given such in-

struction, because it was upon the subject of the weight of evidence and singled out and emphasized one circumstance which should have been considered by the jury along with all the other circumstances in the case. That it embodied a correct abstract statement of the law did not make it a proper instruction to the jury. Other instructions in the case left no room for the jury to entertain the view that old age, or anything else, relieved the plaintiff of the duty to exercise ordinary care. *Charlottesville v. Jones*, 123 Va. 682, 97 S. E. 316.

VI. BRIDGE COMPANIES—TOLLS.

See ante, "Statutory Provisions," 1½; post, TURNPIKES AND TOLL-ROADS.

Incorporation.—Va. Code 1919, § 3865.

Powers Generally.—Va. Code 1919, § 4058.

Consent of Corporate Authorities to Use of Streets.—Va. Const., § 124; Va. Code 1919, §§ 3014, 3882.

The Manchester and Richmond Free Bridge Company is neither a municipal corporation nor a public institution owned and controlled by the state, in contemplation of art. 12 of the constitution of this state, and hence the general assembly had no power to pass the act approved March 5, 1908, entitled: "An act to amend and re-enact §§ 3, 4, 5, 9, of an act approved April 2, 1902, entitled: 'An act to incorporate the Manchester and Richmond Free Bridge Company,' and granting certain powers to said company, and the city councils of the cities of Richmond and Manchester, for public purposes." The power is vested in the state corporation commission. *Commonwealth v. Manchester, etc., Bridge Co.*, 109 Va. 499, 63 S. E. 1083.

VII. OFFENSES.

Injury to Bridge—Obstruction.—Va. Code 1919, §§ 4433, 4730, 4746; Va.

Acts 1918, p. 461; Pollard's Code 1920, p. 460; Barnes Code, ch. 145, § 7; W. Va. Acts 1921, ch. 112, §§ 184, 185.

Traffic Regulations—Violating Law

of Road.—Va. Code 1919, §§ 4736, 4739, 470. See post, **STREETS AND HIGHWAYS.**

BRIEFS.

CROSS REFERENCES.

See the title BRIEFS, vol. 2, p. 628, and references there given. In addition, see ante, **APPEAL AND ERROR; ARGUMENTS OF COUNSEL.** As to rules of court, see 129 Va. p. vi; 83 W. Va. p. xliii—xiv.

Necessity of Assigning Errors in Brief.—It is well settled that the appellate court will not consider objections or exceptions to parts of testimony taken in the trial of a case, unless the same are specifically and particularly pointed out by bill of exceptions or in the brief of counsel or the assignment of errors and brought to the attention of the court. *Fuller v. Margaret Min. Co.*, 64 W. Va. 437, 63 S. E. 206; *Adams Exp. Co. v. Allen*, 125 Va. 530, 100 S. E. 473. See ante, **APPEAL AND ERROR**; post, **EXCEPTIONS; BILL OF.**

Questions Raised for First Time in Reply Brief.—Questions not raised in a

petition for writ of error, as a general rule, come too late in a reply brief. (*Carson v. Mott Iron Works*, 117 Va. 21, 84 S. E. 12; *Virginia R., etc., Co. v. Meyer*, 117 Va. 409, 84 S. E. 742.

A statement in a petition for a writ of error that there are other errors to be assigned at the bar does not reserve to the petitioner the right to assign such errors in a reply brief. *Virginia R., etc., Co. v. Meyer*, 117 Va. 409, 84 S. E. 742, citing *Norfolk, etc., R. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614; *American Locomotive Co. v. Hoffman*, 105 Va. 343, 54 S. E. 25.

Binding of Records with Briefs of Counsel-Fee.—Va. Code 1919, § 6371.

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CROSS REFERENCES.

See the title BROKERS, vol. 2, p. 628, and references there given. In addition, see ante, AGENCY; post, CONTRACTS; EXECUTORS AND ADMINISTRATORS; FACTORS AND COMMISSION MERCHANTS; FRAUD AND DECEIT; GAMBLING CONTRACTS; INTEREST; SALES; SPECIFIC PERFORMANCE; USAGES AND CUSTOMS; WORKING CONTRACTS. As to Assignment of broker's commission, see ante, ASSIGNMENTS. As to sales on margin, see post, GAMBLING CONTRACTS.

I. DEFINITIONS.

D. COUPON BROKERS.

Va. Code 1919, § 2614.

II. STATUTORY PROVISIONS REQUIRING LICENSE.

See post, LICENSES.

III. EMPLOYMENT.

See ante, AGENCY.

A. WHAT WILL CONSTITUTE EMPLOYMENT.

See post, "Form of Contract," III, B.

B. FORM OF CONTRACT.

Necessity for Writing.—The authority of an agent to sell or lease land need not be in writing. *Mustard v. Big Creek, etc., Co.*, 69 W. Va. 713, 72 S. E. 1021.

Same—Agency or Partnership.—In the instant case it was held that the contract was one of agency and not of partnership; that under it plaintiff acquired the exclusive right of sale for one year, thereby acquiring a pecuniary interest in the sale, but not in the property, for that period, and, therefore, the contract was not one providing for a sale of an interest in real estate and was not required to be in writing under sub-division 6 of § 2840 of the

Va. Code of 1904 (Code 1919, § 5561). *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

A resolution adopted by directors of a corporation, owning real estate, that certain real estate brokers "be allowed the exclusive right as real estate agents, to put signs on this property, offering it for sale," made part of the records of the corporations sometime before the commencement of negotiations which resulted in the sale, shows the employment of the brokers to sell the property. *Shea Realty Corp. v. Page*, 111 Va. 490, 69 S. E. 327.

Implied Contract.—Instructions requiring the jury to find a formal contract of employment of the plaintiff, in an action of assumpsit for compensation for services as agent in a sale of land, as a condition precedent to his right of recovery, is properly refused, when the evidence tends to prove facts from which the law raises a promise to pay for the services rendered. *Peters v. Riley*, 73 W. Va. 785, 81 S. E. 530.

C. DURATION AND TERMINATION OF AGENCY.

See post, "Termination of Authority to Act as Broker," IV, B, h.

IV. AUTHORITY, POWERS AND DUTIES.

See ante, AGENCY.

A. BROKERS IN GENERAL.

Good Faith toward Principal—"A broker or agent who undertakes to procure a purchaser of property placed with him for sale is required to act in good faith in presenting to his principal a purchaser. It is the duty of the agent to place his principal in full possession of the facts bearing upon his personal interest and relations to the subject and toward the prospective purchaser. It is not enough for the broker or agent to say that he thought his principal was advised as to all the facts, nor is it sufficient if he be able to point out circumstances from which an inference might be drawn, that the principal knew or had means of knowledge. * * *. All such transactions are voidable, and may be repudiated by the principal, without showing that he was injured. In such cases the amount of consideration, the absence of undue advantage, and other like features are wholly immaterial. Nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts. *Beury v. Davis*, 111 Va. 581, 69 S. E. 1050, and authorities cited; *Francis v. Cline*, 96 Va. 201, 31 S. E. 10." *Cardozo v. Middle Atlantic, etc., Co.*, 116 Va. 342, 360, 82 S. E. 80. See *Lee v. Patillo*, 105 Va. 10, 52 S. E. 696.

A power to a special agent to sell for cash at any time within thirty days, does not authorize a sale on credit, even though the credit does not extend beyond the thirty days. A mere power to sell without more, implies a cash sale. *Bowles v. Rice*, 107 Va. 51, 57 S. E. 575.

B. PARTICULAR KINDS OF BROKERS.

1. Brokers of Real Estate.

a. Nature of Agency and Power in General.

Real estate agents occupy a fiduciary

relation to their clients, and so long as that relation continues, the agent is under a legal obligation, as well as a high moral duty, to give to his principal loyal service and the benefit of his information as to the property entrusted to him for sale. Under such circumstances the principal is frequently at a disadvantage, and hence is entitled to the utmost frankness, fidelity, and fair dealing from the agent. *Barnard v. Gardner Invest. Corp.*, 129 Va. 346, 106 S. E. 346.

An agent having authority to sell one tract of land at a stipulated price or that tract and another combined for a certain other stipulated price, may, within the time limit of his written authority, and with the assent of his principal, verbally expressed, make separate sales of the two tracts to one person at prices which amount in the aggregate to the sum for which he was authorized to sell the two tracts combined. *Campbell v. Beard*, 57 W. Va. 501, 50 S. E. 747.

Where an agent has authority to sell one tract of land at a stipulated price, or that tract and another combined for a certain other stipulated price, election to take the other tract, which the agent was not originally authorized to sell separately, at a price, which, added to the price stipulated for the single tract, will equal the price fixed for both, may be exercised by the purchaser of such first-mentioned tract, at a subsequent date within the period of the agent's authority to sell. *Campbell v. Beard*, 57 W. Va. 501, 50 S. E. 747.

If, in such case as mentioned in the foregoing paragraph, the written contract between the principal and agent gives to the latter an option to purchase the property at the prices named therein, he may, at the time of selling the one tract, which he is authorized to sell separately, at the price stipulated therefor, as a part of the same transaction, bind his principal to sell him the other tract for the residue of the price fixed for the tracts combined,

by accepting the proposition of sale as to it. *Campbell v. Beard*, 57 W. Va. 501, 50 S. E. 747.

h. Termination of Authority to Act as Broker.

An agency, uncoupled with an interest, not for a definite time, may be revoked by the principal at will without liability for damages. *Alexander v. Sherwood Co.*, 72 W. Va. 195, 77 S. E. 1027.

An agent to sell lands at a price net to the owner, under a contract of agency specifying no time for performance, is entitled only to a fair and reasonable opportunity to effect the sale thereof. What is a fair and reasonable opportunity is to be determined from the facts and circumstances of each case. *Alexander v. Sherwood Co.*, 72 W. Va. 195, 77 S. E. 1027.

Defendant, the owner of real property, entered into a verbal contract of indeterminate duration with plaintiff, whereby plaintiff agreed to lease the property for defendant at a three per cent. commission. There was no express stipulation with reference to the collection of rent, yet, in point of fact, plaintiff effected a lease of the premises at \$300 per month, which continued for sometime, and received the rent during the entire term, retaining the agreed commissions and paying over the residue to defendant. After the expiration of this lease, no new or different contract was made between plaintiff and defendant, but, with the latter's approval, a ten years' lease of the premises was entered into between plaintiff and another lessee at the same rental, and plaintiff collected two months' rent from the new tenant from which he deducted commissions as usual and paid the balance to defendant. The defendant then sold the property, thereby terminating plaintiff's agency. Plaintiff knew of defendant's intention to sell the property whenever a purchaser could be found, and interposed no objection when defendant informed him

that he had given other agents an option to sell the property. Held: That the original contract of employment not being for a fixed time, or the agency coupled with an interest, defendant could revoke the powers of plaintiff at will and without incurring liability in damages therefor. *Cassey v. Walker*, 122 Va. 465, 95 S. E. 434.

An agency to sell land, not "coupled with an interest" nor founded on a valuable consideration, may ordinarily, be terminated at will by the principal, by giving notice in good faith and before the broker finds a purchaser. *Perrow v. Rixey*, 119 Va. 192, 89 S. E. 101.

Thus, a contract by a landowner with a real estate agent giving the agent an exclusive right to sell the landowner's property during a certain period may be terminated by the principal at will, on giving notice in good faith before the agent finds a purchaser. *Barnard v. Gardner Invest. Corp.*, 129 Va. 346, 106 S. E. 346.

The words "coupled with an interest," as used in the rule that a real estate agent's contract is terminable at the will of his principal unless "coupled with an interest," mean an interest in the land itself, as distinguished from an interest in the proceeds of sale. *Barnard v. Gardner Invest. Corp.*, 129 Va. 346, 106 S. E. 346; *Perrow v. Rixey*, 119 Va. 192, 89 S. E. 101.

An interest arising from commissions or the proceeds of a transaction is not an interest which will prevent revocation of an agency. *Cassey v. Walker*, 122 Va. 465, 95 S. E. 434; *Alexander v. Sherwood Co.*, 72 W. Va. 195, 77 S. E. 1027.

Where a time is fixed for performance by the broker, a number of considerations arise. If all that the negotiations amount to is an offer by the principal that he will pay a commission if a purchaser be found within a certain time, the offer will only be accepted and ripen into a contract by the finding of

a purchaser within that time. At any time before that event, the offer may be withdrawn by the principal. But if what the negotiations amount to is a contract of employment for the fixed period, or a binding contract that a commission will be paid if a purchaser is found within that time, the broker will usually be entitled to damages in the first case, and, usually, to the amount of his commissions in the second, if he finds a purchaser within that period, although the principal may, in the meantime, have sold the property or withdrawn it from sale. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

In the instant case the brokerage company's agreement to furnish the money for the development and subdivision of the land, and for the expenses of the sales, was a valuable consideration for the agreement that the brokerage company should have the exclusive right of sale for a year. And, while the agency was not coupled with such an interest as to make it irrevocable, the contract which created it was a mutual agreement between competent parties for a lawful purpose and upon a valuable consideration, with the result that neither party could violate it without becoming responsible to the other for the breach. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

2. Stock Brokers.

Although a broker may have reserved the right to sell, without notice, stocks carried by him on margin for a customer, yet if the acts, declarations, or course of dealing on the part of the broker, with full knowledge of the facts, have been such as to lead the customer to believe that he would not exercise his right to sell without giving the customer timely notice, he is estopped from setting up his right to sell under the contract, when sued for a loss incurred by reason of a sale made in derogation of such course of

dealing. *Miller & Co. v. Lyons*, 113 Va. 275, 74 S. E. 194.

3. Merchandise Brokers.

See ante, "Statutory Provisions Requiring License," II.

V. COMPENSATION.

See ante, AGENCY; post, USAGES AND CUSTOMS.

A. WHEN BROKERS ARE ENTITLED TO REWARD.

1. General Rule.

As a general rule, a real estate broker, to be entitled to his commission, must show that he has completed his undertaking according to its terms, or that its completion was prevented, without his fault, by his principal at a time or under circumstances when the latter had no right to interfere. *Caldwell v. Tannehill*, 117 Va. 11, 84 S. E. 6; *Low Moor Iron Co. v. Jackson*, 117 Va. 76, 84 S. E. 100. See *Vaughan v. Pleasanton*, 112 Va. 508, 71 S. E. 529; *Harne v. Pike*, 70 W. Va. 489, 74 S. E. 514; *Noyes v. Caperton*, 68 W. Va. 13, 69 S. E. 364.

"It is well settled that a broker's right to compensation attaches only when he has completed his services, and not till then." *Strickland v. Fairfax*, 110 Va. 142, 145, 65 S. E. 477. See *Linton v. Johnson*, 81 W. Va. 569, 573, 94 S. E. 945.

"The universal rule is that, unless limited by express provisions of the contract, a broker is entitled to his compensation when he has done all his contract required of him." *Hugill v. Weekley*, 64 W. Va. 210, 213, 61 S. E. 360.

Broker Must Be Efficient Cause.—

If the negotiation resulting in a sale of the land was not carried on by the agent but by the owner, the agent must show that he was the efficient cause of the negotiation resulting in the sale, before he will be entitled to commissions. *Cooper v. Upton*, 60 W. Va. 648, 64 S. E. 523; *S. C.*, 65 W. Va. 401, 64 S. E. 527.

If a real estate agent or broker was the procuring cause of a sale, he is entitled to the commission agreed on, or to recover for his services on a quantum meruit. *Shea Realty Corp. v. Page*, 111 Va. 490, 69 S. E. 327.

Recovery Though Sale Not Made by Broker.—Complainant purchased a large tract of mountain land at a judicial sale, and subsequently sold it to one G. for a price which netted him a substantial profit. Defendant held a lien upon this land and it was under a decree in a suit brought to enforce this lien that complainant bought the land upon the instigation of defendant, and complainant entered into a contract with defendant whereby he agreed to give to defendant a one-third interest in the profits upon a sale, made by the complainant, with the assistance of the defendant, of said lands, after all the costs and expenses had been paid, in consideration that the defendant should use his best efforts to make a sale of the property, show the property to prospective buyers, use his best efforts to keep fire off the property, and keep parties from robbing the same, and exercise in fact, a general supervision of the property, under the direction of the complainant. The course of dealings between complainant and defendant, as evidenced by their correspondence and otherwise, indicated that defendant was regarded, not merely as an agent, but an interested party. He continued to look after the physical protection of the property, was active and diligent in his efforts to make a sale, and responded promptly and helpfully when he was called upon in the preliminary negotiations which resulted finally in the sale to G. Held, that there was no error in the decree which awarded defendant one-third of the net profits arising from the sale to G., notwithstanding that the sale to G. was not made by defendant. *Alexander v. Critcher*, 121 Va. 723, 94 S. E. 335.

1 Va.—51.

Broker Not—"Procuring Cause" of Sale.—In the instant case, the activities of a real estate broker were held not to be the "procuring cause" of a sale of property listed with the broker, notwithstanding that the broker pointed out the property to the purchaser while driving past it to view another place, described the house and boundaries, stated the price, and offered to drive in if the purchaser desired, which offer he declined, there being evidence to show that the purchaser's interest in the place was quickened by a description from an independent source the following day, which prompted a trip to the place with another party, that led to the negotiations and the ultimate purchase. *Realty Co. v. Burcum*, 129 Va. 466, 106 S. E. 375.

Furnishing Purchaser Able, Willing and Ready to Purchase.—The broker undertakes to furnish a purchaser, and is bound to act in good faith in representing a person as such, and, when one is presented, the employer is not bound to accept him or to pay the commission, unless he is ready and able to perform the contract on his part according to the terms proposed; but if the principal accepts him, either upon the terms previously proposed, or upon modified terms then agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned. *Middle Atlantic, etc., Co. v. Ardan*, 115 Va. 148, 155, 78 S. E. 588; *Caldwell v. Tannehill*, 117 Va. 11, 14, 84 S. E. 6. See post, "Interference Does Not Defeat Right," V, A, 4.

Where the authority given to a broker to sell land does not require him to produce a written contract with the purchaser, he is entitled to his commission when he produces a purchaser able, ready and willing to buy, although no written contract for the sale is entered into between the owner and the purchaser. *Low Moor Iron Co. v. Jackson*, 117 Va. 76, 84 S. E. 100.

When the owner voluntarily consummates a sale and conveys the land, this is conclusive evidence that the price is satisfactory, and that the purchaser is willing and ready to buy. *Cooper v. Upton*, 60 W. Va. 648, 64 S. E. 523; *S. C.*, 65 W. Va. 401, 64 S. E. 527.

Entitled to Commission on Tender of Performance of Agreement.—Where the authority to a broker to sell land provides that "unless the place is sold or contracted to be sold in writing on or before November 28, 1913, the whole proposition is withdrawn," the broker does not become entitled to his commission by merely producing a customer who is ready, willing and able to purchase. He is required, within the time fixed by the contract, to sell to his customer, or to secure a contract in writing from the customer binding him to purchase upon the terms upon which he was authorized to sell. The refusal of each of the parties to sign a contract prepared by the other, containing terms different from those given to the broker, did not prevent the broker from obtaining from the customer a contract in accordance with said terms, duly signed, and tendering the same to his principal, and until this was done he was not entitled to his commission. *Caldwell v. Tannehill*, 117 Va. 11, 84 S. E. 6.

Where Price Not Stipulated.—Where a contract between the owner of land and a real estate agent provides in substance that, if a party or parties presented by the agent want to buy the land at a price satisfactory to the owner, the agent shall be paid five per centum commissions, the agent must substantially comply with the contract, by presenting or producing a party or parties, able, willing and ready to buy the land at a price satisfactory to the owner before the agent will be entitled to commissions. *Cooper v. Upton*, 60 W. Va. 648, 64 S. E. 523; *S. C.*, 65 W. Va. 401, 64 S. E. 527.

Substitution of One Purchaser for Another.—Upon a demurrer to the evidence, in the absence of evidence to the contrary, upon the substitution of one purchaser of a machine for another, at the same price, the jury might properly have drawn an inference that the agent who made the sale was entitled to the same commission as on the original sale. *Broad St. Bank v. Baker, etc., Co.*, 119 Va. 26, 89 S. E. 110.

Purchaser's Statement to Client that He Was under No Obligations to the Brokers.—Where a landowner, who had listed his property with a real estate broker, asked a prospective purchaser whether he was under any obligation to the broker, purchaser's answer in the negative would not relieve the landowner from liability for commissions to the broker, if as a matter of fact, the real estate broker was the "procuring cause" of the sale to the purchaser. *Realty Co. v. Burcum*, 129 Va. 466, 106 S. E. 375.

Construction of Particular Contracts.—A contract between the Realty Company of Virginia, real estate brokers, and a client provided that: "Should said property be sold to any one with whom the Realty Company of Virginia, Inc., has negotiated for the sale thereof, or to whose attention it has directly brought the property, I agree to pay to said Realty Company of Virginia, Inc., the said commission above mentioned." The contract also contained a clause reserving the right to the client to sell, or employ others to sell, the property without compensation to the Realty Company of Virginia. Held: That the plain meaning of these two sections of the contract was that the defendant was free to sell his property without liability to the realty company, unless with respect to the sale subsequently effected, the latter's initial activities had proceeded to such an extent that they were really the "procuring cause" of that sale. *Realty Co. v. Burcum*, 129 Va. 466, 106 S. E. 375.

The owner of a tract of land subdivided it into lots and gave a real estate broker an exclusive agency for six months for the sale of the lots. The contract provided that the broker should receive twenty per cent. on the list prices and one-half of the overage on the prices which might be upon said lots (referring to the actual selling prices) over and above the list prices, said commissions to be paid out of three-fourths of the collections received on sales until they are paid in full. The difference between the list prices and the actual selling prices is what was meant by the word "overage." Held: That the twenty per cent. of the list price and one-half of the overage together constitute the commissions provided for in the contract, and these commissions were to be paid in full out of three-fourths of all collections of purchase money made by the owner, as the contract is not silent as to when the "overage" compensation to the agent was to be paid. *Hopewell Heights Develop. Co. v. Kagay-Marshall, etc., Co.*, 127 Va. 74, 102 S. E. 582.

1¼. Necessity of Relation of Principal and Agent.

Upon the evidence in this cause, it is held that the suit was founded upon the theory that the plaintiff was entitled to a certain commission for services rendered by him for the defendants as their agent in effecting a sale of the lands described in the bill, whereas it clearly appears from the record that the relation of principal and agent did not exist, and hence there can be no recovery of commissions. *Beury v. Davis*, 111 Va. 581, 69 S. E. 1050.

When Agency Is Revoked.—In an action by a broker for commissions upon a contract, not under seal or expressing a valuable consideration, whereby defendant agreed to sell land to any purchaser produced by plaintiff, provided the land should net \$25

per acre cash, and the sale should be made in 30 days from date; it was held, the defendant, in good faith, having revoked the agency before the broker found a purchaser, was not liable, the agency not being coupled with an interest, and the time limit in the contract not obligating the defendant not to revoke in that time. *Perrow v. Rixey*, 119 Va. 192, 89 S. E. 101.

1½. Necessity for License.

The contract of a real estate agent or broker doing business in this state for compensation for making sale of land is not void because he had not at the time of the contract procured a state license as such, and the absence of such license constitutes no defense to an action by him for commissions earned under such contract. *Linton v. Johnson*, 81 W. Va. 569, 94 S. E. 945.

2. Strict Compliance Required of Special Contract for Commission.

See post, "Change of Price by Owner," V, A, 5¼.

Sale at Price Stipulated.—An agent employed by the owner to sell real estate, on commission, at an agreed price, can not recover his commissions without proving an actual sale made at the price stipulated, unless it appears that he has been wrongfully prevented by the principal from making sale thereof, at that price, and that but for such interference the sale would have been made, or that the principal waived strict performance of the contract. *Harne v. Pike*, 70 W. Va. 489, 494, 74 S. E. 514, citing *Parker v. National Mut. Bldg., etc., Ass'n*, 55 W. Va. 134, 46 S. E. 811; *Noyes v. Caperton*, 68 W. Va. 13, 69 S. E. 364.

Sale to Be Made within a Certain Time.—Where an agent is empowered to procure a purchaser for real estate within a stipulated time, and is to receive a certain compensation for his services, he will not be entitled to recover such compensation unless he furnishes a purchaser within that time. *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E.

899; *Chambers v. Simmons*, 76 W. Va. 174, 183, 85 S. E. 182, citing *Alexander v. Sherwood Co.*, 72 W. Va. 195, 199, 77 S. E. 1027.

Waiver or Continuance of Time in Limited Contract.—Where a broker is empowered to procure a purchaser for real estate within a stipulated time, and is to receive a stipulated sum for his services, if the contract is continued, or performance within the stipulated time is waived, the presumption of law is that the broker was to receive the same compensation as provided for by the contract originally made. *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899.

Where the owner or principal has waived the performance of the contract within the time agreed upon, and accepts the services of the agent and recognizes and treats the contract as still in force, the agent will be entitled to compensation. *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899.

2¾. When Purchaser Is Insolvent.

"If the principal actually enters into a contract with the purchaser furnished by the broker, the commission is due, although the purchaser proves financially irresponsible. 19 Cyc. 271 and cases cited." *Hugill v. Weekley*, 64 W. Va. 210, 213, 61 S. E. 360.

2½. Where Purchaser Fails to Carry Out Contract.

Where Misarrriage of Sale Was on Part of Purchaser.—A real estate agent or broker is not entitled to recover his commission for the sale of land where the whole fault of the misarrriage of the contract of sale was on the part of the purchaser, and the vendor was without fault in the premises. *Middle Atlantic, etc., Co. v. Ardan*, 115 Va. 148, 78 S. E. 588.

Subsequent Default of Purchaser.—

"In many cases the contract of the broker is to furnish a purchaser ready and willing to purchase on the terms proposed. When this has been done, his contract is complete, and

he is entitled to his commission, whether a sale is actually effected or not." *Hugill v. Weekley*, 64 W. Va. 210, 213, 61 S. E. 360.

Where a real estate agent or broker has procured a purchaser and fully complied with the terms and conditions of his contract, and the parties, the vendors and the purchaser have entered into a valid and binding contract of sale and purchase, such agent or broker, unless his contract otherwise provides, can not be deprived of his right to the compensation stipulated in his contract, because of the default of the purchaser to afterwards comply with some of the terms and provisions of his contract. *Linton v. Johnson*, 81 W. Va. 569, 94 S. E. 945.

Where a brokerage contract makes an actual sale a condition precedent to the right of the broker to demand compensation, if the principal and the customer found by the broker enter into a valid contract of sale, and the broker acts in good faith, the latter is not deprived of his right to a commission by the fact that the customer fails to carry out the contract. *Hugill v. Weekley*, 64 W. Va. 210, 61 S. E. 360.

Revocation of Conditional Contract.

—Where a real estate agent or broker is employed by the owner to procure a purchaser for a particular piece of property, and he produces a purchaser who enters into a conditional contract, reserving the right to annul it if the conditions are not fulfilled, and in accordance with the right so reserved he does revoke the same, the broker is not entitled to the commissions stipulated in the contract. Such conditional contract constitutes a limitation upon the broker's right to commissions. *Hawkins v. Green*, 87 W. Va. 116, 104 S. E. 279.

Advice of Counsel that Suit Would Be Expensive and Useless. — In order to excuse a vendor from bringing suit against his vendee to enforce a con-

tract for the sale of real estate and relieve himself from his obligation to pay his broker's commission, it is not sufficient for him, when sued for the commission, to prove that he was advised by his counsel that such a suit would be expensive and useless, but all the facts obtainable upon that question should be laid before the jury, and if as a result it should be made to appear that a suit would have been unavailing, the vendor will be excused for declining to institute it, as the law does not compel a man to do a vain and useless thing. *Middle Atlantic, etc., Co. v. Ardan*, 115 Va. 148, 78 S. E. 588.

4. Interference Does Not Defeat Right.

a. By Principal.

Sale Defeated Through Fault of Seller.—When a broker has found a purchaser who has entered into a valid contract, his right to compensation can not be defeated by the fault of the seller, by his misrepresentation, or by his whimsical or unreasonable refusal to comply with his contract. *Hugill v. Weekley*, 64 W. Va. 210, 215, 61 S. E. 360; *Vaughan v. Pleasonton*, 112 Va. 508, 513, 71 S. E. 529. See *Noyes v. Caperton*, 68 W. Va. 13, 69 S. E. 364.

The contract of real estate brokers provided that they were "to make all the effort possible to make sale of the property, for which they are to receive 5 per cent. commission for their services out of the first payment." They procured a purchaser, who was accepted and entered into a contract of sale and purchase with their principals at a stipulated price, to be paid in full at a stipulated time on delivery of deed. Held: That the brokers were entitled to recover the commissions according to the contract, notwithstanding the purchaser, because of alleged misrepresentation by seller's employee, refused to complete the contract or to pay any part of the

purchase money. *Hugill v. Weekley*, 64 W. Va. 210, 61 S. E. 360.

Terms were agreed upon by the vendor and vendee, and the contract reduced to writing, but not signed. Shortly thereafter a contract prepared by the vendee's attorney was tendered to the vendors for their signature, but they refused to sign because it was essentially different from the contract made by the parties in that it contained terms that they had not agreed to, and omitted others that had been agreed upon. Thereupon the purchaser's attorney insisting upon the contract as prepared by him, the vendors declared the sale off, and sold to another purchaser for an advance price. Held: The vendors were not, under the facts of this case, either unreasonable or whimsical in refusing to execute the contract which the attorney for the vendee insisted upon. There was no completed contract of sale, and hence the broker is not entitled to any commission. *Vaughan v. Pleasonton*, 112 Va. 508, 71 S. E. 529.

Notice or Warning Not to Pay.—A vendor who has incurred liability to an agent for services rendered him in the sale by acceptance thereof, with knowledge of the agent's expectation of recompense, can not avoid it by a mere notice or warning of his purpose not to pay, given on the occasion of the signing of an option fixing the price and terms of sale. *Peters v. Riley*, 73 W. Va. 785, 81 S. E. 530.

Defect in Title.—In making their contracts and in producing a purchaser, real estate agents may, as a general rule, act upon the assumption that the owner can tender a title free from infirmities, and there is an implied contract that he has the ability to confer upon a purchaser a perfect title to that which he offers for sale. This presumption, however, is not conclusive, and will not be indulged when contradicted by the evidence in the

particular case. Where a purchaser refuses to complete a sale because of a defect in the title, a recovery by the broker must be based upon some default or misconduct on the part of the owner. *Leonard v. Vaughan & Co.*, 117 Va. 514, 85 S. E. 471. See post, "Bad Faith of Broker," V, A, 10.

Sale by Owner.—Where the owner of land has employed a broker to sell it at a fixed price, but the broker is not given the exclusive right to sell, a subsequent sale by the owner to a purchaser not procured by the broker is not a wrongful prevention of a sale by the broker which would otherwise have been made by him. *Long v. Flory*, 112 Va. 721, 72 S. E. 723.

Same—After Expiration of Contract.—An agent can not recover commissions on a sale made by the owner after the contract of agency has expired, unless the agency has been extended, and the agent has performed his part of the contract, or has been prevented from doing so by the fraudulent conduct of the principal. *Noyes v. Caperton*, 68 W. Va. 13, 69 S. E. 364.

Same—Exclusive Right to Sell.—A principal can not, after having made a valid contract with an agent for the exclusive right to sell, render performance on the part of the agent impossible by making the sale himself, and then successfully defend an action for breach of the contract by claiming that the agent might not have made the sale. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684; *Robertson v. Atlantic Coast Realty Co.*, 129 Va. 494, 106 S. E. 521.

Effect of Release of Vendee by Vendor.—If a real estate agent or broker, in pursuance of his contract with a land owner, has found a purchaser ready and willing to comply with the vendor's terms, and has brought the parties together, and they have entered into a valid contract of sale which the vendor can enforce and

the sale has been completed so far as the agent is concerned, he can not be deprived of his compensation by the voluntary release of the vendee and refusal of the vendor to consummate the sale, without the assent of the agent. *Middle Atlantic, etc., Co. v. Ardan*, 115 Va. 148, 78 S. E. 588, citing *Paschall v. Gilliss*, 113 Va. 643, 75 S. E. 220; *Banker Loan, etc., Co. v. Spindle*, 108 Va. 426, 62 S. E. 266.

So likewise, the vendor is liable to the agent for his compensation if, without the latter's consent, he release the vendee rather than incur the expense or annoyance or delay of litigation. *Middle Atlantic, etc., Co. v. Ardan*, 115 Va. 148, 78 S. E. 588.

Although a real estate agent or broker has stipulated that his compensation shall be paid out of the last three notes to be given by the purchaser, if he has fully complied with his contract and effected a sale which the vendor can enforce, he can not be deprived of his compensation by the action of the vendor in voluntarily releasing the vendee from his contract, without the assent of said agent. He is entitled to recover the amount stipulated for with interest from the time he would have received it had the said notes run to their maturity. *Bankers Loan, etc., Co. v. Spindle*, 108 Va. 426, 62 S. E. 266.

b. By Co-Agent.

As a general rule, where an owner puts his property in the hands of several real estate agents to sell, the agent who first procures a purchaser is entitled to his commission to the exclusion of the other agents, but this general rule may be modified by contract, or entirely subordinated to its provisions. *Hennings v. Parsons*, 108 Va. 1, 61 S. E. 866.

Where a farm is placed in the hands of several independent real estate agents for sale, and it is also placed in the hands of another for sale, who

has knowledge and acquiesces in the right of sale of the others, the fact that his agreement entitles him to ten days' notice before the land is withdrawn from sale, does not constitute as to him an exclusive agency. *Hennings v. Parsons*, 108 Va. 1, 61 S. E. 866.

If land is in the hands of a real estate agent for sale, but he has not the exclusive right of sale, a sale by another agent does not violate the provision of the owner's contract with the former to the effect that his "contract is to continue in force till ten days' notice is given in writing withdrawing the same from market." This is not a withdrawal from market, but a sale to a prior purchaser, and has no reference to a sale of the property either by other agents, or by the owner himself. *Hennings v. Parsons*, 108 Va. 1, 61 S. E. 866.

Knowledge of Each Other's Employment.—If two or more brokers are employed to sell the same land, and they know of each other's employment, and one of them is not more favored than another by the principal, the owner may sell to the purchaser who is first produced, and the broker producing such purchaser is entitled to the commission. *Cannon v. Bates*, 115 Va. 711, 80 S. E. 581.

Ignorance of Each Other's Employment.—Where two or more broker's are authorized to make a sale of land, but are ignorant of each other's employment, the broker who was the procuring cause of the sale is entitled to the commission. If such broker is the efficient cause of the sale, the fact that another broker or the owner of the land himself takes the matter in hand and completes the sale, does not affect the right of such broker to the commission. Where two or more of such brokers have been endeavoring to bring about a sale which is formally consummated, each may have rendered meritorious services without which that

result would not have been reached. In such a case, a discrimination must be made between them to ascertain whose services must be deemed to be the efficient and effective cause of the sale. *Cannon v. Bates*, 115 Va. 711, 80 S. E. 581.

5¼. Change of Price by Owner.

Where an agent contracts to furnish a purchaser for land at a stipulated price, and such agent does furnish a purchaser, whom the owner accepts, and, in the negotiation of the transaction, the owner agrees upon and accepts a different price from that at which the agent was instructed to sell, still such agent is entitled to his commission, or to such compensation for his services as is reasonable, fair, and just, under all the facts and circumstances. A different rule prevails where the purchaser is rejected on account of variation from price or terms prescribed. *Paschall v. Gilliss*, 113 Va. 643, 75 S. E. 220, distinguishing *Crockett v. Grayson*, 98 Va. 354, 357, 36 S. E. 477; *Long v. Flory*, 112 Va. 721, 72 S. E. 723. See *Cannon v. Bates*, 115 Va. 711, 80 S. E. 581; *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899.

5½. When Broker Agrees to Make No Charge.

If a broker is employed to effect a lease, and afterwards, before the lease is effected or he has done all that it was his duty to do, he agrees with the owner that he will make no charge for his services, there can be no recovery by him for his services. He can not recover for subsequent services because he agreed not to charge for them, and he can not recover for prior services because his services were not completed, and his right to compensation depended upon a full performance of his duty as broker. *Strickland v. Fairfax*, 110 Va. 142, 65 S. E. 477.

6½. Compensation from Both Parties.

A mere middle-man in a sale of land

may consistently accept compensation for his services from both vendor and vendee. *Peters v. Riley*, 73 W. Va. 785, 81 S. E. 530.

In an action by a broker or agent against the seller on an agreement to pay him a commission for making sale of land, under a written option to buy it at a fixed price and on stated terms, it is no defense that the agent or broker was also paid a commission by the purchaser, to whom he had assigned his option contract. *Runnion v. Morrison*, 71 W. Va. 254, 76 S. E. 457.

Where an agent stands in the situation of a mere middleman, not having undertaken to act as agent for either party or to exercise for either his skill, knowledge or influence, but merely to bring the parties together to deal for themselves, and he himself stands entirely indifferent between them, it is held that he may recover from each, although each was ignorant of his relation to the other. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

In order to occupy the position of the middleman, the broker must have limited his exertions to such a service. If in addition thereto, a middleman assists either in effecting a trade, he becomes to that extent a partisan agent, and the duty immediately devolves upon him to disclose his agency to the other. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

Plaintiff employed real estate brokers to effectuate an exchange of her city property for farm lands. The brokers called upon the owner of a farm for the purpose of attempting to trade for the plaintiff her city property for the farm, and at that time the brokers listed the farm for sale and secured from the owner of the farm an agreement to trade the farm for \$15 per acre net, with the understanding that the brokers would guarantee a sale of the plaintiff's city property so as to net the owner of the farm \$15 per acre. The brokers failed to disclose to

the plaintiff that the owner of the farm was receiving \$15 per acre net for his farm, but on the contrary stated to the plaintiff that the owner of the farm would not trade his farm for less than \$20 per acre. Held: That the relationship of the brokers to the plaintiff was such that they were legally bound to deal openly and in good faith with her. Not being mere middlemen, the defendants could not lawfully have charged the owner of the farm a commission, and although they had plaintiff's consent to charge a commission, that did not warrant them in secretly arranging with the owner of the farm so as to make their profit on the transaction by a speculation on plaintiff's property. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

10. Bad Faith of Broker.

See ante, "Compensation from Both Parties," V, A, 6½; post, "Cotenant Acting as Broker," V, A, 12. As a question for jury, see post, "Questions for Jury," V, C, 4.

A broker guilty of bad faith to his principal forfeits all commissions for his services. *Harman v. Moss*, 121 Va. 399, 93 S. E. 609.

Where an agent makes sale of real estate entrusted to him for that purpose for a sum in excess of that for which he is authorized to make sale, and attempts to secure the payment of such excessive amount to himself instead of to his principal, in an action against the principal for his commissions he will be denied recovery. By his conduct in attempting to deprive his principal of the full benefit of the contract of sale he forfeits his right to compensation for his services. *Sutherland v. Guthrie*, 86 W. Va. 208, 103 S. E. 298.

Duty to Disclose Adverse Interests.

—The broker who, in disregard of his duty, conceals adverse interests or secretly enters into the service of, or himself becomes, the adverse party,

forfeits his right to commissions, must account for gains unlawfully acquired, and will be liable in damages for any loss caused to his principal by his perfidious conduct. Failure to disclose information necessary for his principal's protection will have the same effect. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

Misrepresentations of Broker. — Where the vendor has no knowledge of the financial condition of the vendee and relies upon the representation of the broker that the vendee is ready, able and willing to buy, and is financially responsible for his contracts, which representation is untrue, the broker is not entitled to commission. *Middle Atlantic, etc., Co. v. Ardan*, 115 Va. 148, 78 S. E. 588.

Where the owner of real estate, having no knowledge of the title or bounds of his land except that derived from the broker through whom he purchased, is assured by the broker that he can make quick sale thereof at a profit, and, without examining the title, places the land in the hands of the same broker for re-sale, and he makes a sale which the purchaser refuses to complete because of a defect in the title to a part of the land, which title the broker had represented as good both to his principal when he purchased and also to the purchaser at the re-sale, the broker is not entitled to his commission. The general rule that the vendor can tender title free from infirmities does not apply to such a case. A recovery by the broker must be based upon some default or misconduct on the part of the owner. *Leonard v. Vaughan & Co.*, 117 Va. 514, 85 S. E. 471, citing *Middle Atlantic, etc., Co. v. Ardan*, 115 Va. 148, 78 S. E. 588.

Vendor Not Influenced by Misrepresentation of Vendee's Financial Condition. — Where a vendor of land is not influenced by the misrepresentations of his broker as to the financial condition of his vendee, such misrepresentations do not constitute a ground

for refusing to pay the broker's commission. *Middle Atlantic, etc., Co. v. Ardan*, 115 Va. 148, 78 S. E. 588.

Broker Not Guilty of Misconduct.

—Complainant purchased a large tract of mountain land at a judicial sale, and subsequently sold it to one G. for a price which netted him a substantial profit. Defendant held a lien upon this land and it was under a decree in a suit brought to enforce this lien that complainant bought the land upon the instigation of defendant, and with defendant complainant entered into a contract whereby he agreed to give to defendant a one-third interest in the profits upon a sale, made by the complainant, with the assistance of the defendant, of said lands, after all the costs and expenses had been paid, in consideration that the defendant should use his best efforts to make a sale of the property, show the property to prospective buyers, use his best efforts to keep fire off the property, and keep parties from robbing the same, and exercise in fact, a general supervision of the property, under the direction of the complainant. Defendant notified the purchaser, G., that he was entitled to one-third of the money to be paid by him for the land, and warning him not to pay over this amount without defendant's consent. It was held that this was not such an interference with the sale as would bar his right to one-third of the purchase money, defendant having reason to suppose that complainant would not keep the contract on his part; his duty did not require him to stand silently by and submit to a repudiation of the contract by complainant. *Alexander v. Critcher*, 121 Va. 723, 94 S. E. 335.

12. Cotenant Acting as Broker.

Not Guilty of Fraud. — Where the appellant, under agreement with his cotenants, under which he made a

sale of timber, believed he occupied the relation of an optionee purchaser and not that of broker for his cotenants, he is not guilty of fraud which will bar him from recovering compensation for the sale, in representing to his cotenants that the timber sold for a less sum than that actually received by him, when he believed that his personal services, money expended, a right of way over his own land, and other considerations, were worth all the purchase price over and above the price named by him to his cotenants. *Harman v. Moss*, 121 Va. 399, 93 S. E. 609.

Amount of Compensation.—Appellant effected a sale of the timber upon a tract of land, of which he was part owner, in common with appellees and others, under a certain agreement or option by which was granted to the appellant the right of buying or selling the timber on the land at \$10.00 per acre. Appellant did not undertake the sale as an ordinary real estate agent or broker. The sale was of a special character and appellant's situation and qualifications for making the sale were exceptional, and the benefits flowing to appellees as the result of a very advantageous sale were peculiar. Therefore, appellant's compensation for making the sale of the timber should not be measured or governed by the customary commission of five per cent., but should be fixed by the measure of quantum meruit, and ten per cent. is not an unreasonable compensation for his services. *Harman v. Moss*, 121 Va. 399, 93 S. E. 609.

13. Amount of Compensation.

Agreement to Pay "Fifty-Fifty" of What is Saved on Purchase Price.—Where one who is desirous of purchasing certain property, expresses a willingness to pay a certain price therefor, and agrees with another to give him "fifty-fifty" on what is saved if he can purchase the property at a less price, and through the efforts of such other

party it is purchased at a less price than that named, such second party will be entitled to receive one-half of the difference between the price at which the purchaser was willing to purchase and the price at which the property was actually secured. *Chafin v. Main Island Creek Coal Co.*, 85 W. Va. 459, 102 S. E. 291.

Reference to Commissioner.—Where the amount of the commission to be paid to an agent for the sale of land is not fixed by contract, but the record of a suit in chancery where the subject is involved indicates the existence of special circumstances affecting the character and quantum of services rendered by the agent in effecting the sale, which, if sustained, might take the claim to commissions out of the ordinary class of sales for which the customary commission of five per cent. is allowed, the cause should be referred to a commissioner in chancery to ascertain and report what would be reasonable compensation for making the sale. *Harman v. Moss*, 117 Va. 676, 86 S. E. 111.

14. Right to Interest on Commissions.

Where a broker is entitled to recover commission on a sale made by him, he is also entitled to interest thereon from the time the commission was payable. *Paschall v. Gilliss*, 113 Va. 643, 75 S. E. 220.

B. JURISDICTION WHERE ACTION MAY BE MAINTAINED.

Where Cause of Action Arises.—Defendant, the owner of a farm, entered into a contract with plaintiff, a real estate agent, under which plaintiff was to receive a certain commission for negotiating the sale of defendant's farm at a certain price. The contract was entered into, signed and delivered in the city of Lynchburg, where plaintiff's real estate office was, and the farm was situated in Buckingham county, where plaintiff lived. Plaintiff obtained a purchaser for the farm, but

at a lower price than that authorized by his contract with defendant, and a supplemental contract was entered into between plaintiff and defendant in Buckingham county, whereby defendant agreed to accept the lower price and plaintiff agreed to accept a smaller commission. Held: That, the later agreement between the parties, entered into in Buckingham county, whereby the selling price and the commissions were changed, was merely a modification of the original agency contract; and, as the primary contract of agency was made in Lynchburg, at least a part of the cause of action arose there; and, as § 3215 of the Code of 1904 authorizes the bringing of an action "in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein," the corporation court of the city of Lynchburg had jurisdiction of an action of assumpsit by plaintiff against defendant for his commission. *Fitzgerald v. Southern Farm Agency*, 122 Va. 264, 94 S. E. 761.

C. ACTIONS FOR COMPENSATION.

1. Venue.

See ante, "Jurisdiction Where Action May Be Maintained," V, B.

2. Evidence.

a. Burden of Proof.

The burden of showing that a purchaser procured by a broker is able, ready and willing to purchase ordinarily rests on the broker. *Low Moor Iron Co. v. Jackson*, 117 Va. 76, 84 S. E. 100.

b. Admissibility.

Prices of Adjacent Lands.—In an action by an agent for the sale of land to recover his commission, evidence of the prices at which adjacent and neighboring lands of the same kind were selling at the time the sale was made is admissible to show that a good price was realized, since it tends to prove faithful and efficient service

on the part of the agent. *Anderson v. Lewis*, 64 W. Va. 297, 61 S. E. 160.

Condition of Real Estate Market.—

In an action by a real estate broker against the executor of a landowner for breach of an alleged parol contract for the exclusive right to sell a tract of land belonging to deceased landowner, the trial court did not err, under the facts and circumstances of the case, in excluding testimony tendered by the defendant as to the conditions of the real estate market in the neighborhood shortly after the alleged breach of contract, where it appeared that the landowner had sold the property to another. *Robertson v. Atlantic Coast Realty Co.*, 129 Va. 494, 106 S. E. 521.

Prior Contract between Parties.—In the trial of an action by a real estate broker to recover commissions on a sale of real estate, in which the evidence is conflicting as to whether the parties had stipulated for the rate of compensation, evidence of a prior contract between the same parties for a sale of the same property and of compensation therein agreed to be paid by way of commissions is competent upon the question of compensation involved. *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384.

Conversation between Agent and Third Person.—In an action by a real estate broker to recover his commissions it was error to admit in evidence against the defendant, a conversation between the agent of the plaintiff and a third person who is neither a party nor a privy to the contract sued on. Where such conversation bears upon a material and vital issue in the cause, its admission in evidence constitutes reversible error. *Cardozo v. Middle Atlantic, etc., Co.*, 116 Va. 342, 82 S. E. 80.

Declarations of Officers.—Where in an action by a real estate broker to recover his commissions a witness has been permitted to testify to certain declarations of officers and agents of

the corporation tending to show a liability on the defendant, other declarations of its officers and agents in the course of their employment, voluntarily made to the witness in the same conversation, tending to show that the corporation has no right to maintain the action are admissible in evidence. *Cardozo v. Middle Atlantic, etc., Co.*, 116 Va. 342, 82 S. E. 80.

Understanding of Party.—Where in an action for a real estate broker to recover his commissions an alleged contract was verbal and not clearly stated, and the vital question at issue between the parties is whether or not their minds met and concurred in all the essential elements of the contract, the defendant has the right to have his statement go to the jury as to what was his understanding of the contract relied on by the plaintiff although the plaintiff is claiming that the defendant had ratified the contract. *Cardozo v. Middle Atlantic, etc., Co.*, 116 Va. 342, 82 S. E. 80.

Actions between Brokers for Commission—Evidence Admissible.—In an action by one broker against another to recover half the commission received by the defendant for the sale of a tract of land, the fact that the plaintiff did, and the defendant did not, include the commission in his income return for that year and pay tax thereon, is irrelevant to the issue, and should not be admitted. In so far as it affected the plaintiff it was a self-serving declaration, and in so far as it affected the defendant its only purpose could have been to place him before the jury as a "tax dodger." *Hilleary v. Hubbell*, 119 Va. 123, 89 S. E. 111.

c. Sufficiency.

The verdict in this case was not plainly unwarranted by the evidence considered most favorably in support thereof, and the court below erred in setting it aside and awarding defendant a new trial. *Wilson v. Johnson*, 72 W. Va. 742, 79 S. E. 734.

3. Instructions.

Bad Faith.—Proof of a declaration of intention by an agent or broker in a sale of land, to withhold from his principal or client, the vendor, information as to the quantity of the land, without proof of actual suppression of the information or the vendor's ignorance of the fact, the sale having been made by the acre and the agent having acted as a mere middle-man in the transaction, does not justify the giving of an instruction propounding an inquiry as to bad faith on the part of the agent. *Peters v. Riley*, 73 W. Va. 785, 81 S. E. 530.

Fraud in Procuring Agency.—In an action by a real estate agent for compensation, there was evidence that when the agent solicited the contract of agency he misrepresented to his principal the value of the property, and while the evidence of intentional fraud might be doubtful and unconvincing, yet it was sufficient to justify a submission to the jury of the issue, whether or not the defendant was relieved from the obligation of her contract of agency by the fraud and misrepresentation of the agent in inducing her to enter into it. *Barnard v. Gardner Invest. Corp.*, 129 Va. 346, 106 S. E. 346.

Instruction Calculated to Mislead Jury.—*Cardozo v. Middle Atlantic, etc., Co.*, 116 Va. 342, 355, 82 S. E. 80.

Instructions Improperly Refused.—*Cardozo v. Middle Atlantic, etc., Co.*, 116 Va. 342, 357, 82 S. E. 80.

4. Questions for Jury.

Duty of Vendor to Sue.—In an action by a real estate broker to recover his commission, the question whether or not it was the duty of the vendor to have sued the vendee in a foreign jurisdiction to compel performance of the contract is one to be determined by the jury upon all the evidence in the case. *Cardozo v. Middle Atlantic, etc., Co.*, 116 Va. 342, 82 S. E. 80.

Bad Faith of Broker.—Where a

broker, employed by a written contract to sell land for the owner thereof, has been the efficient cause in effecting a sale of the land, though at a less price than he was authorized to sell under his contract with the owner, because the purchaser claimed the broker had misrepresented the amount of the timber on the land, the broker's bad faith, if any was a question for the jury. *Paschall v. Gilliss*, 113 Va. 643, 75 S. E. 220.

Renewal or Continuation of Original Contract.—If a contract of employment between A and a firm of real estate brokers has been revoked by the withdrawal of one of the members of the firm, and the remaining members of the firm continue to conduct the business as a new firm, and A, through his agent, repeatedly urges the new firm to carry out the contract, and they undertake to do so, in an action by the new firm against A to recover the consideration of the contract, the question should be submitted to the jury whether or not there had been a renewal or continuation of the original contract. *Arents v. Casselman & Co.*, 110 Va. 509, 66 S. E. 820.

Whether or not the agent or broker was the procuring cause of the sale, thereby entitling him to his commissions, is a question for the jury. *Shea Realty Corp. v. Page*, 111 Va. 490, 69 S. E. 327.

D. DAMAGES.

Measure of Damages.—In an action by a broker for breach of contract giving him exclusive right to sell a tract of land, the measure of damages would not be the same where the employment was at will and where it had a definite duration. It was error, therefore, for the court to assume that the employment was for twelve months and upon that assumption instruct the jury as to a measure of damages. But when the court decided, on the demurrer to the evidence, that plaintiff did have twelve months within which

to fulfill the contract, the error became harmless, provided the court had fixed the right measure of damages. *Robertson v. Atlantic Coast Realty Co.*, 129 Va. 494, 106 S. E. 521.

Profits.—When contemplated profits constitute the sole purpose and object of the contract, and the plaintiff alleges a breach and a consequent loss of profits he has stated a prima facie case, and is entitled to recover such amount as he can prove, with reasonable certainty, he would have made but for the breach. *Atlantic Coast Realty Co. v. Townsend*, 129 Va. 490, 98 S. E. 684.

The general statement of law contained in the preceding paragraph is subject to the general qualification that if the declaration should allege such a state of facts as would enable the court to say that no profits at all could be proved, a demurrer would end the case. But when the profits claimed may be reasonably, or, as in the instant case, must necessarily, be presumed to have been within the intent and mutual contemplation of the parties when the contract was made, the mere fact that the exact amount can not be calculated with mathematical certainty does not preclude a recovery. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

In the instant case the plaintiff sued for loss of profits which he alleged he would have realized if there had been no breach of the contract. Such profits having been the purpose of the contract, and mutually contemplated by the parties, and the circumstances alleged tending clearly to show that the same to some extent would have been realized, he is entitled to go to the jury with his case, and to recover such amount as his proof will establish with reasonable certainty. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

Basing Profits on Subsequent Sale.—In an action by a real estate com-

pany to recover damages against an executor for breach of an alleged parol contract, whereby plaintiff was to have the exclusive right of selling a tract of land of executor's decedent for a stipulated compensation, where it appeared that the landowner had sold the tract to another, plaintiff had the right to elect to base its profits on this subsequent sale, and such election was not to the detriment of defendant. *Robertson v. Atlantic Coast Realty Co.*, 129 Va. 494, 106 S. E. 521.

"Established Business."—In the instant case, the declaration was demurred to on the ground "that the damages sought to be recovered are profits which would have been realized from a business or enterprise never established; such damages can not be measured and hence can not be recovered." Held: That the demurrer should have been overruled, as the commodity dealt in was a tract of land; plaintiff's business had been successfully established for years, and defendant's decedent demonstrated the existence of a market by selling the property at a large profit over what he was to have as a minimum in his contract with the realty company. *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

VI. LIABILITY.

A. PRINCIPAL TO BROKER.

See ante, "Compensation," V.

The owner of an undivided interest in a tract of land may bind himself personally to pay a commission on the sale of the whole thereof. *Anderson v. Lewis*, 64 W. Va. 297, 61 S. E. 160.

B. BROKER AND THIRD PERSONS TO PRINCIPAL.

See ante, "Brokers in General," IV, A; "Nature of Agency and Power in General," IV, B, 1, a.

Can Not Use Principal's Property for Own Advantage.—In the conduct of his principal's business a real estate broker is held to the utmost good

faith, and will not be allowed to use his principal's property for his own advantage, or to derive secret profits or advantages to himself by reason of the relation of principal and agent existing between him and his principal. *Sutherland v. Guthrie*, 86 W. Va. 208, 103 S. E. 298. See ante, AGENCY.

Must Account for Excess Above Authorized Price.—Where an agent for the sale of real estate upon commission sells the same for an amount in excess of that at which he is authorized to make sale, and provides for the payment of such excess by the purchaser to him instead of to his principal, he will be required to account to his principal for such secret profits upon discovery of the same. *Sutherland v. Guthrie*, 86 W. Va. 208, 103 S. E. 298.

Fraud Vitiating Sale.—A contract was made by the complainant with one of the defendants whereby the complainant authorized him to sell all the timber on a given tract of land at \$2,000, cash. Subsequently, defendant represented that the timber could not be sold at that price, and recommended a thirty-day option at \$1,500; upon false representation as to facts about the timber, he induced complainant to confer authority upon him to "buy or sell" the timber at \$1,200. Defendant assured complainant that he would put forth his best efforts to obtain the highest possible price for the timber, and complainant reposed the utmost confidence in his judgment and integrity. Upon the assertion of defendant that he had obtained purchasers at \$1,250, complainant conveyed to them the timber. In fact, the purchasers had agreed to pay \$2,000 for the timber, but this fact was kept secret from complainant. Upon discovery of the facts, complainant sued to rescind the contract fixing price at \$1,200, on the ground of fraud. The said defendant answered denying the fraud, and setting up an option contract to purchase at the price fixed, and the purchasers answered and denied

the right to rescind as far as they were concerned. Held, there was a quasi relation of principal and agent existing between complainant and said defendant and the contract made with him must be set aside for fraud, but as the purchasers are willing to abide by their contract, a decree will be entered directing the payment of \$1,950 to the complainant, and of \$50 to said defendant for his services. *Lee v. Patillo*, 105 Va. 10, 52 S. E. 696.

Where stocks have been illegally converted by a stockbroker, the measure of damages which the owner is entitled to recover is the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it so as to enable him to replace the stock. What is such reasonable time is dependent upon the facts of the particular case. In the case at bar, twenty-one days was held to be a reasonable time. *Miller & Co. v. Lyons*, 113 Va. 275, 74 S. E. 194.

Duty to Minimize Damages.—Where part of plaintiff's stock was sold by stockbrokers, without authority, it was not incumbent upon him to repurchase the stock to minimize the damage and diminish his loss, and he was therefore not limited to a recovery of the difference between it brought when sold by the stockholders and what it would have cost him to recover his position by a repurchase of the stock at a subsequent day. *Miller & Co. v. Lyons*, 113 Va. 275, 74 S. E. 194.

C. BROKER TO THIRD PERSON.

A broker authoritatively representing a known or disclosed principal, as vendor in the sale of a commodity, not notified, at the time of the sale, of purpose of the vendee to hold him responsible for performance of the contract, nor bound by its terms in any form is not personally liable for any breach thereof. *Hurricane Milling Co.*

v. Steel, etc., Co., 84 W. Va. 376, 99 S. E. 490. See *Hoon v. Hyman*, 87 W. Va. 659, 105 S. E. 925.

To absolve a broker from personal liability for performance of contract of sale negotiated for a known or disclosed principal, it suffices that the vendee knew, before consummation of the contract of sale, that the person negotiating it was a broker engaged in the sale, as such, of the kind of commodity in question, and that he was then selling the vendee property belonging to a third person. The contract need not show by express stipulation, or express warning given at the time of the sale, that the negotiator was making it as a broker and for a third party. *Hurricane Milling Co. v. Steel, etc., Co.*, 84 W. Va. 376, 99 S. E. 490.

Contract Not Accepted by Owner as Intended.—Where, after negotiations, parties reduce their understandings to writing, which writing provides for the signatures of all of them thereto, and further for the approval of the contract by a third party, upon whose behalf one of the parties is acting as agent, and there is nothing to show that they intended the contract to be complete unless such writing was signed by all of such parties, and the subject-matter is such as is ordinarily the subject of a contract in writing, as in this case the sale of real estate, and one of the parties does not sign said contract, and the principal whose acceptance thereof is provided for does not accept the same, it will be held that there was no completed contract binding upon the parties. *Hoon v. Hyman*, 87 W. Va. 659, 105 S. E. 925.

Broker Negotiating Instrument without Indorsement.—Va. Code 1919, § 5631; Barnes Code, ch. 98A, § 6A.

E. ACTIONS TO ENFORCE LIABILITY.

1. Right to Sue.

Where an agent for the sale of prop-

erty has an interest in the contract, such as his commission, he can maintain a suit against the vendee to compel him to comply with his contract of purchase. *Cardozo v. Middle Atlantic, etc., Co.*, 116 Va. 342, 82 S. E. 80.

Election to Sue Trustee Bars Recovery against Broker.—Several parties were the joint owners of real estate, the title to which stood in the name of one of the owners as naked trustee, without power to sell or to receive the purchase money if sold by the owners. The trustee, with the acquiescence of the other owners, employed a real estate broker to sell the property, and agreed to pay him a commission of ten per cent. After a satisfactory sale had been negotiated, the owners alleged that, by a secret agreement between the broker and the trustee and in fraud of their rights, the broker had agreed to divide his commission with the trustee, and, with full knowledge of all the facts constituting the alleged fraud, they sued the trustee for the recovery of the commission he had received, and for an accounting. Two years and a half thereafter, and more than three years after knowledge of the alleged fraud perpetrated upon them they sued the broker to rescind the contract of employment and to recover back the commission paid him. Held: The plaintiffs' election to sue the trustee only, and their acquiescence, after knowledge of all the facts, bars their recovery against the broker. *Heckscher v. Blanton*, 111 Va. 648, 69 S. E. 1045.

2. Defenses.

The case for the defendant in error rests upon two propositions—first, that the plaintiff in error did not have a right to sell his stocks, or any of them, without notice, as was done after having, by their acts, and by the course of dealings between themselves and him, covering a period of four years, led him to believe that a sale would not

be made without an opportunity being given him to increase and maintain his margin; second, that he made with the plaintiff in error a valid contract, whereby the plaintiff in error bound themselves unconditionally to wait until the following day for the margin called for, and therefore the plaintiff in error did not have the right to sell his stocks, nor any part of them, on that day. These two defenses are by no means contradictory the one of the other, or even in any degree inconsistent. Either one of them would be sufficient if maintained by satisfactory proof, or both of them together may be relied upon by the plaintiff to maintain his suit. *Miller & Co. v. Lyons*, 113 Va. 275, 74 S. E. 194.

3. Pleading.

Declaration in Action to Recover Secret Profit.—In an action by a property owner against real estate brokers to recover a secret profit made by the brokers, the failure of the declaration to show whether or not the defendants were acting in the dual capacity of agents for the plaintiff and for the third party with whom the trade was made, was immaterial and did not render the declaration demurrable. According to the allegation of the declaration, the defendants were assuming to use their skill and influence primarily for the benefit of the plaintiff, and they were not mere middlemen, but, on the contrary, were the trusted agents of the plaintiff and owed her the same duty of loyalty and good faith which they would have owed her independent of any relationship with the third party. It was therefore unnecessary for the declaration to allege that the plaintiff did not know that the agents were also representing the third party and were to be paid a commission by him. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

In an action of assumpsit against real estate brokers by a client to recover a secret profit made by the bro-

kers, it was objected to the sufficiency of the declaration that it did not allege the scienter; that is, did not allege that the defendants knew of the falsity of their representations, and that it also failed to aver that such representations were false and material. Held: That this position was untenable, because, although the declaration did not in terms contain these allegations, it stated facts which necessarily implied that the representations were material and that the defendants knew they were false. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

4. Evidence.

a. Presumptions and Burden of Proof.

Presumption of Fair Dealing.—In an action by a real estate broker against a landowner and a third party for damages, the broker alleged that the sale of the property in question to the third party was a mere device to deprive him of his commissions, the third party at once transferring the land to a purchaser furnished by the broker. Held: That the landowner was entitled to the presumption of fair dealing, and plaintiff's proof in the case must be clearly and satisfactorily sufficient to overturn that presumption in order to entitle him to a recovery against the landowner. Mere suspicious circumstances would not be enough to warrant such a recovery in such a case. *Palmer v. Showalter*, 126 Va. 306, 101 S. E. 136.

Non-disclosure of Principal—Burden of Proof.—If, in the case of a sale, there is liability on the part of the broker by reason of non-disclosure of his principal, for breach of a warranty of quality, due to injury in transportation, the burden is upon the vendee to prove the injury occurred before delivery of the commodity at the place of delivery specified in the contract. *Hurricane Milling Co. v. Steel, etc., Co.*, 84 W. Va. 376, 99 S. E. 490.

b. Admissibility.

The relation of the parties to the transaction and knowledge thereof on the part of the vendee may be established in an action by the vendee against the broker on account of a breach of the contract, by proof of facts and circumstances warranting inference thereof by the jury; and, for such purpose, evidence of the situation of the parties and the attendant facts and circumstances is admissible. *Hurricane Milling Co. v. Steel, etc., Co.*, 84 W. Va. 376, 99 S. E. 490.

c. Weight and Sufficiency.

Evidence held to show that a broker had no right to close a customer's margin account, without first giving him notice that his margins were running out. *Miller & Co. v. Lyons*, 113 Va. 275, 74 S. E. 194.

In an action by a real estate broker against a landowner and a third party for damages, the broker alleged that the sale of the property in question to the third party was a mere device to deprive him of commissions, the third party at once transferring the land to a purchaser by the broker. There was ample testimony to sustain the jury in concluding that the sale to the third party was not a bona fide sale, but was merely a pretended sale, and that the sale was in truth one from the landowner to a customer of the broker. Held: That a verdict in favor of the broker would not be disturbed. *Palmer v. Showalter*, 126 Va. 306, 101 S. E. 136.

Unqualified and unexplained payment by the vendee of a sight draft with bill of lading attached, for the contract price of the commodity, reception by the vendee of a written confirmation of the sale, from the broker, disclosing the name of his principal and advising that the sale was made for his account, and identity of the manner of the sale, delivery and payment with those of others of the same kind of commodity, previously

affected between the same parties and by the same broker, are each conclusive proof of the vendee's knowledge of the relation of the parties to one another in the transaction. *Hurricane Milling Co. v. Steel, etc., Co.*, 84 W. Va. 376, 99 S. E. 490.

5. Instructions.

In Action against Brokers for Secret Profits.—In an action against brokers for secret profits, an instruction was properly refused which ignored the plaintiff's theory and the rule of law applicable to the facts of the case as to the duty of agents to deal openly and in good faith with their clients. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

In an action by a client to recover a secret profit made by her brokers in an exchange of property between herself and one Basho, the court instructed the jury: "If you believe from the evidence the plaintiff, after executing the deed to Mr. Basho of her property, learned of the facts in reference to the transaction she is now complaining of, and with full knowledge of all said facts then executed, along with said Basho, a deed conveying her said property to the defendant A. D. Smith in accordance with the understanding with Mr. Basho and the defendants, and in the said deed required the said A. D. Smith to assume certain mortgages executed by the said plaintiff, then this was a ratification of the transaction complained of, and you must find for the defendants." The words "and with full knowledge of all the facts" were added by the court over the objection of the defendants. It was objected that the instruction tended to confuse and mislead the jury because it did not sufficiently specify what facts were referred to by the expression "all said facts." Held: That the instruction could have had no such tendency. The question was one of fact, depending upon conflicting evidence, and the instruction as modified presented that question fully and fairly

to the proper tribunal. *Schmidt v. Wallinger*, 125 Va. 361, 99 S. E. 680.

Charges Held Not Inconsistent.—In an action against stock broker for the illegal conversion of plaintiff's stocks, held on margins, by selling the same without sufficient notice, an instruction that if the jury believe that the defendant by any course of conduct in their dealings with the plaintiff in the purchase and carrying of stock upon a margin waived their right to exact strict performance of the contract, and gave the plaintiff time and indulgence in increasing and maintaining his margin, then the defendants could not recall such waiver at their own option without reasonable notice to the plaintiff, so that he might have an opportunity to protect his stock, nor could the defendants, if they made such waiver, sell the stock of the plaintiff without giving such reasonable notice to plaintiff, etc., was not inconsistent with another instruction that if the jury believe that in the conversation between the plaintiff and R. the said R. asked the plaintiff to put up additional margin, the plaintiff replied by asking whether it would not be satisfactory if he would put it up the next day, and, if so, that he would send the said R. \$5,000 the next day, and that to such inquiry the said R. replied that it would be satisfactory if he would send up that amount the next day, and that R. has power and authority from the scope of agency to make such promise, and, further, that the plaintiff did send up that amount the next day, then the defendants had no right to sell. *Miller & Co. v. Lyons*, 113 Va. 275, 74 S. E. 194, 195.

VII. STATUTORY REGULATION OF SALE OF SECURITIES.

Speculative Securities—Unfairness, Imposition or Fraud in the Sale of Certain Securities.—Va. Acts 1918, p. 676; Acts 1920, p. 536; Pollard's Code 1920, p. 647; W. Va. Acts 1921, ch. 99.

BROTHERHOOD.—See ante, ASSOCIATIONS; BENEFICIAL AND BENEVOLENT ASSOCIATIONS; post, LABOR.

BROWN.—As meaning "bay" see *Green v. Comm.*, 122 Va. 862, 867, 94 S. E. 940.

BUCKET SHOP.—See post, GAMBLING CONTRACTS; GAMING.

BUDDLE.—A buddle is a machine used for the purpose of separating iron ore from the dirt and other impurities found with it. *Virginia Iron, etc., Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362.

BUDGET SYSTEM.—See post, STATE.

BUILDERS.—See post, INDEPENDENT CONTRACTORS; WORKING CONTRACTS. As to builder's Liens, see post, MECHANICS' LIENS.

BUILDING AND LOAN ASSOCIATIONS.

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CROSS REFERENCES.

See the title BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 645, and references there given. In addition, see ante, BANKRUPTCY AND INSOLVENCY; post, CORPORATIONS; FOREIGN CORPORATIONS; MORTGAGES AND DEEDS OF TRUST; STOCK AND STOCKHOLDERS; USURY. As to liability of surety for defaulting officer, see post, SURETYSHIP.

I. ORGANIZATION AND GENERAL CONSIDERATION.

Incorporation.—Va. Code 1919, § 4154, as amended by Acts 1920, p. 318; Pollard's Code, 1920, p. 198; Barnes Code, ch. 54, § 25, as amended by Acts 1920, p. 253. A company may be created under

the general law for the purpose of establishing a building and loan association. Barnes Code, ch. 54, § 2.

Corporation Held Building and Loan Association.—"One dominant feature is strong to classify this corporation as a building and loan association, that is, the fact that its main purpose is to enable persons of small means to obtain loans with which they can serve homes. Its very name so imports." *Standard Home Co. v. Reed*, 70 W. Va. 636, 638. 74 S. E. 877.

Supervision by Banking Commissioner.—Barnes Code, ch. 54, §§ 78a (5)-78a (7), 81 et seq.

Permit for Doing Business Issued by Banking Commissioner.—W. Va. Acts 1919, Reg. Sess., p. 314.

Supervision by State Corporation Commission—Statements of Financial Condition.—Va. Code 1919, §§ 4163-4166.

By Laws.—Va. Code 1919, § 4157; Barnes Code, ch. 54, § 29, as amended by Acts 1921, p. 253.

Same—Setting Forth Premium Fines and Mode of Loaning Money.—Va. Code 1919, § 4154, as amended by Acts 1920, p. 318 (*Pollard's Code* 1920, p. 198); Barnes Code, ch. 54, §§ 26, 27, as amended by Acts 1921, p. 253.

Ambiguous By-Law.—By-laws of a building association, requiring weekly meetings of the board of directors for the purpose of receiving dues and other demands from the stockholders and attendance of the treasurer thereat, but not expressly inhibiting him from receiving dues at other times and places, is ambiguous and subject to construction by the directors and officers of the corporation. *Wait v. Homestead Bldg. Ass'n*, 76 W. Va. 431, 85 S. E. 637.

II. POWERS AND RIGHTS IN GENERAL.

Powers in General.—Va. Code 1919, § 4154, as amended by Acts 1920, p. 318; *Pollard's Code* 1920, p. 198; Barnes

Code, ch. 54, § 25, as amended by Acts 1921, p. 253.

Contingent Fund Authorized.—W. Va. Acts 1919, Reg. Sess., p. 314.

Voluntary Liquidation.—Barnes Code, ch. 54, § 80a (1).

May Change Trustees in Deeds of Trust.—Va. Code, 1919, § 4167.

III. OFFICERS AND AGENTS.

The authority of the treasurer of a building and loan association as to the time and place of receiving payments is established by proof of his having done so for a long period of time, with the knowledge and acquiescence of the directors. *Wait v. Homestead Bldg. Ass'n*, 76 W. Va. 431, 85 S. E. 637.

V. LOANS.

A. IN GENERAL.

In General.—Va. Code 1919, § 4154, as amended by Acts 1920, p. 318; *Pollard's Code* 1920, p. 198; Barnes Code, ch. 54, § 26, as amended by Acts 1921, p. 253.

Dues, Interest and Fines.—Va. Code 1919, § 4155; Acts 1920, p. 318, amending Code 1919, § 4154; *Pollard's Code* 1920, p. 198; Acts 1921, p. 253, amending Barnes Code, ch. 54, § 27.

Repayment of Loans—Default.—Va. Code 1919, § 4156; Acts 1921, p. 253, amending Barnes Code, ch. 54, § 28.

Right of Stockholders to Default.—"The ultimate success of a building and loan association depends upon each stockholder paying his dues; and a member who has secured an advancement from the association upon his stock will not be permitted to gain an advantage over the others by defaulting in his payments." *Stoddard v. Jarrett*, 76 W. Va. 203, 206, 85 S. E. 251.

Proportion of Loans to Be on Real Estate—Revocation of License for Exceeding Minimum.—Va. Code 1919, § 4166.

B. INTEREST, PREMIUM AND USURY.

1. Power to Make Contracts Contrary to Usury Law.

Va. Code 1919, § 4154, as amended by Acts 1920, p. 318; Pollard's Code 1920, p. 198; Barnes Code, ch. 54, § 26, as amended by Acts 1921, p. 253.

It is within the power of the legislature to designate what transactions shall be subject to, and what shall be exempt from, the influence of the laws against usury. *Bryan v. Augusta Perpetual Bldg., etc., Co.*, 104 Va. 611, 52 S. E. 357.

2. Authority to Fix Premiums—Competitive Bidding.

W. Va. Acts 1921, p. 253, amending Barnes Code, ch. 54, § 26.

A building and loan association may fix a minimum premium payable in advance or in periodical installments and such premium must be a lump sum, certain and definite, and not a percentage payable indefinitely at fixed periods. *Brown v. Rockey*, 60 W. Va. 268, 271, 54 S. E. 343.

Competitive Bidding.—It seems from the books that the requirement of competitive bidding has the purpose of enabling the borrower to get as low a premium as he can. If the loan is governed by a fixed premium, he can not get it lower. Endlich on Building Associations, § 410. But the West Virginia statute expressly gives power to fix a minimum. And it forbids a loan by open bidding at less than the premium, since if no one bids it, the association may award the money, without bidding to a shareholder to the value of his stock at that premium. *Tahaney v. Building Ass'n*, 59 W. Va. 296, 299, 53 S. E. 791.

Premium or profit for the use of an advance or loan by a building and loan association to a member thereof must be fixed or determined, under the law of this state, by competitive bidding by the members of such an association for

right of priority to the mutual funds; or, in default of bidders at or above a minimum premium, fixed by the by-laws, by awarding the money to a member, at such minimum premium. *Miller v. Prudential Banking, etc., Co.*, 63 W. Va. 107, 59 S. E. 977; *Irving v. Iron Belt Bldg., etc., Ass'n*, 63 W. Va. 348, 61 S. E. 325.

When an application for a loan on stock by a building association makes a bid of premium and it is accepted, and the deed of trust securing it states that a certain premium was bid for the advance, the loan is not illegal as not being a competitive bid. *Tahaney v. Building Ass'n*, 59 W. Va. 296, 53 S. E. 791.

Certainty of the Amount of Premium.—Where the minimum premium bid by a borrowing member of a building and loan association is fixed by the charter and by-laws of the association and the bond and deed of trust securing it, in monthly payments for a stated and definite number of years, or until the maturity of the pledged shares, should they mature before the expiration of the years stated, the amount of the premium is sufficiently certain and definite. *Thompson v. National Mut. Bldg., etc., Ass'n*, 57 W. Va. 551, 50 S. E. 756.

3. What Constitutes Usury.

Contracts Not Usurious.—A contract with a building and loan association for the repayment of money advanced upon unmatured stock, which provides for payment of the premium bid for the loan, not in a lump sum but in monthly installments for a definite time, is not usurious. *Stoddard v. Jarrett*, 76 W. Va. 203, 85 S. E. 251.

A contract of loan with a building association, without naming a lump sum of premiums, provides that monthly premiums of fixed sum shall be paid for a fixed number of months. This fixes the amount and duration of payment of premiums with certainty,

and the contract is not open to the charge of usury. *Tahaney v. Building Ass'n*, 59 W. Va. 296, 53 S. E. 791; *Burkheimer v. National Mut., etc., Ass'n*, 59 W. Va. 209, 53 S. E. 372.

A contract made by a building and loan association for an advancement or loan to one of its stockholders upon stock issued to him by such association, is not usurious because it provides for the payment of a fixed monthly premium by such stockholder for a certain stated number of years, or until the earlier maturity of said stock. *Brown v. Rockey*, 60 W. Va. 268, 54 S. E. 343. See *Thompson v. National Mut. Bldg., etc., Ass'n*, 57 W. Va. 551, 50 S. E. 756.

When Premiums Arbitrarily Fixed Are Usurious.—Premium or profit arbitrarily fixed by the by-laws of an association, domestic or foreign, in contravention of § 26, chapter 54, of the West Virginia Code, and without regard to its provisions as to ascertaining the right of priority among members to loans, by a selling of the money in the treasury to the bidders of the highest premium therefor, or, in default of bidders at or above a minimum premium, fixed by the by-laws, by awarding the money to a member, at such minimum premiums, is unlawful and usurious, if it exceeds the legal rate of interest, when stipulated for in a contract respecting an advance or loan. *Miller v. Prudential Banking, etc., Co.*, 63 W. Va. 107, 59 S. E. 977.

A building and loan association contract requiring payment of a fixed monthly premium for an indefinite period of time is usurious. *Irving v. Iron Belt Bldg., etc., Ass'n*, 63 W. Va. 348, 61 S. E. 325.

When such premium or profit is fixed or determined by any other method than that regulated by law, and such premium or profit is greater than the legal rate of interest, the contract respecting the advance or loan is usurious, and, to the extent of such usury,

can not be enforced in the courts of West Virginia. *Miller v. Prudential Banking, etc., Co.*, 63 W. Va. 107, 59 S. E. 977; *Irving v. Iron Belt Bldg., etc., Ass'n*, 63 W. Va. 348, 61 S. E. 325.

The by-laws of a foreign building and loan association, doing business in West Virginia, contain no provision for competitive bidding or for a minimum premium in default of bidders, but provide that a borrowing stockholder in addition to six per cent. interest on the money actually loaned shall pay a fixed premium of \$50 per share, or at the time of the advance may obtain from the association and use therefor "special advance stock" equal to one half the number of shares necessary to carry the advance, which special stock shall mature at the same time as his regular stock but be not subject to membership fees or expenses, and which on repayment of the loan shall be forfeited to the association, the borrower then receiving only his original stock. Held, that a contract for an advance of \$1500 on fifteen shares of regular and fifteen shares of special advance stock in lieu of such fixed premium, with a stockholder in this state, the bond and deed of trust providing for monthly payments of \$24 each, of which \$9 is for dues on regular stock, \$7.50 for dues on special advance stock and \$7.50 for interest, to be continued until such time as such stock shall be matured, is usurious, and enforceable only as a simple loan of money at legal interest. *Irving v. Iron Belt Bldg., etc., Ass'n*, 63 W. Va. 348, 61 S. E. 325.

A corporation claiming to be a building and loan association incorporated under the laws of another state, taking contracts of loan in West Virginia without having complied with the statutes of the state relating to building and loan associations, and providing in such contracts that in addition to the dues on the stock issued to the borrower and interest on its loans, there

shall be paid premiums in monthly payments, such contracts are usurious, and must be held to be straight loans to be repaid with legal interest, and all payments of dues, premiums and fines which may have been made shall be applied as partial payments on such loans. *Miller v. Monumental Savings, etc., Ass'n*, 57 W. Va. 437, 50 S. E. 533.

Continued Payments of Interest.—A contract of loan with a building association requires continuance of payment of lawful interest on the sum advanced, after cessation of dues and premiums, until the stock matures, unless it sooner matures. This does not make the contract usurious. *Tahaney v. Building Ass'n*, 59 W. Va. 296, 53 S. E. 791.

4. What Constitutes a Loan within Operation of Usury Law.

Contracts Formerly Regarded as Usurious.—By act approved March 1, 1894, the legislature legalized certain contracts to be thereafter made by building fund associations, which had theretofore been regarded as usurious. The contract in suit was made after the passage of that act, and is within its provisions. By it a borrowing stockholder agreed to make certain quarterly payments on his stock and to pay interest on the whole sum loaned, quarterly every year until his stock was paid up in full, and this was held to be valid. *Bryan v. Augusta Perpetual Bldg., etc., Co.*, 104 Va. 611, 52 S. E. 357.

5. Conflict of Laws.

See post, CONFLICT OF LAWS.

Laws of State of Location Govern as to Validity, Interpretation and Effect.—Where the by-laws of a non-resident building association provide that all dues from members shall be payable at the home office of the company, which is outside of the state, a contract by a member for a loan, which is silent as to the place of payment, is a foreign contract, and is governed by

the laws of the state in which the home office is located as to its validity, interpretation and effect. *Middle State Loan, etc., Co. v. Miller*, 104 Va. 464, 51 S. E. 846.

Provisions Enforcible.—A contract of a borrowing member of building association to pay six per cent. interest on the money borrowed during the continuance of the loan, and the taxes and insurance premiums on the property conveyed to secure the repayment of the loan, in addition to what he undertook to pay as a stockholder to mature his stock, is not usurious under the law of Maryland, where the dues are payable; and the contract will be upheld in Virginia when its enforcement is sought here. *Middle State Loan, etc., Co. v. Miller*, 104 Va. 464, 51 S. E. 846.

6. Defense of Usury Is Personal.

One who purchases land which is subject to an usurious trust debt, and assumes the payment of such debt as part of the consideration for his purchase, can not be relieved from the usury. *Stuckey v. Middle State Loan, etc., Co.*, 61 W. Va. 74, 55 S. E. 996. See post, USURY.

VI. TERMINATION OF MEMBERSHIP AND EFFECT THEREOF.

Withdrawal.—Va. Code 1919, § 4156; Barnes Code, ch. 54, § 28, as amended by Acts 1921; p. 253.

Termination on Account of Mismanagement.—When, by reason of gross mismanagement of a building and loan association, a member, who has borrowed from it the ultimate value of the stock subscribed by him, has the right to sever his relations with it, and elects to do so, he is to be charged with the amount of the loan and legal interest thereon from the date on which he received the money, and credited with the interest and premium paid, until the date on which his right to withdraw accrued, and the value of his stock as of said date, as nearly as the

same can be ascertained, making due deductions for his share of the expenses and losses sustained up to that date; and, on the balance thus found to be due from him, he is to be charged with interest and credited with all payments thereafter made by him, whether on account of dues, interest or premium; and, in applying credits, before, on and after said date, the rule governing partial payments is to be observed and followed. *Burkheimer v. National Mut., etc., Ass'n*, 59 W. Va. 209, 53 S. E. 372.

Borrower Not Estopped from Demanding Dissolution of Contract.—A borrower is not estopped from demanding dissolution of his contract with a building and loan association for suspension for an unreasonable time of the payment of dues on its stock by its members under such circumstances, by his having voted for an amendment to the by-laws of the association, conferring upon its directors power to suspend payment of dues. *Burkheimer v. National Mut., etc., Ass'n*, 59 W. Va. 209, 53 S. E. 372.

Termination by Death.—Under the laws of Maryland, the amount due on a bond given to a Building Association by a borrowing member who has since died is to be ascertained by charging the estate of the borrowing member with the amount of the loan to him as of its date, and interest at six per cent., and crediting his estate with all sums paid on the loan as of the dates of payment, whether principal or interest, and thus ascertain the balance due on the loan at the time of borrower's death. Upon this sum there should be credited the withdrawal value of the borrower's shares of stock at the time of his death, ascertained according to the by-laws of the company, then in force for determining the withdrawal value of the stock of a borrowing member who pays back a loan in advance of the maturity of his stock. For the balance thus ascertained, with

interest thereon from the time of borrower's death, and unpaid fines assessed against him in his lifetime, and the taxes paid by the company on the trust property, with interest thereon from date of payment, the company is entitled to a decree. *Middle State Loan, etc., Co. v. Miller*, 104 Va. 464, 51 S. E. 846.

VIII. TAXATION.

License Tax.—Va. Code 1919, appendix, p. 3135.

Exemption from Franchise Tax.—Va. Code 1919, § 4168.

X. FOREIGN ASSOCIATIONS.

Conditions of Doing Business in State.—Va. Code 1919, §§ 4158-4162; Barnes Code, ch. 54, § 78a (8).

Certificate to Do Business.—A foreign building and loan association, before it can get from the secretary of state a certificate to do business in this state, must have a certificate of authority from the commissioner of banking under W. Va. Acts of 1907, ch. 70, section Vc. *Standard Home Co. v. Reed*, 70 W. Va. 636, 74 S. E. 877.

Corporation held to be a building and loan association within meaning of above statute. *Standard Home Co. v. Reed*, 70 W. Va. 636, 74 S. E. 877.

Noncompliance with Law.—Failure of a foreign building and loan association to comply with the provisions of § 30 of chapter 54 of the West Virginia Code of 1899, does not preclude it from transacting business in the state. *Burkheimer v. National Mut., etc., Ass'n*, 59 W. Va. 209, 53 S. E. 372.

In *Thompson v. National Mut. Bldg., etc., Ass'n*, 57 W. Va. 551, 557, 50 S. E. 756, it is said: "There was a general replication to the answer whereby the onus was thrown upon the defendant to show that it had complied with the statute, but it does not appear to have filed any proofs of having complied with § 30, chapter 54, Code. However, that does not invalidate its

contracts; it only renders the association liable to the penalties prescribed for failure to comply."

A foreign building and loan association, coming into West Virginia to transact business, must conform to the law regulating similar corporations organized under the law of the state; and its contract, although in terms solvable at its domicile in the foreign state, must be such as a similar domestic corporation is authorized to make, in order to be enforced in this state. *Irving v. Iron Belt Bldg., etc., Ass'n*, 63 W. Va. 348, 61 S. E. 325.

Exemption from Usury.—If a foreign building and loan association, doing business in West Virginia, contravenes the provisions of § 26, chapter 54, W. Va. Code, relating to building and loan associations formed in the state, the exemption from usury afforded by that statute will be denied it. *Miller v. Prudential Banking, etc., Co.*, 63 W. Va. 107, 59 S. E. 977.

XI. INDUSTRIAL LOAN ASSOCIATIONS.

Va. Acts 1920, p. 61, Pollard's Code 1920, p. 716.

BUILDING CONTRACTS.—See post, **WORKING CONTRACTS**. As to contract for pavement of street, see post, **STREETS AND HIGHWAYS**. As to assignment of rights by general contractor, see post, **MECHANICS' LIENS**.

BUILDING RESTRICTIONS.

CROSS REFERENCES.

See the title **BUILDING RESTRICTIONS**, vol. 2, p. 654, and references there given. In addition, see post, **COVENANTS; INJUNCTIONS; MUNICIPAL CORPORATIONS; RESTRAINT ON ALIENATION**.

B., the owner of a large lot, conveyed a portion of it, 40x70 feet, to certain named trustees of the Methodist Episcopal Church, in trust for a place of worship for the use of the members of said church, and covenanted "that no building shall be erected on any part of the land surrounding the above described granted church lot within ten feet of said church lot." Held: I. That said covenant created a perpetual easement in said ten foot strip of ground in favor of the church lot, for the purpose of light and air. II. That said easement passed by a conveyance of the church lot, and was not extinguished by the conversion of the church building into a business house. *Hennen v. Deveny*, 71 W. Va. 629, 77 S. E. 142.

Building Line Restrictions.—Where the owner of a tract of land lays the same out as a subdivision of a city or town, and conveys to various persons the lots so laid out, in each of which

conveyances there is contained a covenant providing that any buildings erected upon the land so conveyed shall not be used for other than residence purposes, and shall not be constructed within a less distance than fifteen feet from the street line of said lots, such restrictions are valid and binding, constituting covenants running with the land, and are for the benefit of all of the owners of lots in such subdivision. *Withers v. Ward*, 86 W. Va. 558, 104 S. E. 96.

A covenant between the grantor and grantee of a city lot that the building line of the square shall not be less than twenty-five feet from the true street line, and that the front wall of the building to be erected on said lot shall be set back at least twenty-five feet from the street line, is a reasonable and lawful agreement, and may be enforced. *Spilling v. Hutcheson*, 111 Va. 179, 88 S. E. 250.

Same—Construed Liberally in Favor

of Grantee.—Under a covenant such as is mentioned above, the projection of a bow window over the agreed building line is a breach of the covenant where the foundation walls of the window form part of the front wall of the house. But, construing the covenant liberally in favor of the grantee, a frame porch, set on brick piers and extending over the building line is not a breach of the covenant, as the porch does not form part of the "front wall of the building."

Spilling v. Hutcheson, 111 Va. 179, 88 S. E. 250.

Remedy by Injunction.—An injunction will lie to restrain the continuance of the building encroachments in violation of restrictive covenants. It is the specific performance of the agreement of the parties, and the plaintiff will not be left simply to his action at law for damages. *Spilling v. Hutcheson*, 111 Va. 179, 88 S. E. 250.

BUILDINGS.—See *South Penn Oil Co. v. Knox*, 68 W. Va. 362, 368, 69 S. E. 1020. As to platforms or docks as constituting **buildings**, within meaning of timber contract, see *McCorkle & Son v. Kincaid*, 121 Va. 546, 93 S. E. 642. See, also, post, **TREES AND TIMBER**.

BULK SALES LAW.—See post, **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

BULLET.—" 'Shot' is defined as 'a projectile, particularly a solid ball or bullet that is not intended to fit the bore of a piece; also such projectiles collectively.' " *Green v. Commonwealth*, 122 Va. 862, 867, 94 S. E. 940.

BURDEN OF PROOF.—See post, **PRESUMPTIONS AND BURDEN OF PROOF**. As to burden of showing error on appeal, see ante, **APPEAL AND ERROR**.

BUREAU.—"The word **bureau** means, 'A subordinate department, or a division of a principal department;' 'A department or force of men transacting a particular branch of public business.' Standard Dict.; Bouvier's Law Dict.; *Button v. State Corp. Comm.*, 105 Va. 634, 640, 54 S. E. 769." *Pine v. Commonwealth*, 121 Va. 812, 93 S. E. 652.

Bureau of Archives and History.—See post, **STATE**.

Bureau of Labor and Industrial Statistics.—See post, **LABOR**.

Bureau of Negro Welfare.—W. Va. Acts 1921, p. 561.

BURGLARY AND HOUSEBREAKING.

I. Definitions and Statutory Provisions.

II. Elements of the Offense.

D. Intent.

III. Indictment.

B. Joinder of Counts or Offenses.

IV. Evidence.

B. Possession of Stolen Goods and Burglarious Tools as Evidence.

C. Weight and Sufficiency.

D. Burden of Proof.

VI. Verdict and Sentence.

CROSS REFERENCES.

See the title BURGLARY AND HOUSEBREAKING, vol. 2, p. 654, and references there given. In addition, see post, CRIMINAL LAW; DECLARATIONS AND ADMISSIONS; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; INSTRUCTIONS; PRESUMPTIONS AND BURDEN OF PROOF.

I. DEFINITIONS AND STATUTORY PROVISIONS.

Va. Code 1919, §§ 4437, 4438, 4439; Barnes Code, ch. 145, §§ 11, 12, 13.

II. ELEMENTS OF THE OFFENSE.

D. INTENT.

See also ante, "Definitions and Statutory Provisions," I.

In the crime of burglary, there are always two intents, one to break and enter, which must be executed, and the other to commit, in the building, a theft or other offense, which may be executed or not. *State v. Phillips*, 80 W. Va. 748, 752, 93 S. E. 828.

Intoxication, if established by proof, precludes a finding of guilt of the breaking with intent to steal, when the proof shows only a breaking and entering, but not an actual taking nor any attempt to take. *State v. Phillips*, 80 W. Va. 748, 93 S. E. 828.

III. INDICTMENT.

B. JOINDER OF COUNTS OR OFFENSES.

The charge in the second count of an indictment for house breaking and larceny that the defendant "afterwards"

without breaking did not enter the particular car alleged to have been broken and entered in the first count but referring to the same car by number and alleging the commission of the offense on the same day as the offense alleged in the first count, is not bad on demurrer for misjoinder of offenses unrelated to the same transaction. *State v. Ringer*, 84 W. Va. 546, 100 S. E. 413.

IV. EVIDENCE.

B. POSSESSION OF STOLEN GOODS AND BURGLARIOUS TOOLS AS EVIDENCE.

Exclusive Possession.—The possession of stolen goods is not of itself even prima facie evidence that the person in whose possession the stolen goods are found, is the thief, or that he is guilty of breaking and entering the house from which the goods were stolen; but the exclusive possession and control of property recently stolen, are circumstances tending to show that the person found in possession is the thief, and the jury may consider them in connection with all the other circumstances and facts in proof. *State v. Littleton*, 77 W. Va. 804, 88 S. E.

458. See *Tyler v. Commonwealth*, 120 Va. 868, 91 S. E. 171.

The burden rests upon the commonwealth to prove that the alleged possession of the stolen goods by the accused was an exclusive possession. *Tyler v. Commonwealth*, 120 Va. 868, 91 S. E. 171.

Constructive Possession.—A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the prisoner to a criminal charge. *Tyler v. Commonwealth*, 120 Va. 868, 91 S. E. 171.

Possession of Other Stolen Goods.—On the trial of an indictment for breaking and entering a railroad car with intent to steal, and stealing certain railroad goods, the admission of evidence of the possession of other goods by defendant in the same room where the goods alleged to have been stolen were stored, and which the evidence tends to show were also stolen by defendant, does not constitute reversible error, in the absence of evidence showing that defendant was prejudiced thereby. *State v. Ringer*, 84 W. Va. 546, 100 S. E. 413. Va. Code 1919, § 4437.

C. WEIGHT AND SUFFICIENCY.

Statements of Accused as Assertion

BURIAL.—See post, DEAD BODIES. As to burial ground, see post, CEMETERIES; DEEDS. As to burial expenses, see post, EXECUTORS AND ADMINISTRATORS.

BURNING.—See ante, ARSON; post, FIRES.

BUSINESS.—See post, CARRYING ON BUSINESS; DOING BUSINESS; NEW BUSINESS. The legicographers and courts have found it impossible to define even the word **business** with sufficient accuracy to cover all cases. The same is true of the meaning of the phrase **engage in business**. *Derrick v. Commonwealth*, 122 Va. 906, 911, 95 S. E. 392. As to when a non-resident is engaged in **business** within the state, see *Jamison v. Commonwealth*, 120 Va. 137, 90 S. E. 640. See, also, post, TAXATION.

Engaged in His Own Business.—The mere fact that one is employed by another does not furnish a valid test of whether the former is or is not **engaged in his own business**. All professional men and those engaged in any kind of work for others, whether skilled or unskilled, are employed by others even when the former are engaged in their own business. When one is employed by an-

of Property in Stolen Goods.—Upon being asked permission by another to wear the stolen property, the accused replied, "All right I don't care if you do." It was held that this reply of the accused was not sufficiently distinct and unequivocal in meaning to prove, with that degree of certainty required in a criminal case, an assertion of property by the accused in the stolen article. It was consistent with a claim of ownership on the part of accused, but was also consistent with a position of indifference. *Tyler v. Commonwealth*, 120 Va. 868, 91 S. E. 171.

D. BURDEN OF PROOF.

Proof of the unlawful entry into a dwelling house in the nighttime does not throw upon the accused the burden of proving to the satisfaction of the jury that his entry was for a lawful purpose. The burden is upon the commonwealth to prove beyond a reasonable doubt every fact essential to the establishment of the guilt of the accused. *Garnett v. Commonwealth*, 117 Va. 902, 83 S. E. 1083.

VI. VERDICT AND SENTENCE

Punishment.—Va. Code 1919, §§ 4437, 4438, 4439; Barnes Code, ch. 145, §§ 11, 12, 13.

other, the true test of whether the former is engaged in his own business, or the business of the latter, is the character of the employment. Is the former an independent contractor and as such in the employment of another and doing work for such other; or is the former a mere servant or ordinary employee of another? In the case first stated, the person employed is engaged in a business of his own, although doing work for another. In the second case, the person employed is engaged in the business of his employer, and not in a business of his own. *Derrick v. Commonwealth*, 122 Va. 906, 95 S. E. 392. See post, LICENSES.

BUT IF.—See post, EXCEPT—BUT IF.

BUYER.—See *Ashland Coal, etc., Co. v. Hull Coal, etc., Corp.*, 67 W. Va. 503, 516, 68 S. E. 124.

BY-LAWS.—See ante, BENEFICIAL AND BENEVOLENT ASSOCIATIONS; BUILDING AND LOAN ASSOCIATIONS; post, CORPORATIONS; MUNICIPAL CORPORATIONS; ORDINANCES.

BYRD LIQUOR LAW.—See post, INTOXICATING LIQUORS; STATUTES.

CABINET MAKER.—A cabinet maker is a manufacturer. *First Nat. Bank v. Trigg Co.*, 106 Va. 327, 56 S. E. 158.

CALLS.—See ante, BOUNDARIES.

CANALS.

CROSS REFERENCES.

See the title CANALS, vol. 2, p. 666, and references there given. In addition, see post, CARRIERS; EMINENT DOMAIN; MILLS AND MILLDAMS; NAVIGABLE WATERS; PUBLIC SERVICE COMMISSIONS; WATERS AND WATERCOURSES.

Creation of Canal Companies.—Va. Code 1919, §§ 3865-3871.

Statutory Provisions Concerning Public Service Corporations.—Code of Va., §§ 3882-3903.

Abandonment of Navigation—Rights of Riparian Owners.—The Chesapeake and Ohio Railway Company is the fee-simple owner of the land in controversy, under condemnation proceedings had by its predecessor in title, for navigation purposes. For nearly seventy years, it and its predecessors in title have held title to the property, and during all these years that title has never been doubted or drawn in question by the appellant, or any of his predecessors in title. The abandon-

ment of North River for the purpose of navigation in the year 1881, and the application of appellee's property to other uses authorized by statutes of this state did not cause the property rights once vested in its predecessors in title to revert to the riparian owners. The application of the property to different uses was authorized by statute. *Glass v. Columbian Paper Co.*, 111 Va. 404, 69 S. E. 354.

Construction of Charter.—"Identical language to that employed in the charter of the North River Navigation Company is found in the charter of the James River and Kanawha Canal Company, which, in the case of Chesapeake, etc., R. Co. v. Walker, 100 Va. 69, 40

S. E. 633, has been construed to confer upon the canal company the fee-simple interest in property acquired by condemnation to be occupied by its works." *Glass v. Columbian Paper Co.*, 111 Va. 404, 407, 69 S. E. 354.

Section 30 of the charter to the Dismal Swamp Canal Company does not create a contract between the States of North Carolina and Virginia affecting all the provisions of the charter, but refers only to the items set out in § 28 of the charter. *Commonwealth v. Lake Drummond Canal, etc., Co.*, 10 Va. Law Reg. 236.

Condition in Franchise of Free Use by Abutting Owners—Abandonment—Rights of Abutting Owners.—The right of owners of land on a canal owned and operated by the state or under state authority, who have used the canal for the benefit of their abutting lands without any contract right to continue to do so, and merely by acquiescence of the state or the operator of the canal, terminates when and to the extent that the operation of the canal ceases with the assent of the commonwealth. If the commonwealth permits the holder of the franchise to abandon the canal in whole or in part, individuals who have enjoyed its use, without any contract right to continue to do so, have no right to complain. *Johnson v. Lake Drummond Canal, etc., Co.*, 125 Va. 139, 99 S. E. 771.

By Laws 1839, ch. 145, a canal company was authorized to build a certain canal and condemn the necessary lands. The act provided, however, that the canal should be free for the vessels of owners on abutting lands. Before the construction of the canal these owners could reach deep water by navigable creeks or streams on which they bordered, but access to deep water was

completely shut off by the construction of the canal. The canal company obtained its right of way by purchase and condemnation and not by a grant from the state. By act of general assembly the canal company was authorized to abandon the operation of the canal and sell the property. Suit was brought by the property owners to enjoin the canal company and a railroad to whom the canal company had given the right to cross the canal with a fill, bridge or obstruction which would prevent the navigation of the canal. Held: That the act authorizing the abandonment of the canal was constitutional and that complainants were not entitled to an injunction against the railroad company. The condition of free use was imposed only on the right of exercise of the franchise. *Johnson v. Lake Drummond Canal, etc., Co.*, 125 Va. 139, 99 S. E. 771.

Application to Cut Canal Across Watercourse.—Va. Code 1919, § 3582 et seq.

Canal as Lawful Fence.—Va. Code 1919, § 3553.

Lien on Franchise of Canal Company.—Va. Code 1919, §§ 6438-6442.

Taxation.—Va. Const., §§ 176-178, 181; Va. Code 1919, p. 3096 et seq.

Tolls.—Va. Code 1919, §§ 4020-4021.

Crossing Other Canal.—Barnes Code, ch. 52, § 11.

Obstructing or Injuring Canal.—Va. Code 1919, § 4468; Barnes Code, ch. 145, §§ 26, 26a.

Right of Railroad to Cross Canal.—Va. Code 1919, § 3999; Barnes Code, ch. 54, § 50, cl. 6.

Wagon Ways over Canals.—Barnes Code, ch. 52, § 9.

Connection of Chesapeake Bay and Ohio River.—W. Va. Const., Art. XI, § 1.

CANCEL—CANCELLATION.—As to cancellation of instruments, see post, RESCISSION, CANCELLATION AND REFORMATION.

In *Brown v. Gibson*, 107 Va. 383, 387, 59 S. E. 384, the court, in construing a clause in a will canceling certain debts due the testator says: "The word 'cancel' excludes the idea of payment, **cancellation** being the forgiving and obliteration of a debt. It not only is in no sense a payment, but it is the very thing that makes the payment unnecessary and impossible." See generally, post, RESCISSION, CANCELLATION AND REFORMATION; WILLS.

CAP BOARD.—See *Virginia Iron, etc., Co. v. Kiser*, 105 Va. 695, 702, 54 S. E. 889.

CAPIAS AD SATISFACIENDUM.—See Va. Code 1919, § 6480.

CAPITAL.—See ante, BANKS AND BANKING; post, CORPORATIONS; STOCKS AND STOCKHOLDERS; TAXATION. As to **capital** of foreign corporation for taxation purposes, see *Com. v. United Cigarette Mach. Co.*, 119 Va. 447, 89 S. E. 935. See also post, TAXATION.

CAPITATION TAX.—See post, TAXATION.

CARBON COPY.—See ante, BEST AND SECONDARY EVIDENCE.

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CROSS REFERENCES.

See the title CARRIERS, vol. 2, p. 671, and references there given. In addition, see ante, ADMIRALTY; ANIMALS; ATTACHMENT AND GARNISHMENT; AUTOMOBILES; post, CONFLICT OF LAWS; CONSTITUTIONAL LAW; CONTRACTS; ELECTION OF REMEDIES; ELEVATORS; EMINENT DOMAIN; EVIDENCE; EXEMPLARY DAMAGES; FALSE IMPRISONMENT; FERRIES; HEALTH; LARCENY; MANDAMUS; MINES AND MINERALS; MUNICIPAL CORPORATIONS; ORDINANCES; PIPE LINES; PLEADING; RESTRAINT OF TRADE; STREETS AND HIGHWAYS; TAXATION; THEATERS AND SHOWS; WAIVER. As to establishment and maintenance of railroad crossings, obstruction thereof and accidents thereat, see post, CROSSINGS. As to demurrer to the evidence in actions against carriers, see post, DEMURRER TO THE EVIDENCE. As to express companies as carriers, see post, EXPRESS COMPANIES. As to regulation of shipment of game by common carriers, see post, GAME AND GAME LAWS. As to federal control of interstate carriers and their rights, duties and liabilities under the federal stat-

utes, see post, INTERSTATE COMMERCE. As to transportation of intoxicating liquors, see post, INTOXICATING LIQUORS. As to limitation of actions against carriers, see post, LIMITATION OF ACTIONS. As to the relations of a carrier with its servants and its liability to them for injuries, see post, MASTER AND SERVANT. As to powers and duties in general of the Virginia corporation commission and the West Virginia public service commission in respect to common carriers, see post, PUBLIC SERVICE AND CORPORATION COMMISSIONS. As to liability of a street railroad company for injuries to passengers, see post, STREET RAILROADS. As to running trains and loading or unloading steamboats on Sunday, see post, SUNDAYS AND HOLIDAYS.

I. IN GENERAL.

A. DEFINITIONS.

Common Carrier Defined.—A common carrier is one who undertakes a business for hire, or reward, to carry from one place to another the goods of all persons who may apply for such carriage, provided the goods be of the kind which it professes to carry, and the persons so applying agree to have them carried upon the lawful terms prescribed by the carrier, and who, if he refuse to carry such goods for those who are willing to comply with such terms, becomes liable to an action by the aggrieved party for such refusal. *Norfolk, etc., R. Co. v. Young*, 10 Va. Law Reg. 913.

The true test of the character of a party, as to whether he is a common carrier, or not, * * * is his legal duty with respect to the thing required. If he may carry, or not, as he deems best, he is a private individual. *Norfolk, etc., R. Co. v. Young*, 10 Va. Law Reg. 913, 918.

To constitute one a common carrier it is necessary that he should hold himself out to the community as such. This may be done not only by advertising, etc., but by actually engaging in the business and pursuing the occupation as an employment. *Carlton v. Boudar*, 118 Va. 521, 525, 88 S. E. 174.

Definition of "Common Carrier" as Used in Code Provisions Relating to Liability of Such Carriers for Injuries

to Employees.—Va. Code 1919, § 5795. See post, MASTER AND SERVANT.

Local Carrier as a Common Carrier.—A local carrier, such as a cabman, wagoner or transfer man, carrying passengers and baggage for the public generally, from place to place in and about a city, or from town to town, is a common carrier, and, in his relations with his patrons, he is governed by the legal principles applicable to carriers doing business on a larger scale. *Brown Shoe Co. v. Hardin*, 77 W. Va. 611, 87 S. E. 1014. See post, "In General," V, A.

"Transportation Company" Defined.—Va. Const. § 153; Va. Code 1919, §§ 3693, 3881.

A½. COMMON CARRIER DISTINGUISHED FROM PRIVATE CARRIER.

"A common carrier may undoubtedly become a private carrier, or bailee for hire, when as a matter of accommodation, or special engagement, he undertakes to carry something which it is not his business to carry. The relation in such case is changed from that of a common carrier to that of a private carrier, and where this is the effect of the special engagement, the carrier is not liable, as a common carrier, and cannot be proceeded against as such." *Norfolk, etc., R. Co. v. Young*, 10 Va. Law Reg. 913, 920,

quoting from Hutchinson on Carriers, p. 34.

B. TELEGRAPH AND TELEPHONE COMPANIES AS PUBLIC CARRIERS.

See post, TELEGRAPHS AND TELEPHONES.

C. EXPRESS COMPANIES AS CARRIERS.

See post, EXPRESS COMPANIES.

E. RESPONSIBILITY OF RECEIVERS.

See post, RECEIVERS.

II. GOVERNMENTAL REGULATION AND CONTROL.

A. STATE GOVERNMENT.

1¼. Right of Regulation and Control Never to Be Surrendered or Abridged.

Va. Const., § 164.

1½. Control by Legislature of Railroad Rates.

W. Va. Const. Art. XI, § 9; Barnes Code, p. 760, ch. 54, § 55. See post, "Freight, Demurrage and Other Charges," III, D; "Fares and Tickets," V, C.

That a new railroad was built without expectation of an immediate realization of a fair return on the investment is not a circumstance justifying disallowance of such return, if it can be earned without exaction of unreasonable rates. Coal, etc., R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613.

Earnings of a railroad company applied to the purchase of additional equipment, extension of its lines and other improvements, must be regarded as a part of its net earnings upon an inquiry as to whether a rate statute is confiscatory. Coal, etc., R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613.

2. Authority Exercisable by Public Service Commissions.

See post, "Duties Imposed With Respect to Transportation," II, A, 2 1/5;

"Delay," III, B, 1, c; "Statutory Regulations in General," III, D, 1. See also post, PUBLIC SERVICE COMMISSIONS.

Constitutionality of Virginia Enactments Giving Power to Corporation Commission. — The constitution and laws of Virginia which give to the state corporation commission control over common carriers of persons and goods in matters affecting their public duties and charges, require notice of such carriers, give them the most ample opportunity to be heard on all matters of law and fact which they may desire to allege or put forward in their defense, and in event of an adverse decision an appeal of right to the appellate court regardless of the amount in controversy. Such legislation does not deprive them of their property without due process of law, and is not in conflict with the Constitution of the United States. Winchester, etc., R. Co. v. Com., 106 Va. 264, 55 S. E. 692.

Authority of Commission to Authorize Connections between Railroads. — Va. Code 1919, § 3971.

The state corporation commission may, under the powers conferred by § 1294d, subsection 37, of the Virginia Code of 1904 (Code 1919, § 3971), establish as many connections between two railroads as may be reasonably necessary for the convenient interchange of traffic between such roads, and for the accommodation of said roads and the public. Louisville, etc., R. Co. v. Interstate R. Co., 107 Va. 225, 57 S. E. 654.

Commission Cannot Require Grant Use of Station and Terminal Facilities.

—The power given and the duty imposed upon the state corporation commission by § 156 (b) of the constitution refer to all matters relating to the performance of the public duties of transportation and transmission companies, but the use by one railroad company of the station and terminal facilities of another railroad company is

not a public duty owing by the latter to the former, or its patrons. *Commonwealth v. Norfolk, etc.*, R. Co., 111 Va. 59, 68 S. E. 351.

Duty of Carriers to Make Monthly Reports of Accidents to Corporation Commission.—Va. Code 1919, § 3988.

§ 1/8. Duties Imposed with Respect to Transportation.

Va. Code 1919, §§ 3907, 3937; Barnes Code, p. 768, ch. 54, § 71.

Limitation of Requirements that May Be Imposed under Virginia Statute.—Under the terms of § 1294c (4) of the Code (Code 1919, § 3907), the state corporation commission is prohibited from requiring one railroad company to grant the use of its track and terminal facilities to another company engaged in a like business. *Commonwealth v. Norfolk, etc.*, R. Co., 111 Va. 59, 68 S. E. 351.

What May Be Required of Transportation Companies by Public Service Commission.—Barnes Code, p. 220, ch. 150, § 4.

Power to Require Adequate Transportation Facilities.—The public service commission has authority, under ch. 9, Acts 1913 (Barnes Code, ch. 150), to require railroads to provide adequate facilities for the transportation of persons and property on both main and lateral lines. *Chesapeake, etc.*, R. Co. v. Public Service Comm., 75 W. Va. 100, 83 S. E. 286.

Requirement of adequate service and facilities therefor does not presuppose the previous existence of either service or facilities. It applies alike to cases where the carrier has failed to provide any service and where it has provided insufficient service or facilities. *Chesapeake, etc.*, R. Co. v. Public Service Comm., 75 W. Va. 100, 83 S. E. 286.

Power to Remove Individual Inconveniences.—Neither the state corporation commission nor the courts can undertake to remove individual inconveniences, so long as the carrier affords

reasonable facilities for the reception and delivery of freight for the general public, and denies no individual or individuals an essential right. *Danville, etc.*, R. Co. v. Lybrook, 111 Va. 623, 69 S. E. 1066.

Power of State to Regulate Furnishing and Loading Cars for Interstate Shipments.—A state may, in the absence of action by congress, prescribe rules and regulations for transportation companies and shippers in the matter of furnishing and loading cars for interstate shipments, provided such rules and regulations be reasonable and just, and do not in their application directly infringe upon the commerce clause of the constitution of the United States, or violate some right of such companies or shippers protected thereby. For divergence of opinion on this point, see separate opinions of judges. *Southern R. Co. v. Com.*, 107 Va. 771, 60 S. E. 70. See post, INTERSTATE COMMERCE.

Duty to Permit Switch Connections for Intra-state Business to Be Made.—Barnes Code, p. 220, ch. 150, § 4.

Legislature Enjoined to Require Railroad Companies under Certain Conditions to Establish Stations in or Near Towns or Villages.—W. Va. Const. Art. XI, § 10.

Reasonableness of Order Requiring Passenger Service on Lateral Line.—Though competent upon an inquiry as to the reasonableness of an order entered by the public service commission requiring installation and operation of a passenger carrying service on a lateral line constructed under the provisions of § 2983, Code 1913 (ch. 54, § 69), a comparison of the expenses incident thereto with prospective returns therefrom is not controlling. *Chesapeake, etc.*, R. Co. v. Public Service Comm., 75 W. Va. 100, 83 S. E. 286.

Mere excess of estimated operating expenses above prospective returns from the required service on a branch line is inadequate upon the question of

reasonableness. Other factors are requisite for that purpose. *Chesapeake, etc., R. Co. v. Public Service Comm.*, 75 W. Va. 100, 83 S. E. 286.

Quaere as to what is to be considered in determining reasonableness of requirement for passenger service on branch line. *Chesapeake, etc., R. Co. v. Public Service Comm.*, 75 W. Va. 100, 83 S. E. 286.

22/5. Undue Preferences Prohibited.

See post, "Preferences," III, D, 3; "Discrimination," V, C, 8¼. Va. Code, 1919, § 3906; Barnes Code, p. 221, ch. 150 § 7; p. 773 ch. 54, § 71e. (3).

Exclusive Privilege Granted by Railway Company to Local Transfer Company.—A railway company is not prohibited by §§ 7, 8, and 9, chapter 9, Acts 1913 (Barnes Code, ch. 150, §§ 7, 8, 9), or by any rule or principle of the common law from granting to a local transfer company, in good faith and for public convenience, the exclusive privilege of occupying a portion of its station platform and ground for the purpose of soliciting patronage in the business of transferring through passengers and baggage, arriving on its trains, to the station of another railway company. The rights of a competing transfer company are not thereby violated. *Rose v. Public Service Comm.*, 75 W. Va. 1, 83 S. E. 85.

Truck Lines Prohibited from Discriminating against Industries and Shippers Located on Tap Lines.—Barnes Code, p. 222, ch. 150, § 8.

23/5. Regulations Regarding Transportation of Dead Bodies.

Va. Code 1919, § 1728, 1733; Barnes Code, p. 602, ch. 45, § 176b.

24/5. Restrictions upon Running Trains and Loading or Unloading Steamboats on Sunday.

See post, SUNDAYS AND HOLIDAYS.

4. Appointment by Governor of Special Police Officers for Railroad Company.

Barnes Code, p. 1205, ch. 145, § 31. See post, "Treatment and Protection of Passengers," V, B, 4.

When Railroad Company Liable for Wrongful Acts of Special Officers.—

A special officer, appointed and commissioned by the governor, at the instance of a railroad company, under the provisions of § 31, ch. 145, Code 1899, § 4281, Code 1906, and paid by such company for his services, is prima facie a public officer for whose wrongful acts such company is not liable. *McKain v. Baltimore, etc., R. Co.*, 65 W. Va. 233, 64 S. E. 18; *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103. See post, PUBLIC OFFICERS.

The company is not liable for a false arrest, assault and battery and malicious prosecution, not directed nor instigated by it, and founded upon an alleged breach of the peace at one of its stations, in no way affecting or involving, so far as the evidence discloses, any of its property, rights or servants, nor growing out of any transaction between the plaintiff and the company, although the plaintiff was rightfully in the station, having a ticket and awaiting the arrival of a train, and the alleged breach of the peace, arrest and assault and battery occurred on the premises of the company. *McKain v. Baltimore, etc., R. Co.*, 65 W. Va. 233, 64 S. E. 18.

Evidence disclosing the facts and circumstances above stated and nothing more, is insufficient to sustain a verdict against the railroad company at whose instance the special officer was appointed and by whom he was paid for his public services, and the trial court properly set it aside. *McKain v. Baltimore, etc., R. Co.*, 65 W. Va. 233, 64 S. E. 18.

But if such an officer is engaged in special service for the company, such

as guarding its property or enforcing obedience to its rules and regulations, and does a wrongful act for which the injured party is entitled to damages, and such act was within the scope of such service or employment, the company is liable as in the case of its regular employees such as conductors and station masters. *McKain v. Baltimore, etc., R. Co.*, 65 W. Va. 233, 64 S. E. 18; *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

If the injured party is a passenger of such carrier and the officer acted, in the transaction in which the injury was suffered, in the capacity of servant of the carrier, the question of liability is determined by the legal principles applicable in cases of injury to the passengers by ordinary servants of carriers. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103. See post, "Unlawful or Unjust Treatment by Servants," V, D, 3.

B. FEDERAL GOVERNMENT.

See post, CONSTITUTIONAL LAW; CORPORATIONS; INTER-STATE COMMERCE.

III. CARRIERS OF GOODS.

1. A. DEFINITION.

"The common carrier of goods," says Dobie on Bailments and Carriers, p. 300, 'is one who holds himself out, in the exercise of a public calling, to carry goods, for hire, for whomsoever may employ him. From this definition it appears that the essential characteristics of the common carrier of goods are: (a) He must carry as a public employment by virtue of his general holding out; (b) he must carry for hire, and not gratuitously.' " *Carlton v. Boudar*, 118 Va. 521, 526, 88 S. E. 174.

A. CONTRACT OF TRANSPORTATION AND DELIVERY.

1. Contract Implied by Law.

In every case of action for damages for breach of contract or breach of duty by a common carrier of freight to carry

it safely, whether in assumpsit on the contract, or in tort for breach of duty, the right of action is dependent upon the existence of a contract of carriage between the plaintiff and defendant at the time the alleged cause of action arose, which contract, however, need not have been an express contract, but may have arisen from the duty imposed at common law or by statute, state or federal, in which case, the contract will be implied in law from the duty imposed by the common law or by statute. *Chesapeake, etc., R. Co. v. National Bank*, 122 Va. 471, 95 S. E. 454.

2. Contract for Through Transportation.

Liability of Initial Carrier Accepting Goods for Through Transportation.—Va. Code 1919, § 3929.

If the initial carrier expressly contracted to carry the goods to their ultimate destination, such initial carrier is liable for loss through default of its connecting carrier, because the connecting carrier is the agent of the initial carrier. *Radford-Portsmouth Veneer Co. v. Norfolk, etc., Co.*, 1 Va. Law Reg., N. S. 598.

What Shall Be Deemed a Contract for Carriage to Ultimate Destination and Delivery.—Va. Code 1919, § 3926.

Authority of Agent to Contract—English and American Rules.—"Under the English rule and the cases adopting it, it held that the agent authorized to receive the goods for carriage has implied authority to bind his principal by a contract for through carriage; but under the American rule, it is held that, while the general freight agent of a railroad may have such authority, it will not be implied in the case of local freight agents from their general authority to receive and receipt for goods offered for transportation over the carrier's road; and the mere fact that a through rate of freight is collected or that the

goods are billed for through shipment will be insufficient to support an inference that he has such authority.' To charge the company it is absolutely necessary, not only that there be a special contract for liability for loss on other lines of railroad, but also that the agent has power to make such contract." *Roy v. Chesapeake, etc., R. Co.*, 61 W. Va. 616, 619, 57 S. E. 39. See post, "Loss or Damage on Line of Connecting Carrier," III, B, 3.

4. Construction of Contract.

Railroad Company Not Bound to Furnish Cars on a Particular Day.—

An application to a station agent for cars for shipper's use on a particular day, made in the ordinary way, by one who has not been accustomed to take special contracts to furnish cars for particular dates, and without notice of intention or purpose to bind the company absolutely to furnish the cars on the day named, and the promise of the agent, in response to such application, to get the cars, do not prove a contract on the part of the railroad company, binding it absolutely to furnish them on the day named. *McNeer v. Chesapeake, etc., R. Co.*, 76 W. Va. 803, 86 S. E. 887.

5. Bills of Lading.

Both a Receipt and a Contract.—

A bill of lading issued by a carrier is both a receipt and a contract. *Frasier v. Norfolk, etc., R. Co.*, 10 Va. Law Reg. 247.

Ordinarily, a bill of lading issued by the carrier and accepted by the shipper becomes the contract of shipment of the parties subject to the rules governing other contracts, provided such a contract is not forbidden by law. It merges and supercedes all prior and contemporaneous oral agreements. *Old Dominion, etc., Co. v. Blakeman*, 129 Va. 206, 105 S. E. 752.

Prima Facie Evidence of Receipt of Goods.—A bill of lading constitutes prima facie evidence of the fact that the carrier has received the goods recited therein, but this evidence may be rebutted. *Director-General v. Chandler*, 129 Va. 418, 106 S. E. 226.

If Contract Is Forbidden by Law Bill Is Void.—In order for a bill of lading to become a contract between the carrier and the shipper, the contract must be one which the parties have a right to enter into. If the contract is one forbidden by law, the bill of lading is void. No rights grow out of it and no obligations are imposed by it. The status of the parties is the same as if it had never been entered into. *Old Dominion, etc., Co. v. Blakeman*, 129 Va. 206, 105 S. E. 752.

Unintelligible characters placed on a bill of lading which convey no meaning to a person of ordinary intelligence and which are not explained to the shipper, do not bind him. *Norfolk, etc., Railway v. Harman*, 104 Va. 501, 52 S. E. 368.

The character "Rel. Val. Lts. (or Ltd.) 5 Cwt" appearing on a bill of lading of goods and live stock will not be held to mean that the shipper and the carrier have agreed that the property should be considered as worth only five dollars for every hundred pounds of weight, where there is no evidence as to what the characters stood for and that construction is glaringly inconsistent with another clause of the bill of lading in which a different and higher valuation is placed upon the stock. *Norfolk, etc., Railway v. Harman*, 104 Va. 501, 52 S. E. 368.

Provisions as to Live Stock Not Applicable to Household Goods.—In an action to recover damages for injuries inflicted on live stock and household goods, shipped under one bill of lading containing provisions, applicable only to the live stock, it is

not error to refuse to instruct the jury to find for the defendant unless they believe that the provision as to live stock has been complied with. The plaintiff may be entitled to recover for his goods although the provision as to live stock has not been complied with. *Norfolk, etc., Railway v. Harman*, 104 Va. 501, 52 S. E. 368.

Condition Limiting Time within Which Claim for Loss or Damage May Be Made.—A condition in a bill of lading that claims for loss or damage shall be made in writing to the carrier's agent at the point of delivery promptly after the arrival of the property, and if delayed more than thirty days after the delivery of the property, or after due time for the delivery thereof, there shall be no liability upon the carrier, is a reasonable provision and will be upheld. Such a provision contravenes no public policy and excuses no negligence, but is a reasonable regulation for the protection of the carrier from fraudulent imposition in the adjustment and payment of claims for goods alleged to have been lost or damaged. *Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 58 S. E. 569.

Failure of Shipper to State Value.—The failure of a shipper who fills up a bill of lading for goods of the value of more than fifty dollars, to fill in the blank left for the value of the shipment, does not constitute a fraudulent representation or concealment of the value of the goods on his part, nor a refusal to give their value when requested, although he knew that the carrier bestowed a higher degree of care on packages of the value of fifty dollars or more than on packages of less value. His mere knowledge of that fact could not change the degree of care imposed by law upon the shipper any higher duty than if he

were ignorant of such fact. *Adams Exp. Co. v. Green*, 112 Va. 527, 72 S. E. 102.

Mistake in Description of Goods, Rates Charged and Release Valuation.—In the instant case, the bill of lading was in the standard form, the only error being in the misdescription of the goods and the rate therefor, and in fixing a release valuation. Both parties were chargeable with notice of, and are bound by, the filed tariff rate, and their rights and obligations were measured thereby. The mistake in the description of the goods, the rate charged, and the amount fixed as the release valuation did not, under the circumstances, change these rights and obligations, and neither is estopped by the bill of lading from asserting rights arising under the interstate commerce act. *Old Dominion, etc., Co. v. Blakeman*, 129 Va. 206, 105 S. E. 752. See post, INTERSTATE COMMERCE.

Carrier Not Estopped by Recitals of Bill from Showing True Facts.—In the instant case plaintiff bought a carload of potatoes from a dealer and instructed the dealer to ship the same in plaintiff's name to Chicago. The dealer procured from defendant's agent a bill of lading accordingly, and upon presentation of this bill of lading plaintiff settled with dealer, treating that document as evidence that the contract of purchase and the incidental instructions as to shipping had been complied with by the dealer. Plaintiff was in both form and substance the shipper, and had made the dealer his agent in regard to the shipment. As a matter of fact, it developed that the goods recited in the bill of lading were never delivered to defendant carrier, and that the issuance of the bill was due to a mistake of defendant's agent. Held: That the case was simply one of a shipper suing a carrier to recover for loss of goods which were never delivered for carriage, and that the reci-

tals of the bill of lading in no way estopped the carrier from showing the true facts. *Director-General v. Chandler*, 129 Va. 418, 106 S. E. 226.

If a bill of lading expressly authorizes the carrier to deliver the goods upon the written order of the consignee without the bill of lading, such order, when given, has the same effect as the transfer of the bill of lading. *Seward & Co. v. Miller*, 106 Va. 309, 55 S. E. 681.

Who is a Bona Fide Purchaser.—

If upon the face of a bill of lading there appears evidence sufficient to put an ordinarily prudent man upon inquiry as to the true ownership of the consignment, a purchaser, without such investigation as would disclose the true owner, from one (other than the consignee) who transfers to him the bill of lading by mere delivery, and who has no title to the property, can not claim protection as a bona fide purchaser. *Richlands Brick Corp. v. Hurst Hdw. Co.*, 80 W. Va. 476, 92 S. E. 685.

Effect of Transfer or Assignment.—

A bona fide assignment or transfer of a bill of lading vests in the assignee or transferee the title of the shipper to the goods covered by the bill. *Fourth Nat. Bank v. Bragg*, 127 Va. 47, 102 S. E. 649; *Seward & Co. v. Miller*, 106 Va. 309, 55 S. E. 681.

And this is so, although the transaction is not intended to give the permanent ownership, but to furnish security for advances of money, or discount of commercial paper made upon the faith of it. *Seward & Co. v. Miller*, 106 Va. 309, 55 S. E. 681.

The assignment of a bill of lading for goods operates to transfer to the holder the legal title to the goods and the possession thereof as effectually as if there were a physical delivery of the goods to a purchaser. After such assignment, the levy of an attachment on the goods for a debt due by the shipper is a conversion of the goods,

for which the holder of the bill of lading may bring either an action for damages resulting from the wrongful seizure, or an action of trover, and in either case the measure of damages is practically the same. The holder of the bill of lading is not limited to a recovery of the value of the goods sold in the attachment proceedings and the costs incident to the sale. The conversion is complete, and in such case the injury suffered is, as a rule, the value of the property converted, and the holder of the bill of lading, with a draft attached for the price of the goods, is entitled to recover at least the amount of the draft. *Buckeye Nat. Bank v. Huff*, 114 Va. 1, 75 S. E. 769. See post, TROVER AND CONVERSION.

A bank which discounts a draft with a bill of lading attached, if not the absolute owner of the goods, stands in the position of a mortgagee in possession and is not required, in order to protect its lien, to have the papers recorded under § 2465 of the Code (Code 1919, § 5194). *Seward & Co. v. Miller*, 106 Va. 309, 55 S. E. 681.

A bank which had discounted a draft with a bill of lading attached is not liable to the consignee who has paid the draft and received the bill of lading, for breach of contract between the shipper and consignee with respect to the quality of the goods. The bank in such case holds the bill of lading, and a special property in the goods, merely as security for the payment of the draft. *Brinkley & Co. v. Carlyle, etc., Co.*, 6 Va. Law Reg. 778.

Where a bank takes, by endorsement, a bill of lading and pays the draft of the shipper for the value of the goods, the bank becomes the owner of the goods covered by the bill of lading until the draft is paid, and this is true, although the transfer be not to give the permanent ownership, but to furnish security for the advance of money or discount of commercial pa-

per. After such transfer no attachable interest in the goods remains in the shipper. *Buckeye Nat. Bank v. Huff*, 114 Va. 1, 75 S. E. 769; *Fourth Nat. Bank v. Bragg*, 127 Va. 47, 102 S. E. 649. See ante, ATTACHMENT AND GARNISHMENT.

A consignee assigned a bill of lading to a purchaser, attached it to a draft on him for the price agreed, and had the draft discounted at the bank. The purchaser, under a right reserved in the contract, refused to accept the goods after inspection. The agent of the consignee then sold to X, who agreed to pay the draft. The next day, and before the draft was paid, the goods were attached for a debt due by the consignee. Subsequently X paid the draft. Held, the goods were not the property of the consignee at the time the attachment was levied. They belonged either to the bank or to X. If payments of the draft was an essential prerequisite to invest X with title, then they were the property of the bank; and if the agent of the consignee had no right to make sale to X, yet when the bank accepted payment of the draft from X, all its rights passed to him, and the attaching creditor had no greater right against him than it had against the bank. *Seward & Co. v. Miller*, 106 Va. 309, 55 S. E. 681. See ante, ATTACHMENT AND GARNISHMENT.

The law presumes that the transfer of a bill of lading, with a draft attached, is for a valuable consideration, and the burden of proving the contrary is upon him who denies it. *Buckeye Nat. Bank v. Huff*, 114 Va. 1, 75 S. E. 769.

§ 1/4. Authority of Station Agent to Make Special Contract of Shipment.

The making of a special contract of shipment, as one to expedite delivery or furnish cars to a shipper on a particular day, is within the scope of the apparent authority of a station agent, and the shipper, in the absence of

knowledge of a limitation or restriction upon such authority, may make a valid and binding contract with the company, through him, for the delivery of cars at his station, on a particular day, for the shipper's use. *McNeer v. Chesapeake, etc., R. Co.*, 76 W. Va. 803, 86 S. E. 887.

51/2. Where and to Whom Delivery Is to Be Made.

A carrier is bound to deliver goods entrusted to it for shipment, at the place of destination named in the contract, and can not compel the owner to accept them elsewhere. *Belknap v. Baltimore, etc., R. Co.*, 79 W. Va. 691, 91 S. E. 656.

The carrier is bound to respond to the demand of the real owner for possession of his goods, and in so doing does not render himself liable to one who having wrongfully obtained possession, has delivered them to the carrier for transportation. *Smith v. Linden Oil Co.*, 69 W. Va. 57, 62, 71 S. E. 167.

6. Notice to Consignee of Readiness to Deliver.

a. In Virginia.

Duty to Notify Consignee When Freight is Ready for Delivery and to Give Reasonable Time for Removal.—Va. Code 1919, § 3916.

b. In West Virginia.

"Our decisions say, in accordance with the better rule, that a railroad company is not required to give notice to the owner of the arrival of goods, the duty resting upon the owner to be on the lookout for their arrival." *Annese v. Baltimore, etc., R. Co.*, 87 W. Va. 588, 105 S. E. 807, 808.

6 1/4. Time of Delivery.

When a carrier undertakes to convey goods, the law implies a contract that they shall be delivered at destination within a reasonable time, in the absence of any special agreement as to the time of delivery. And the principle applies, although there is a written contract for the shipment

which contains no stipulation as to the time within which the goods are to be delivered. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684.

7. Disposition When Delivery Prevented—Sale of Goods.

It is the duty of the carrier to notify the consignor of the consignee's refusal to accept a consignment in car-load lots, where the carrier is not under duty to unload. *Baltimore, etc., R. Co. v. Luella Coal Co.*, 74 W. Va. 289, 81 S. E. 1044.

"Where the goods are of a perishable character and the consignee will not accept them, or there are other reasons requiring a sale without delay, the carrier may be justified in selling the goods because of the necessity of the particular case." *Dudley v. Chicago, etc., R. Co.*, 58 W. Va. 604, 608, 52 S. E. 718.

If, in such case, the property is perishable and decaying, and the owner, upon being notified of the danger of its loss, relying upon the unauthorized inspection as constituting a conversion, gives notice of his abandonment of the property and intention to claim the value thereof, the carrier may sell the same on account of the owner, deduct his charges from the proceeds of sale and will be liable for the balance thereof only. *Dudley v. Chicago, etc., R. Co.*, 58 W. Va. 604, 52 S. E. 718.

If, as to the property left on its hands, the railway company is to be regarded as a warehouseman, its rights to sell the same, to prevent loss by the decay thereof, is clear. Any kind of imminent danger of loss or destruction will justify a sale in such case. *Dudley v. Chicago, etc., R. Co.*, 58 W. Va. 604, 609, 52 S. E. 718.

A½. DUTIES IMPOSED BY STATUTE.

1. Duty to Receive, Weigh and Receipt for Freight and Transport without Unreasonable Delay.

Duty with Respect to Taking on

and Delivering Property.—Va. Code 1919, § 3938.

Duty to Weigh and Receipt for Goods.—Barnes Code, p. 771, ch. 54, § 71a (11).

Carriers to Receive and Receipt for Freight Delivered during Established Business Hours — Exceptions. — Va. Code 1919, § 3927.

Duplicate Freight Receipts to Be Issued on Demand—Duties in Respect Thereto.—Va. Code 1919, § 3915.

Freight Must Be Transported without Unreasonable Delay. — Barnes Code, p. 773, ch. 54, § 71e (3).

2. Duty to Furnish Sufficient Accommodation for Transportation.

Va. Code 1919, § 3990; Barnes Code, ch. 54, § 71e. (3).

Duty to Furnish Suitable Cars—Reasonable Notice.—A railroad company engaged as a common carrier, in the shipment of any particular class of articles or property, is bound to furnish suitable cars for such shipments, upon reasonable notice, whenever it can do so by the exercise of reasonable diligence and fairness and impartially to all of its patrons. *McNeer v. Chesapeake, etc., R. Co.*, 76 W. Va. 803, 86 S. E. 887.

To be reasonable, such notice must allow sufficient time to enable the railroad company, by the exercise of reasonable diligence under the existing circumstances, to furnish cars without disturbance of applications previously made by other shippers at the same station, injustice to itself or unfairness to patrons other than the applicant. *McNeer v. Chesapeake, etc., R. Co.*, 76 W. Va. 803, 86 S. E. 887.

When State of War No Excuse for Not Furnishing Shipping Facilities.—

A common carrier will not be excused from its duty of furnishing shipping facilities to one offering commerce to it, upon the ground that all of its energies are required to meet government needs, brought about by an existing state of war, where it does not appear that the

granting of such facilities would divert any of the carrier's energies, or require of it service which would make it less able to perform its public duty. *Norfolk, etc., R. Co. v. Public Service Comm.*, 82 W. Va. 408, 96 S. E. 62.

Duty to Provide for Transportation or Storage of Farm Produce.—Va. Code 1919, § 3956.

Duty to Make Provision for Transportation of Coal and Coke—Equality of Facilities among Shippers.—Barnes Code, p. 765, ch. 54, § 66c.

Section 2364, Code 1906 (Barnes Code, ch. 54, § 66c.); provides that "every railroad corporation along whose line of railroad the industries of mining coal and manufacturing coke are carried on, shall without discrimination between or amongst shippers, and without unnecessary delay, make a reasonable provision for the transportation of all such coal and coke offered for transportation over its railroad, and no such railroad corporation shall discriminate in rates, distribution of cars or otherwise against or among shippers of coal or coke offered for shipment on its line or lines." What will constitute such "reasonable provision" for the transportation of coal will depend on the facts and circumstances of each individual case. *State v. White Oak R. Co.*, 65 W. Va. 15, 64 S. E. 630.

Provisions which a railroad company had determined before the alternation writ issued were proper to be made for the transportation of relator's coal offered it for shipment, the court will assume on final hearing may reasonably be required by its mandate; at least until a different showing be made. *State v. White Oak R. Co.*, 65 W. Va. 15, 64 S. E. 630.

Where in order that "reasonable provision" be made by it for the transportation of coal and coke offered it for shipment, as required by said § 2364, Code 1906 (Barnes Code, ch. 54, § 66c), the facts and circumstances demand it, a railroad company may be compelled

by mandamus to construct and operate upon its right of way a side track and switch for that purpose. *State v. White Oak R. Co.*, 65 W. Va. 15, 64 S. E. 630.

Requiring such "reasonable provision" to be made does not amount to a command to enter into a contract therefor with relator, or to build and maintain a permanent structure on right of way, to be continued indefinitely; nor to the taking of the private property of such railroad company for private use without due process of law, inhibited by art. 14 of the amendment to the Constitution of the United States. It is a mere command of the temporary use by such company of a part of its right of way for the purpose of performing a duty imposed upon it by law. *State v. White Oak R. Co.*, 65 W. Va. 15, 64 S. E. 630.

In so far as section 66c of chapter 54, Code of 1916, contemplates equality of transportation facilities among shippers of coal, in point of mere convenience, not reasonable means of transportation within the ability of the carrier, it applies only to mining industries having efficient and usual equipment for loading coal cars. *Baltimore, etc., R. Co. v. Public Service Comm.*, 81 W. Va. 457, 94 S. E. 545.

In view of a great shortage of cars suitable for coal shipments, occasioned by extraordinary conditions bringing into temporary activity a great many mines that are not equipped with tipples for loading cars, but demand pro rata allotments to them of open-top cars for their shipments, which cannot be furnished without serious detriment to permanent and properly equipped mines, the carrier, and the general public, a railroad company of which such allotments and distributions are demanded may, by promulgation of a regulation applicable to all such mines, assign its open-top cars to the permanent and properly equipped

mines and box cars to those loading without tipples and from wagons and trucks. Such a regulation, under such circumstances, is neither unreasonable nor unjustly discriminatory. *Baltimore, etc., R. Co. v. Public Service Comm.*, 81 W. Va. 457, 94 S. E. 545.

An order of the public service commission setting aside a regulation of a railroad company, classifying shippers for the purpose of distribution of freight cars for coal shipments, on an occasion of an immense shortage in such cars, is reviewable on the question of the unreasonableness of the regulation and the character of the discrimination it makes. *Baltimore, etc., R. Co. v. Public Service Comm.*, 81 W. Va. 457, 94 S. E. 545.

Duty to Afford Facilities for Interchange of Traffic with Other Carriers.—Va. Code 1919, § 3907; Barnes Code, p. 222, ch. 150, § 8.

3. Order of Time in Which Property Shall Be Transported.

Va. Code 1919, § 3937.

4. Duty to Furnish Freight Bill When Goods Are Delivered.

Va. Code 1919, § 3917.

5. Duty to See That Agricultural Seeds Are Tagged or Labeled.

Va. Code 1919, § 1144.

6. Duties in Relation to Transportation of Explosives.

Va. Code 1919, § 3922.

7. Duty to Maintain Sanitary Conditions in Transportation of Food Products.

Va. Code 1919, § 1220.

8. Duties in Relation to Transportation of Nursery Stock.

W. Va. Code, Supp. 1918, ch. 62a, § 13 (3534m).

9. Duty of Proprietor of Lateral Railroad to Transport Freight for Others.

Barnes Code, p. 767, ch. 54, § 69a, (5).

B. LIABILITY.

1. In General.

a. Responsibility for Goods and Exceptions to Liability.

As to when carrier is justified in selling goods, see ante, "Disposition When Delivery Prevented—Sale of Goods," III, A, 7.

Common Carrier Receiving Property for Transportation or Issuing Receipt or Bill of Lading, Liable for Loss of or Damage to Property Caused by Its Negligence.—Va. Code 1919, § 3926.

At common law, and also under the Virginia statute, Code 1919, § 3926, the liability of a common carrier for goods entrusted to it for shipment is, with certain exceptions, that of an insurer to the extent of their value. *Chesapeake, etc., R. Co. v. Beasley*, 104 Va. 788, 790, 52 S. E. 566; *Vaughan Mach. Co. v. Stanton Tanning Co.*, 106 Va. 445, 451, 56 S. E. 140; *Chesapeake, etc., R. Co. v. Pew*, 109 Va. 288, 64 S. E. 35; *Hutchinson v. United States Exp. Co.*, 63 W. Va. 128, 59 S. E. 949; *Hurley & Son v. Norfolk, etc., R. Co.*, 68 W. Va. 471, 473, 69 S. E. 904; *Radford-Portsmouth Veneer Co. v. Norfolk, etc., Co.*, 1 Va. Law Reg., N. S. 598.

The degree of care required of a common carrier is not measured by the value of the goods shipped. *Adams Exp. Co. v. Green*, 112 Va. 527, 72 S. E. 102.

The exceptions in which a common carrier is exempted from liability for loss of goods entrusted to it for carriage, are classified by Hutchinson as follows: (1) Those arising from what is known as the act of God; (2) those caused by the public enemy; (3) those arising from the act of the public authority; (4) those arising from the act of the shipper; and (5) those arising from the inherent nature of the goods. *Hutchinson v. United States Exp. Co.*, 63 W. Va. 128, 59 S. E. 949. See post, "Act of God," III, B, 1, b; "Acts of Enemies," III, B, 1, b¼.

b. Act of God.

The liability of a common carrier as an insurer is exonerated by an act of God. *Chesapeake, etc., R. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566; *Radford-Portsmouth Veneer Co. v. Norfolk, etc., Co.*, 1 Va. Law Reg., N. S. 598.

Plaintiff directed defendant carrier to deliver a carload of potatoes to a connecting carrier, and notified defendant that the connecting carrier would send its own steamer therefor. The only duty resting upon the defendant carrier as to this carload of potatoes was to hold them in its warehouse until the steamer of the connecting carrier called for them. Therefore, the defendant carrier was not liable for a loss from the freezing of the potatoes due to the delay by the connecting carrier in calling for them. *Merchants, etc., Co. v. Upton*, 127 Va. 406, 103 S. E. 616.

To Excuse Carrier Act of God Must Be Proximate Cause of Loss.—To excuse a carrier from liability on the ground that the cause of the loss was the act of God or the like, it must appear that such act was the proximate, not the remote, cause of loss. *Hutchinson v. United States Exp. Co.*, 63 W. Va. 128, 59 S. E. 949.

Negligence Concurring with Act of God.—The rule is that a carrier is exempt from liability of the act of God is the proximate and sole cause of the loss; but it is equally well settled that, even though the immediate cause of the loss is an act of God, nevertheless, if the negligence of the carrier mingles with it as an active and co-operative cause, the carrier is still responsible. If the negligence of the carrier concurs in and contributes to the loss, the carrier is not exempt from liability, even if the immediate damage is caused by the act of God. *Merchants, etc., Co. v. Upton*, 127 Va. 406, 103 S. E. 616. See post, "Delay," III, B, 1, c.

b $\frac{3}{4}$. Acts of Public Enemies.

The common law liability of a com-

mon carrier as an insurer of goods carried did not extend to losses caused by the acts of public enemies. *Hutchinson v. United States Exp. Co.*, 63 W. Va. 128, 59 S. E. 949; *Radford-Portsmouth Veneer Co. v. Norfolk, etc., Co.*, 1 Va. Law Reg., N. S. 598.

The term "enemies" was understood to mean the public enemies of the country of the carrier and not of the owner of goods and did not include thieves, robbers, or those engaged in mobs, riots or insurrections. *Hutchinson v. United States Exp. Co.*, 63 W. Va. 128, 59 S. E. 949.

b $\frac{1}{2}$. Refusal or Failure to Receive or Transport Property.

Va. Code 1919, § 3938.

Liability for Failure to Provide for Transportation or Storage of Farm Produce.—Va. Code, 1919, § 3956.

c. Delay.

By the weight of authority the general rule is that a carrier will not be held responsible for mere delay in transportation. *Merchants, etc., Co. v. Upton*, 127 Va. 406, 103 S. E. 616.

But if damage results from failure, without good excuse, to deliver the goods at their destination within a reasonable time, the carrier is liable for such damage. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684.

A carrier is liable for negligent delay in delivering perishable goods. *Baltimore, etc., R. Co. v. Hudgins*, 116 Va. 27, 81 S. E. 48.

Where a shipment of potatoes should have been delivered within two days the carrier was held liable for a delay of 8 days more on the ground of negligence. *Norfolk Truckers Exch. v. Norfolk, etc., R. Co.*, 116 Va. 466, 82 S. E. 92.

"In *McGraw v. B. & O. R. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 697, the company was held liable for loss occasioned by freezing of Irish potatoes where they were delivered on the 13th,

of February in time to be shipped on the 14th, and there was a daily train. They were not shipped until the 16th, and were then frozen." *Merchants, etc., Co. v. Upton*, 127 Va. 406, 410, 103 S. E. 616.

Delay Due to Unavoidable Accident.—Without special agreement to deliver in a specified time, a common carrier is not liable for delay in the delivery of freight, due entirely to unavoidable accident. *Woodford v. Railroad Co.*, 70 W. Va. 195, 73 S. E. 290.

Negligent Delay Concurring With Act of God.—Where negligent delay in the transportation creates a condition which concurring with an act of God causes injury to the goods shipped such as excessive cold weather causing the freezing of fruit or vegetables, the carrier is liable for the loss of the property. *Merchants, etc., Co. v. Upton*, 127 Va. 406, 103 S. E. 616, distinguishing *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778, 45 S. E. 322. See ante, "Act of God," III, B, 1, b.

Duty of Carrier After Delay Caused by Excepted Peril.—Where the cause of the delay is one from which the carrier is excepted from liability "by operation of the law" (Harter Act), the carrier is not relieved from the exercise of a reasonable degree of skill and diligence under all the circumstances of the case, in preserving and caring for and forwarding the shipper's goods after such delay. *Baltimore, etc., R. Co. v. Hudgins*, 116 Va. 27, 81 S. E. 48. As to provisions of the Harter Act, see ante, ADMIRALTY.

Penalty for Failure to Deliver Property Received within a Reasonable Time.—Va. Code 1919, § 3938.

State Corporation Commission to Fix Detention Charges to Be Paid to Consignee or Consignor—Waiver of Charges and Election to Claim Actual Damages.—Va. Code 1919, § 3774. See post, PUBLIC SERVICE COMMISSIONS.

d. Wrongful Delivery.

A wrongful delivery by a common carrier is technically a conversion of the goods. *Clarke-Lawrence Co. v. Chesapeake, etc., R. Co.*, 63 W. Va. 423, 61 S. E. 364.

"That a common carrier is liable for a wrongful delivery, if in any way at fault, is perfectly clear. Such act may be treated as a conversion. Common carriers are bound to exercise the highest degree of care in this respect. 'No circumstances of fraud, imposition or mistake will excuse the common carrier from responsibility for a delivery to the wrong person.' *Hutchinson v. Carriers*, § 344. To the same general effect, see *Pennsylvania R. R. Co. v. Commercial Bank*, 123 U. S. 727, and *Indianapolis and St. L. R. R. Co. v. Herndon*, 81, III, 143." *Dudley v. Chicago, etc., R. Co.*, 58 W. Va. 604, 606, 52 S. E. 718.

Where goods are shipped to the order of the consignor, and a sight draft is drawn upon the purchaser for the price thereof with the bill of lading attached, which is to be surrendered and the goods delivered to the purchaser only upon the payment of the draft, and the carrier, with knowledge of the stipulation upon the bill of lading, delivers the goods to a subvendee of the purchaser, without payment of the draft or surrender of the bill of lading, the seller may sue the carrier for the wrongful delivery. The mere fact that some ninety days after the wrongful delivery the purchaser gave the agent of the seller his check for the amount of the bill is no bar to the action. The mere acceptance of the check without any agreement to receive it in payment and discharge of the debt owing by the drawer, and when the liability of the carrier was not in the contemplation of the parties and it has suffered no injury therefrom, is not a ratification of the wrongful delivery, and, the

check being dishonored, the carrier remains liable. *Kewanee Priv. Utilities Co. v. Norfolk, etc., R. Co.*, 118 Va. 628, 88 S. E. 95. As to election of remedies of seller in such case, see post, ELECTION OF REMEDIES.

c. Removal of Goods From Place of Destination after Delivery There.

A carrier's unauthorized and wrongful removal of goods from their place of destination, after delivery there, imposes upon it the duty to notify their owner of the probable date of return thereto, an omission of such duty subjects the carrier to absolute liability for loss of the goods, occurring between the dates of their return and the owner's knowledge thereof. *Belknap v. Baltimore, etc., R. Co.*, 79 W. Va. 691, 91 S. E. 656.

In such case, the general rule absolving the carrier from duty to notify the consignee of the arrival of goods at their place of destination and making it his duty to await their arrival and inquire about it, does not apply. To make it applicable, the carrier must give notice of the date of the return shipment. *Belknap v. Baltimore, etc., R. Co.*, 79 W. Va. 691, 91 S. E. 656.

1½. When Services of Carrier Are Gratuitous.

Common carriers, if gratuitous carriers of goods, will be liable only for losses occurring through gross negligence. *Norfolk, etc., R. Co. v. Young*, 10 Va. Law Reg. 913.

2. Beginning and Ending of Liability.

Insurance of Carrier Only Incidental to Contract of Carriage.—Although common carriers are insurers of property entrusted to them for shipment, this insurance is not primary or special in its nature, but only incidental to the contract of carriage and neither begins earlier nor continues longer than is necessary to secure faithful and efficient execution of the contract of carriage. *Hutchinson v.*

United States Exp. Co., 63 W. Va. 128, 59 S. E. 949.

When Liability Begins.—The duties, obligations and liabilities of a common carrier with respect to goods commence with their delivery to the carrier, and this delivery must be complete, so as to put upon it the exclusive duty of seeing to their safety. *Norfolk, etc., R. Co. v. Young*, 10 Va. Law Reg. 913; *Dudley v. Chicago, etc., R. Co.*, 58 W. Va. 604, 606, 52 S. E. 718.

The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely with one or the other, and until it has become imposed upon the carrier by the delivery and acceptance, it cannot be held responsible for them. *Norfolk, etc., R. Co. v. Young*, 10 Va. Law Reg. 913.

If goods are delivered for carriage, of which the company has notice, and the place to which they are delivering is the usual place for receiving similar articles, then the responsibility of the company attaches. *Norfolk, etc., R. Co. v. Young*, 10 Va. Law Reg. 913.

When Goods Completely Delivered to Railroad Company.—Goods stored along the line of a railway company awaiting shipment, where the owner is to load them when he can get necessary cars, are not completely delivered to the railroad company until they are so loaded and ready for shipment. *Norfolk, etc., R. Co. v. Young*, 10 Va. Law Reg. 913.

When Liability Ends.—Common carriers are liable as such until they have performed all that the law or the special contract of shipment has enjoined upon them. *Hutchinson v. United States Exp. Co.*, 63 W. Va. 128, 59 S. E. 949.

Time of Removal at Place of Delivery as Affecting Liability.—The carrier remains liable until the goods

have reached their destination and the consignee has had reasonable opportunity (involving notice of arrival when such notice is essential to charge him with the duty of taking the goods), to receive the goods from the carrier, and, after the expiration of such reasonable time, the liability of the carrier, if the goods remain in his possession, is that of warehousemen only. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684; *Annese v. Baltimore, etc., R. Co.*, 87 W. Va. 588, 105 S. E. 807, 808. See post, "Warehouseman," III, B, 4.

It is proper to refuse to instruct the jury, in an action by a consignee against a carrier for loss of goods by fire at the place of delivery, that it was the duty of the consignee to remove them without delay, for the law allows a reasonable time for removal thereof. *Hurley & Son v. Norfolk, etc., R. Co.*, 68 W. Va. 471, 69 S. E. 904.

It is proper, in such case, to refuse to instruct that payment of the freight alone terminates the contract of carriage. *Hurley & Sons v. Norfolk, etc., R. Co.*, 68 W. Va. 471, 69 S. E. 904.

A consignee must promptly and diligently remove goods in a reasonable time after arrival without regard to distance from the depot or the means of removal or conveyance of the consignee, else the carrier will cease to be further liable as carrier. *Hutchinson v. United States Exp. Co.*, 63 W. Va. 128, 59 S. E. 949.

Refusal of Conditional Consignee to Receive Goods as Affecting Liability.—Plaintiff delivered a carload of potatoes to defendant carrier to be carried to Atlanta, to the plaintiff as consignee, to be there delivered on written order to a third party. Upon the delayed arrival of the potatoes at their destination the third party, having no written order from the plaintiff, refused to accept delivery.

Held: That thereupon the plaintiff became the unconditional assignee, and as such he was entitled to notice of the arrival of the goods, the refusal of the third party to qualify as consignee, and a reasonable time thereafter within which to make other disposition of the goods. The refusal of the third party, the conditional consignee, to receive the goods did not terminate the carrier's liability as carrier and render it liable as warehouseman only. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684.

In the instant case, the time between the notice to plaintiff of the arrival of the goods at destination and the refusal of the conditional consignee to qualify as such, and the delivery by the terminal carrier of the goods to another for sale, four days, was not, under all the evidence, a reasonable time within which to make other disposition of the goods, and the relationship of the carrier to plaintiff still remained that of carrier and not of warehouseman. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684.

2½. Loss of Goods Detained for Nonpayment of Illegal Charges.

Charges founded upon a wrongful reshipment of goods from their destination after delivery there, are illegal and the detention of the goods, on their return to the place of destination, for nonpayment thereof, is wrongful and subjects the carrier to absolute liability for loss thereof, occurring within the period of such detention. *Belknap v. Baltimore, etc., R. Co.*, 79 W. Va. 691, 91 S. E. 656.

3. Loss or Damage on Line of Connecting Carrier.

As to liability under a contract for through transportation, see ante. "Contract for Through Transportation," III, A, 2. As to liability under interstate

commerce act, see post, INTER-STATE COMMERCE.

Liability of Initial Carrier for Loss of or Injury to Property Caused by Negligence of Connecting Carrier.—Va. 1919, § 3926.

"As a general rule, no carrier is bound by law to accept and carry goods beyond the terminus of its own line. In the absence of any agreement, either express, or clearly implied, for transportation beyond its own line, the common-law duty of an independent carrier is performed by safely transporting the goods over its own line and delivering them to the consignee or connecting carrier, as the case may be. If, in such a case the goods are to be delivered by the initial carrier to a connecting carrier for further transportation, the former is considered as a forwarding agent rather than a carrier as to such further transportation, and is not liable for the default of subsequent carriers." *Roy v. Chesapeake, etc., R. Co.*, 61 W. Va. 616, 619, 57 S. E. 39; *Radford-Portsmouth Veneer Co. v. Norfolk, etc., Co.*, 1 Va. Law Reg., N. S., 598.

"In the absence of special agreement to extend its liability beyond its own line such liability will not attach, and such agreement will not be inferred from doubtful expressions of loose language, but must be established by clear and satisfactory evidence." *Pennsylvania R. R. Co. v. Stewart*, 155 U. S. 333." *Roy v. Chesapeake, etc., R. Co.*, 61 W. Va. 616, 618, 57 S. E. 39.

Where one carrier receives goods for transportation part of the way to destination, and delivers the goods at the end of its carriage to another carrier for carriage to destination, the contract is several and there may be a suit only against the carrier that is liable for delay of transportation. *Delaney v. United States Exp. Co.*, 70 W. Va. 502, 74 S. E. 512.

For Acts of Connecting Carriers as Warehouseman Initial Carrier Not Liable.—If the goods, have reached their

destination, and the consignee, after ample notice, has failed and neglected to receive them for an unreasonable time, the liability of the connecting carrier ceases, and it becomes a mere warehouseman, and for its acts of negligence as warehouseman the initial carrier is not liable. *Norfolk, etc., R. Co. v. Stuart's Draft, etc., Co.*, 109 Va. 184, 63 S. E. 415.

A connecting carrier can not, as a rule, be held liable for the default of the initial or other connecting carrier in the absence of a partnership, agency, or some similar relation. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161.

A connecting carrier is liable only for such damage or injury to a shipment of goods as is attributable to its own negligence or wrongful acts. *Copenhaver, etc., Co. v. Kanawha, etc., Railroad*, 81 W. Va. 73, 93 S. E. 940.

Where, in an action for such damage or injury, plaintiff's testimony shows that the impairment of the shipment occurred while the goods remained upon the lines or in the custody of a preceding carrier, and before their delivery to defendant, such evidence on motion should be excluded, and a verdict directed for the defendant. *Copenhaver, etc., Co. v. Kanawha, etc., Railroad*, 81 W. Va. 73, 93 S. E. 940.

Whether a carrier is liable for the loss of goods by a preceding carrier on the route depends upon whether the carrier assumed or held itself out to the public as assuming such liability. The mere agreement to carry all freight delivered to it by the preceding carrier at an agreed rate of freight does not render the two carriers jointly liable, nor make them partners. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 98, 51 S. E. 161. See ante, "Contract for Through Transportation," III, A, 2.

If several carriers associate and form a continuous line, and contract to carry goods through for an agreed price,

which the shipper pays in one sum, and which the carriers agree to divide among themselves, they are jointly and severally liable for a loss on any part of the line. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 105, 51 S. E. 161.

Right of Initial Carrier to Recover from Connecting Carrier Amount It Is Required to Pay Owner of Property Lost or Injured through Negligence of Connecting Carrier.—Va. Code 1919, § 3926.

4. Warehouseman.

See post, WAREHOUSES AND WAREHOUSEMEN. As to right of carrier to sell goods left on its hands, see ante, "Disposition When Delivery Prevented—Sale of Goods," III, A, 7.

9. Ratification of Carrier's Wrongful Act.

In order to release a common carrier from an admittedly wrongful act upon the ground that the person injured thereby has condoned and ratified it, it should plainly appear that the ratification was intended and took place with full knowledge on the part of those to be affected thereby of all the material facts. *Kewanee Priv. Utilities Co. v. Norfolk, etc., R. Co.*, 118 Va. 628, 88 S. E. 95.

C. CONTRACTS OR RULES OF EXEMPTION AND LIMITATION.

1. In Virginia.

No Contract or Rule Shall Exempt Carriers from Liability Which Would Exist Had No Contract Been Made.—Va. Code 1919, § 3926.

No Argument by Carrier for Exemption from Liability for Injury or Loss Occasioned by Its Negligence or Misconduct Valid.—Va. Code 1919, § 3930.

Exemption from Whole or Any Part of Loss Invalid.—The carrier cannot by contract excuse itself from liability for the whole nor any part of a loss brought about by its negligence. It is

perfectly clear that the two kinds of stipulations—that providing for total and that providing for partial exemption from liability for the consequences of the carrier's negligence—stand upon the same ground and must be tested by the same principles. If one can be enforced the other can, if either be invalid, both must be held to be so, the same considerations of public policy operating in each case. *Chesapeake, etc., R. Co. v. Beasley*, 104 Va. 788, 798, 52 S. E. 566.

Limitation on Amount of Damages Invalid.—"Under statutes forbidding carriers to limit their common-law liability by contract, a limitation on the amount of damages is invalid. Under a statute forbidding a carrier to exempt himself by contract from his liability, the shipper is not bound by the value fixed by him, even if fixed too low in fraud of the railway company." *Chesapeake, etc., R. Co. v. Beasley*, 104 Va. 788, 796, 52 S. E. 566.

Under § 1294c (24) of the Code of 1904 (Code 1919, § 3926) the liability of a common carrier of goods with respect to goods lost on its own line is that of an insurer except against losses occasioned by the act of God, or a public enemy, or of the shipper, or the nature or inherent qualities of the goods shipped, and a contract with a common carrier whereby, in consideration of a reduced rate, a shipper agrees to accept an agreed sum, less than the true value of goods lost, is invalid. *Chesapeake, etc., R. Co. v. Pew*, 109 Va. 288, 64 S. E. 35; *Southern Exp. Co. v. Keeler*, 109 Va. 459, 64 S. E. 38; *Adams Exp. Co. v. Green*, 112 Va. 527, 72 S. E. 102. See *Norfolk, etc., Railway v. Harman*, 104 Va. 501, 502, 52 S. E. 368. See ante, "Responsibility for Goods and Exceptions to Liability," III, B, 1, a.

It is immaterial that such contract was fairly entered into for a valuable consideration. It is void, not because it is unreasonable, but because the legislature has declared all such contracts invalid, whether reasonable or unrea-

sonable. *Chesapeake, etc., R. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566.

Exemption from Liability for Damage to Property Stored upon Carrier's Premises.—Under a contract between a railway company and a dealer in scrap iron and tan bark, whereby it was agreed that scrap iron and tan bark should be stored upon the premises of the company, upon the condition that the company should "not be in any way responsible for any damage to the scrap iron and tan bark, or its contents, or any part thereof, by fire or any casualty whatsoever resulting from the use of its engines on the road or otherwise," where the property was not stored for shipment, nor was it at any time in the custody or possession of the company or its agents, it was held: (1) The written contract fixed the relation between the parties, and the railway company was not even a gratuitous bailee of the dealer's bark. (2) The railway company, as a common carrier, was not compelled to furnish a place to store bark upon its premises, and, therefore, with reference to such a matter, could make such contract as it saw fit, including a contract against liability for negligence. *Norfolk, etc., R. Co. v. Young*, 10 Va. Law Reg. 913.

Stipulation Requiring Notice of Claim.—A provision in a bill of lading that claims for loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property, and if delayed more than thirty days after the delivery of the property, or after due time for delivery thereof, no common carrier thereunder should be liable in any event has been held by the supreme court to be a reasonable one, and enforceable by the carrier in bar of any suit brought by the shipper for the loss of goods for which claim was not presented as provided in the bill of lading containing such provision. *Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 58 S. E. 569; *Atlantic, etc., R. Co. v. Bryan*, 109 Va.

523, 525, 65 S. E. 30; *Virginia-Carolina Chemical Co. v. Southern Exp. Co.*, 110 Va. 666, 66 S. E. 838; *Old Dominion, etc., Co. v. Flanary & Co.*, 111 Va. 816, 69 S. E. 1107.

In *Liquid Carbonic Co. v. Norfolk, etc., R. Co.*, 107 Va. 323, 58 S. E. 569, the court said: "The stipulation requiring notice of any claim for damages to be given, cannot be regarded as an attempt to exonerate the company from negligence or from the negligence or misfeasance of any of its servants. The company concede that such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the company from fraud and imposition in the adjustment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause."

An attempt by a carrier to find a lost shipment after its exemption from liability has attached and become a vested right by reason of the failure of the shipper to present a claim therefor within the time and at the place stipulated for in the bill of lading, does not constitute a waiver of its right to claim such exemption, if the goods should not be located. *Atlantic, etc., R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30; *Virginia-Carolina Chemical Co. v. Southern Exp. Co.*, 110 Va. 666, 66 S. E. 838; *Old Dominion, etc., Co. v. Flanary & Co.*, 111 Va. 816, 69 S. E. 1107.

A letter from the carrier's agent, after exemption from liability has attached, requesting "the affidavit of the packer of the case, also invoice showing the original cost of the articles," and stating that promptly upon the receipt of these documents the matter will receive attention, did not constitute a waiver of the carrier's exemption from liability, nor estop it from relying on its exemption as a defense. *Atlantic, etc., R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30.

Effect of Contract Exempting Initial

Carrier from Liability for Loss of or Injury to Goods While in Charge of Carrier.—Va. Code 1919, § 3929.

2. In West Virginia.

A carrier of goods can not stipulate against liability for damages caused by its Negligence. *Williamsport, etc., Lumber Co. v. Baltimore, etc., R. Co.*, 71 W. Va. 741, 77 S. E. 333, citing *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 46 S. E. 613; *Annese v. Baltimore, etc., R. Co.*, 87 W. Va. 588, 105 S. E. 807, 808.

When confronted with circumstances due to the elements rendering a carrier unable to make safe delivery of goods consigned to a particular destination, it cannot by contract excuse itself for its negligence in wantonly discharging said goods at such point in mud and rain in a place where they will certainly be destroyed and rendered useless. *Annese v. Baltimore, etc., R. Co.*, 87 W. Va. 588, 105 S. E. 807.

Limitation upon Liability Not Applicable to Liability for Delay.—A bill of lading for goods shipped given by a carrier fixing their value, and providing that the carrier shall in no event be liable beyond that value, relates to loss of the goods, and does not preclude recovery for delay of transportation or fix amount of damages for delay. *Delaney v. United States Exp. Co.*, 70 W. Va. 502, 74 S. E. 512.

A clause in a bill of lading given by a carrier for goods shipped, providing that "claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event," relates to the loss of and injury to the goods, and does not preclude recovery for delay in transportation. *Williamsport, etc., Lumber Co. v. Baltimore, etc., R. Co.*, 71 W. Va.

741, 77 S. E. 333. (The court here cited and approved *Delaney v. United States Exp. Co.*, 70 W. Va. 502, 74 S. E. 512, and distinguished it from *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 46 S. E. 613.)

Limitation upon Liability Not Applicable to Liability for Wrongful Delivery.—A contract, limiting the liability of a common carrier to a certain amount in case of loss of, or injury to, the goods, in consideration of a reduced freight rate, does not limit the recovery in case of a delivery of the property to wrong person, since a wrongful delivery is deemed not to have been within the contemplation of the parties. *Clarke-Lawrence Co. v. Chesapeake, etc., R. Co.*, 63 W. Va. 423, 61 S. E. 364.

Limitation upon Liability at Stations, etc., at Which There Is No Agent.—The following provision in a bill of lading viz: "Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains," is a reasonable limitation upon the carrier's liability and enforceable. But neither clause of said provision has application, except in cases where it appears the loss of goods shipped occurred at stations, wharves or landings at which the carrier did not maintain a regularly appointed agent. *McClure v. Norfolk, etc., R. Co.*, 83 W. Va. 473, 98 S. E. 514.

Such provision will not exempt the carrier from liability for the loss of goods by the burning of the cars in which such goods are loaded while on plaintiff's private siding connected with defendant's belt line and from half to three quarters of a rule from defendant's station at which a regularly ap-

pointed agent is maintained. *McClure v Norfolk, etc., R. Co.*, 83 W. Va. 473, 98 S. E. 514.

Notwithstanding such a provision in a bill of lading the carrier will not be relieved thereby from his gross negligence in unloading in the mud and rain at an unreasonable hour of the night goods consigned to such point, when the consignee is not present or could not reasonably be expected to be present, and when it is manifest that such goods because of their character will be certainly destroyed or rendered useless by the elements. A carrier cannot by such contract ordinarily relieve itself from liability for negligence in the performance of its duties as carrier. *Annese v. Baltimore, etc., R. Co.*, 87 W. Va. 588, 105 S. E. 807.

D. FREIGHT, DEMURRAGE AND OTHER CHARGES.

1. Statutory Regulations in General.

Limitations upon Charges for Transportation of Freight.—Barnes Code 1919, p. 773, ch. 54, § 71e (z).

To What Railroad Limitations upon Freight Rates Apply.—Barnes Code, p. 770, ch. 54, § 71a. (6).

State Corporation Commission to Fix Rates Charges and Classifications of Traffic.—Va. Const. § 156; Va. Code 1919, §§ 3709, 3711.

State Corporation Commission to Fix Storage, Demurrage and Car Service Charges.—Va. Code 1919, § 3774.

Power of Public Service Commission to Establish and Enforce Rates for Carriage of Goods.—Barnes Code, p. 227, ch. 150, § 22.

Freight Charge Permissible by Railroad Not Exceeding Thirty Miles in Length.—Barnes Code, p. 772, ch. 54, § 71c.

What Horse Railroads May Charge for Transportation of Freight—Not Applicable to Street or Suburban Railroads.—Barnes Code, p. 772, ch. 54, § 71d.

Mode of Determining Rates for

Transportation of Freight on Lateral Railroads.—Barnes Code p. 769, ch. 54, § 69a (6).

What Prescribed Transportation Charges Shall Cover.—Barnes Code, p. 773, ch. 54, §§ 71a (10), 71e (3).

Schedules of Rates—Posting—Form and Contents.—Va. Code 1919, § 3908.

Schedules to Be Submitted to State Corporation Commission.—Va. Code 1919, § 3911.

Duty to Make a Tariff of Charges and What It Must Show—Copies to Be Kept with Station Agents.—Barnes Code, p. 773, ch. 54, § 71e, (2).

Schedules of Rates to Be Filed with Public Service Commission and Kept Open to Public Inspection.—Barnes Code, p. 224, ch. 150, § 12.

Classification of Freight According to Interstate Commerce Act—Copies of Classification at Stations—Exemptions to Be Attached to Copies.—Barnes Code p. 772, ch. 54, § 71e (1).

Regulation of Line and Manner in Which Carriers Shall Adjust and Pay Freight Charges and Claims for Loss or Damage to Freight and Claims for Storage, Demurrage and Car Service.—Va. Acts 1918, ch. 291, Pollard's Code Biennial p. 463, amending and re-enacting § 3928, Code 1919.

3. Preferences.

Discrimination in Freight Rates Prohibited.—Barnes Code, p. 773, ch. 54, § 71e (3).

Unjust Discrimination in Freight Charges Prohibited—Right to Furnish Transportation to Publications in Exchange for Advertising.—Va. Act 1920, p. 243; Pollard's Code Biennial, p. 185, amending § 3905, Code 1919.

Special Rates and Rebates Prohibited.—Barnes Code, p. 221, ch. 150, § 6; p. 773, ch. 54, § 71e (3).

When Reduction in Rates or Free Carriage May Be Given.—Va. Acts 1920, p. 618, Pollard's Code Biennial, p. 185, amending Code 1919, § 3918.

Power of Public Service Commission to Prevent Undue Discrimination

as between Persons, Localities or Classes of Freight.—Barnes Code, p. 221, ch. 150, § 5.

Unlawful to Charge Smaller Rate than Is Specified in Schedule of Rates Authorized and Published by State Corporation Commission.—Va. Code 1919, § 3910.

A contract for a freight rate less than that authorized, prescribed and published by the state corporation commission is declared to be void in this state by § 1294c, cl. 7 of the Code of 1904 (Code 1919, § 3910), *Carolina, etc., Railway v. Clinch Valley Lumber Co.*, 112 Va. 540, 72 S. E. 116.

Discrimination in Charges between Connecting Lines Prohibited.—Va. Code 1919, § 3907; Barnes Code, p. 222, ch. 150, § 8.

Discrimination against or among Shippers of Coal or Coke Prohibited.—Barnes Code, p. 765, ch. 54, § 66c.

3½. Long and Short Haul Regulations.

Va. Const. § 160; Va. Code 1919, § 3904; Barnes Code, p. 773, ch. 54, §§ 71a (9), 71e (2).

4. When Entitled to Freight and Demurrage.

Charge founded upon a wrongful re-shipment of goods from their destination after delivery there, are illegal. *Belknap v. Baltimore, etc., R. Co.*, 79 W. Va. 691, 91 S. E. 656.

The term demurrage may be used to designate a mere money charge for the use of a car, or a penalty intended by its imposition to prevent any detention of the car. *Director General v. Gates & Son Co.*, 7 Va. Law Reg., N. S., 253.

Demurrage for Detention of Cars.—A railroad company carrying in car-load lots coal to be unloaded by the consignee is entitled to demurrage, or damages for the detention of its cars, on the same principle that it has a right to charge for storing goods in its warehouse. *Baltimore, etc., R. Co. v. Luella Coal Co.*, 74 W. Va. 289, 292, 81 S. E. 1044.

5½. Who Is Liable for Freight and Demurrage.

"The shipper is always liable for the freight in the absence of a special contract exonerating him, and the consignee becomes liable also when he accepts the shipment. 2 Hutchinson on Carriers, §§ 799 and 810," quoted in *Baltimore, etc., R. Co. v. Luella Coal Co.*, 74 W. Va. 289, 291, 81 S. E. 1044.

A consignor who signs a bill of lading on his own account, and not as agent for the consignee, is liable to the carrier for the freight, although title to the goods passed to the consignee on delivery to the carrier. *Coal, etc., R. Co. v. Buckhannon River Coal, etc., Co.*, 77 W. Va. 309, 87 S. E. 376.

The carrier does not, by waiving its lien and delivering the goods to the consignee before payment of freight, release the consignor from liability. In the absence of a special contract, both consignor and consignee, who has accepted the goods, are liable to the carrier. *Coal, etc., R. Co. v. Buckhannon River Coal, etc., Co.*, 77 W. Va. 309, 87 S. E. 376.

Neither the words, "Freight collect from consignee," written in the face of a bill of lading, nor a printed condition on the back thereof, stating, "The owner or consignee shall pay the freight," are alone sufficient to relieve the consignor from liability. Such provisions are for the benefit of the carrier and do not constitute a special contract with the consignor. *Coal, etc., R. Co. v. Buckhannon River Coal, etc., Co.*, 77 W. Va. 309, 87 S. E. 376.

After a sale and delivery to the carrier by the consignor, the owner may reconsign the goods without releasing the consignor from liability for freight, provided his liability is not thereby increased. *Coal, etc., R. Co. v. Buckhannon River Coal, etc., Co.*, 77 W. Va. 309, 87 S. E. 376.

The consignee's being under bond

to the terminal carrier to pay the freight, does not effect the consignor's liability on his contract with the initial carrier for the joint freight charges. *Coal, etc., R. Co. v. Buckhannon River Coal, etc., Co.*, 77 W. Va. 309, 87 S. E. 376.

Where a carrier was not under any duty to unload coal shipped in carload lots and the consignee refused to accept the consignment it was held, that in the absence of special contract the consignor was liable for demurrage as well as freight though the consignor was not liable for the demurrage until notice was given him of the consignee's failure to accept. *Baltimore, etc., R. Co. v. Luella Coal Co.*, 74 W. Va. 289, 81 S. E. 1044. See ante, "When Entitled to Freight and Demurrage," III, D, 4.

7½. Right to Sell Unclaimed Articles for Transportation Charges.

Va. Code 1919, § 3933.

How Proceeds of Sale After Payment of Transportation Charges Disposed of.—Va. Code 1919, § 3934.

8. Excessive Charges.

Common Law Right to Recover Back Excessive Freight.—At common law an action accrues in favor of a shipper against a common carrier, to recover back excessive charges of freight. *Robinson v. Baltimore, etc., R. Co.*, 64 W. Va. 406, 408, 63 S. E. 323.

Charges Must Be Just and Reasonable.—Barnes Code, ch. 150, § 4; ch. 54, § 71a. (13).

Unlawful to Charge Greater Rate than Is Specified in Schedule of Rates Authorized and Published by State Corporation Commission.—Va. Code 1919, § 3910.

Unlawful to Receive Any Fee or Commission Other than Regular Rates—Exception.—Va. Code 1919, § 3939.

Excessive Charges for Freight Received from Intersecting Roads Prohibited.—Va. Code, p. 772, ch. 54, § 71b.

Power of Public Service Commission

to Change Unjust or Unreasonable Charge.—Barnes W. Va. Code, p. 221, ch. 150, § 5.

Penalty for Demanding and Receiving More than Is Lawful.—Va. Code 1919, § 3938; Barnes Code p. 771, ch. 54, § 71a (14).

9. Change of Rate.

As to power of public service commission to change unjust or unreasonable charge, see ante, "Excessive Charges," III, D, 8.

What Essential to Change in Rates—Authority of Public Service Commission in Relation Thereto.—Barnes Code, ch. 150, §§ 9, 22.

When State Corporation Commission to Change and Revise Rates.—Va. Code 1919, § 3920.

No Advance in Rates without Approval of State Corporation Commission—Notice of Advances—New Schedules.—Va. Code 1919, § 3909.

IV. CARRIERS OF LIVE STOCK.

A. STATEMENT OF DUTY—LIABILITY.

1. Degree of Care and Liability in General.

A carrier of live stock is relieved from special care and oversight of the animals when the owner or agent accompanies them for that purpose. *Adams Exp. Co. v. Scott*, 113 Va. 1, 73 S. E. 450, citing *Norfolk, etc., R. Co. v. Reeves*, 97 Va. 284, 33 S. E. 606, and *Norfolk, etc., R. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465.

1½. Duty to Receive, Transport and Deliver and Penalty for Refusal.

Va. Code 1919, § 4006.

Degree of Diligence Required.

In the absence of any contract to deliver the cattle at their destination "at any specified time or date or for any particular market," the defendant is not required to use any special diligence, but is held only to ordinary and reasonable diligence. *Woodford v. Railroad Co.*, 70 W. Va. 195, 200, 73 S. E. 290.

Duty of Carrier Receiving Cattle for Transportation over Its Own and Other Lines.—"In the absence of a special contract, a railroad company by receiving cattle for transportation, over its own line and other lines therewith connected is only bound to carry the cattle over its own lines and deliver them safely to the next connecting carrier. A contract whereby the liability of the company is sought to be extended beyond such carriage and delivery will not be inferred from loose and doubtful expression, but must be established by clear and satisfactory evidence. Taking a through fare on the receipt of the cattle does not establish such liability." *Myrick v. Michigan Central*, 107 U. S. 102." *Roy v. Chesapeake, etc., R. Co.*, 61 W. Va. 616, 618, 57 S. E. 39.

2. Providing Suitable Cars and Appliances.

Three days' notice of a demand for cars for a shipment of live stock, in a period of great activity in such shipments, is not reasonable nor sufficient. *McNeer v. Chesapeake, etc., R. Co.*, 76 W. Va. 803, 86 S. E. 887.

Duty to Disinfect Cars—Penalty for Failure.—Va. Code 1919, § 911.

3. Confinement and Treatment in Transitu.

Duty to Feed and Water Stock.—The provisions of a bill of lading of live stock that the shipper is to feed and water them is waived by the carrier when he writes across the face of the bill of lading: "To be fed and watered at the expense of the shippers. No one in charge." Besides, when the carrier knows that no one accompanies the stock, it is his duty to look after and care for them as if there were no contract with the shipper. *Norfolk, etc., R. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465.

Railroads Required to Furnish Water to Live Stock Awaiting Shipment under Certain Conditions.—Va. Act 1920,

p. 817; *Pollard's Code Biennial*, p. 792; *Acts W. Va. 1919*, p. 163, ch. 29.

Feeding and Confining Stock—Extension of Time under "28 Hour Law."—An endorsement by the shipper on the blank margin of the "Uniform Live Stock Contract" or bill of lading, "No one in charge, 36 hr. run requested without feed or water," is a request in writing "separate and apart from any printed bill of lading or other railroad form" in the sense and for the purpose evidently contemplated by act of Congress (U. S. Comp. St. Sup. 1911, p. 1341) providing "that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading or other railroad form, the time of confinement may be extended to thirty-six hours." Such endorsement was an affirmative and conspicuous expression of the wish of the shipper, removed from any possibility of being overlooked, or inadvertently signed along with the numerous other stipulations and the provisions usually appearing in the printed forms of shipping contracts used by railroads. *Norfolk, etc., R. Co. v. Steele & Son*, 117 Va. 788, 86 S. E. 124.

4. Liability for Violation of Quarantine Regulations.

Va. Code 1919, § 912.

B. LOSS OR DAMAGE CAUSED BY DEFAULT OF OWNER.

Where a shipper has agreed to load and unload horses at his own risk, and is furnished with a car of his own selection, containing fourteen stalls for the shipment of ten horses, in one of which there is a radiator which is a permanent fixture and a necessary part of the outfit for the shipment of high-grade horses in cold weather, and one of the horses is unnecessarily placed by the shipper's care-taker in that stall, and, in consequence of fright from the usual and ordinary

noise of trains, injures himself on the radiator, in the presence of a number of such care-takers, who had previously observed his fright, and consequent kicking and plunging, but made no effort to release him, there can be no recovery of the carrier. *Adams Exp. Co. v. Scott*, 113 Va. 1, 73 S. E. 450.

C. CONTRACTS OF EXEMPTION AND LIMITATION.

Stipulation against Liability for Negligence Void.—"The bill of lading contains a stipulation that, in the event of unusual delay or detention 'caused by the negligence of said carrier or its employees, or its connecting carrier, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage; sustained thereby, the amount actually expended by said shipper in the purchase of food and water for the said stock while so detained.' This stipulation is void. It is against the policy of the law to permit a common carrier to contract against its common law liability for its own negligence, or that of its employees. *Bosley v. Baltimore, etc., R. Co.*, 54 W. Va. 563, 46 S. E. 613; 6 Cyc. 409; 1 *Hutchinson on Carriers*, § 450." *Woodford v. Railroad Co.*, 70 W. Va. 195, 199, 73 S. E. 290. To the same effect see *Norfolk, etc., R. Co. v. Steele & Son*, 117 Va. 788, 795, 86 S. E. 124.

Injuries Caused by Inherent Nature or Vices.—A carrier of live stock may lawfully stipulate with the owner thereof against liability for injury to animals occasioned by their inherent vices or natural propensities to injure themselves or each other, such as kicking, biting, and goring; and if an animal in course of transportation, takes fright at the noise and smoke of passing trains in the usual conduct of business, and injures himself in consequence thereof, there is no liability upon the carrier, if he has provided all

suitable means of transportation, and exercised that degree of care which the nature of the property, under the attending circumstances, requires. *Adams Exp. Co. v. Scott*, 113 Va. 1, 73 S. E. 450; *Adams Exp. Co. v. Allendals Farm*, 116 Va. 1, 3, 81 S. E. 42.

D. NOTICE OF CLAIM FOR DAMAGES FOR FAILURE TO DELIVER.

Notice to a carrier of a claim for damages for failure to deliver stock is within "a reasonable time" and is sufficient, when given without delay as soon as the negligence of the carrier which occasioned the loss was discovered, although the contract of carriage required notice to be given within five days after the stock were removed from the cars, within, a reasonable time thereafter. *Chesapeake, etc., R. Co. v. Rebman*, 120 Va. 71, 90 S. E. 629.

V. CARRIERS OF PASSENGERS.

A. IN GENERAL.

Transfer Company a Common Carrier of Passengers.—A transfer company which is authorized by its charter to engage in the transportation for hire of passengers and their baggage from the various railroad stations and other points in a city and in two adjacent counties, and provides taxicabs or other vehicles which attend the depots of the various railroads in the city, and transports passengers from and to the same, and holds itself out as ready to receive and transport all who apply for passage and are ready to pay compensation for the service, is a common carrier of passengers and subject to all the liabilities of such carrier. *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174.

Distinction between Common Carrier and Private Carrier.—"The distinction between a public or common carrier of persons and a private or special carrier of the same is that it is the duty of the former to receive all persons who

apply for a passage.' *Angell v. Carriers*, § 524." *Carlton v. Boudar*, 118 Va. 521, 525, 88 S. E. 174.

The common carrier of passengers holds himself out to carry all proper persons who apply. The private carrier makes no such profession, and engages in the transportation of passengers only by virtue of special contract made in each individual case, into which contract the private passenger carrier can enter or not, as he chooses. He can refuse, either for a bad reason or no reason at all, to transport individuals without incurring any liability for such refusal. *Carlton v. Boudar*, 118 Va. 521, 528, 88 S. E. 174.

B. RIGHTS, DUTIES AND LIABILITIES IN GENERAL.

1. Contract for Passage.

As to when persons are regarded as passengers, see post, "Persons Regarded as Passengers," V, B, 3.

Nature of Contract between Passengers and Carrier.—The relation of passenger and carrier is one of contract. It differs, however, from a contract in the ordinary relation of parties to each other, in that it is a contract which a common carrier is not at liberty to decline to make, where the would-be passenger has brought himself within the requirement entitling him to ask of it the service of carriage and he does in fact ask it. The law in such case imposes the duty upon the carrier to render the service, and, under proper circumstances, the law will imply the existence of a contract of carriage. *Virginia R., etc., Co. v. Arnold*, 121 Va. 204, 92 S. E. 925.

Reciprocal Rights and Obligations.—The relation of carrier and passengers is personal in its nature, and neither can with impunity disregard the reciprocal rights and obligations of the other. *Schuster v. Norfolk, etc., R. Co.*, 85 W. Va. 658, 102 S. E. 476.

A street railway company operating a car, with a sign thereon indicating

that it will carry passengers to a certain terminus on its line, impliedly contracts with passengers boarding such car that such car will carry them to such terminus or to points on the usual route of such car between where the passenger boards such car and such terminus. *Burrow v. Norfolk R., etc., Co.*, 12 Va. Law Reg. 763.

It is the duty of a street car company, when its conductor or motorman have knowledge of the fact that such car will not carry passengers to the points indicated by signs on said car, to notify passengers boarding such car, with the expectation of being carried to such terminus, or to points between where such car is taken and said terminus, of the fact, and the failure to do so is a neglect of duty on the part of the company for which it is liable in damages. *Burrow v. Norfolk R., etc., Co.*, 12 Va. Law Reg. 763.

The rules stated in the two preceding paragraphs are subject to these limitations: First, that if there is a regular transfer point, where in the usual course of its business a street railway company transfers passengers from one car to another and such custom is generally known to the public, the implied contract does not apply so far as to compel the street car company to carry the passenger on the particular car boarded by him; and the company can transfer him to another car at the usual point and according to its custom without liability. Second, where there arises a reasonable necessity due to the exigencies naturally attendant upon the conduct of the street car business to transfer a passenger from one car to another, which necessity is not known to the conductor or the motorman of the car boarded by the passenger at the time of taking passage, then the street car company has a right to transfer said passenger from one car to another without liability to the passenger. Reasonable necessity within this last limitation must be determined

upon the facts and circumstances of each particular case. *Burrow v. Norfolk R., etc., Co.*, 12 Va. Law Reg. 763.

When there is a reasonable necessity to transfer a passenger from one car to another, not known to the conductor or motorman of the car, but of which the proper agents of the company have knowledge, it is the duty of the company to use reasonable care to notify the conductors and motormen of their respective cars of such necessity with reasonable promptness. What constitutes such reasonable care and reasonable promptness must depend upon the facts and circumstances of each individual case. *Burrow v. Norfolk R., etc., Co.*, 12 Va. Law Reg. 763.

2. Who May Become a Passenger.

Rule Applicable to Persons Physically or Mentally Incapacitated.—A carrier is not required to accept upon its cars, without an attendant, persons who, because of some physical or mental infirmity, are incapable of properly caring for themselves. *Walters v. Norfolk, etc., R. Co.*, 122 Va. 149, 94 S. E. 182.

Railroad Company May Exclude Persons with Contagious Diseases.—*W. Va. Code, Supp. 1918, ch. 54, § 71i. IV.*

Discretionary Right to Exclude Persons from Sleeping Cars, Dining Cars, etc.—*Va. Code 1919, § 4007.*

3. Persons Regarded as Passengers.

"The law of carrier is that where one presents himself for passage, buys a ticket, and is received as such, either at the station, a reasonable time before the time for departure, or on board the cars provided, he is a passenger, and continues to be such until the contract of carriage has been fully performed by the carrier, and during that time is entitled to all the protection which the law imposes upon carriers. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103; *Kidwell v. Chesapeake, etc., R. Co.*, 71 W. Va. 664, 77 S. E. 285; *Killmyer v. Wheeling Tract.*

Co., 72 W. Va. 148, 77 S. E. 908; *Illinois Cent. R. Co. v. O'Keefe*, 61 Am. St. Rep. 68, and note." *Turk v. Norfolk, etc., R. Co.*, 75 W. Va. 623, 629, 84 S. E. 569. See post, "When Relation of Carrier and Passenger Terminates," V, B, 3½.

The relation of passenger and carrier begins when one presents himself at a passenger station of the carrier, in readiness to be transported to his destination under such circumstances of time, place, manner and condition that the carrier must be deemed to have accepted him as a passenger. No formal act of delivery of one's person into the care of a railroad company, or of acceptance by the latter of one who presents himself for transportation, is essential to constitute the relation of passenger and carrier. The existence of such relation is ordinarily implied from circumstances. *Kidwell v. Chesapeake, etc., R. Co.*, 71 W. Va. 664, 77 S. E. 285.

One upon the premises of a railroad company to purchase a ticket for passage over its lines on a train scheduled to depart eight hours later, intending in the meantime to remain in the city of purchase and not upon the premises of the company, and therefore not under its care or control, is not a passenger within the proper meaning of the term. *Kidwell v. Chesapeake, etc., R. Co.*, 71 W. Va. 664, 77 S. E. 285.

The ticket as Evidencing Status of Passenger.—The purchase of a ticket does not alone operate to constitute the relation of passenger and carrier, nor is such purchase essential to the existence, of such relation, though it may be considered as one among other elements entering into the inception of such relation. *Kidwell v. Chesapeake, etc., R. Co.*, 71 W. Va. 664, 77 S. E. 285. See also *Turk v. Norfolk, etc., R. Co.*, 75 W. Va. 623, 84 S. E. 569.

One waiting at a railway station to take a train is regarded as a passenger.

Pendleton v. Richmond, etc., R. Co., 104 Va. 813, 52 S. E. 574.

Person Waiting for Train in Empty Car upon Invitation of Ticket Agent.—

"High authority is found for the proposition that if a person waiting at a station for passage on a train soon to depart, and who is invited by the ticket agent to sit in an empty car standing on a side track, while the station room is being cleaned, is entitled to the same protection from the company while in the car as while waiting in the regular waiting room. *Shannon v. Boston, etc., R. Co.*, 78 Me. 52, 4 R. C. L. § 491, p. 1025." *Turk v. Norfolk, etc., R. Co.*, 75 W. Va. 623, 84 S. E. 569.

The conscious acceptance by the motorman or conductor of a stock car of the offer of a would-be passenger to become a passenger—i. e., the actual meeting of minds of passenger and carrier in fact upon a contract of carriage—is not essential to the relationship of carrier and passenger. *Virginia R., etc., Co. v. Arnold*, 121 Va. 204, 92 S. E. 925.

Invitation to Become Passenger—

Stopping of Car.—The act of a carrier in stopping a street car, or in bringing it almost to a stop at a place where it is accustomed to receive or discharge passengers, is an implied invitation by the carrier to a would-be passenger to get aboard, regardless of the motive or mental attitude of the employee controlling the movement of the car, and an acceptance by a would-be passenger of this implied invitation, creates the relationship of carrier and passenger. The law under such circumstances implies the contract of carriage. *Virginia R., etc., Co. v. Arnold*, 121 Va. 204, 92 S. E. 925.

Where the servant in charge of the car does not see the intending passenger, and is not aware that he wishes to become a passenger, the situation, must be such that the exer-

cise of ordinary care in the discharge of its duty as a common carrier the defendant through such employee ought to have seen him or have been aware that he wished to become a passenger, before the law will imply the contract of carriage. *Virginia R., etc., Co. v. Arnold*, 121 Va. 204, 92 S. E. 925.

Employee Riding on Pass.—An employee of a railroad company riding on a trip pass, between his home and place of business, furnished by the company is entitled to be treated as a passenger. *Bragg v. Norfolk, etc., R. Co.*, 110 Va. 867, 67 S. E. 593.

A servant, employed to labor by the day in the power house of a railway company, and who is furnished with a free pass, under a rule of the company, which entitles him to ride on any of the company's cars at any time, and about his own business, during the continuance of his employment, is a passenger when riding either to or from his place of labor, and not a fellow servant of the motorman in charge of the car, and is entitled to the same rights as a passenger for hire. If such servant is injured, or killed, through the negligence of a motorman while so riding, the railway company is liable. *Harris v. City, etc., R. Co.*, 69 W. Va. 65, 70 S. E. 859.

A mail clerk on a railway train occupies the position of a passenger. *Virginian R. Co. v. Bell*, 115 Va. 429, 79 S. E. 396; *Washington, etc., Railway v. Carter*, 117 Va. 424, 85 S. E. 482; *Carter v. Washington, etc., Railway*, 122 Va. 458, 95 S. E. 464. See post, "To Whom Liable and When," V, D, 1, c.

A person, riding gratuitously on a truck or hand car, maintained and operated by a coal mining company to haul its express matter over a spur track of a railway company, leading from the main line to its coal mine, with

the consent of its general manager having control of the operation of such car, is a passenger and not a trespasser or mere licensee. *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808.

3½. When Relation of Carrier and Passenger Terminates.

The general rule is, that the relation of carrier and passenger does not terminate until the passenger has alighted from a railway train and left the place where passengers are discharged; or, after reaching his destination, has had reasonable time to get off the car and leave the premises of the carrier. *McDade v. Norfolk, etc., R. Co.*, 67 W. Va. 582, 68 S. E. 378; *Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 69 S. E. 700.

In relation to a street railway company the relation of carrier and passenger does not terminate until after the passenger has alighted from the car, and has had a reasonable opportunity to reach a place of safety. *Houston v. Lynchburg Tract., etc., Co.*, 119 Va. 136, 89 S. E. 114.

Where Passenger Delayed in Leaving Carrier's Premises.—The general rule is, that where a passenger is necessarily hindered or delayed on leaving the carrier's premises, the question whether he failed to depart within a reasonable time is one of fact for the jury. *McDade v. Norfolk, etc., R. Co.*, 67 W. Va. 582, 68 S. E. 378; *Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 69 S. E. 700.

Where a passenger on a railway train has alighted at his point of destination and is proceeding by the usual way to leave the railway company's premises, but, before actually doing so, is halted by the discharge of a gun and a report that his brother, a fellow passenger, has been shot by a special police officer of the railway company, and in good faith and without the intention of engaging in the difficulty

returns to relieve his brother, he should be regarded as reasonably and necessarily delayed, and as continuing to be a passenger, entitled as such to the protection of the railway company and its agents, and if assaulted by such police officer or agent of the railway company, the railway company is liable to him in damages for injuries sustained. *Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 69 S. E. 700.

In such cases the good faith of a passenger, and the purpose of his return to the place of trouble, are questions of fact for jury determination from all the evidence in the case. *Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 69 S. E. 700.

Where Passenger Alights at Station Other than Destination.—A passenger does not cease to be such by reason of his alighting from a railway train at a station, other than his point of destination, for exercise or motives of curiosity or to engage in an altercation with a servant of the company, if he does not leave the premises of the carrier, nor the train, with intention not to return to it and resume his journey. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

"The temporary suspension of a contract of carriage, until arrangements can be made by the carrier to overcome difficulties due to washouts or other obstructions on the track, does not sever the relation of carrier and passengers already begun. And * * * during such time the passenger is entitled to all the rights pertaining to a passenger on train moving towards the point of destination, and stipulated in the contract. 4 R. C. L., section 496; *Dwinelle v. N. Y. Cent. & H. R. R. Co.*, 120 N. Y. 117; *Killmyer v. Wheeling Tract. Co.*, 72 W. Va. 148, 77 S. E. 908. And these cases hold that under such circumstances the obligation still rests on the carrier to

protect its passengers against any injury from the negligence or willful misconduct of its servants, and of the fellow passengers and strangers, so far as practicable, and to provide them with the usual accommodations, and any information and facilities necessary for the full performance of the contract on the part of the carrier." *Turk v. Norfolk, etc., R. Co.*, 75 W. Va. 623, 629, 84 S. E. 569.

One in transit from one car to another, substituted therefor because of an obstruction, remains a passenger, and entitled to the protection of the highest decree of care on the part of the carrier that it can afford under the circumstances. *Killmyer v. Wheeling Tract. Co.*, 72 W. Va. 148, 77 S. E. 908. See post, "Statement of Duty as to Care and Safety," V, D, 1, a.

Wreck—Train Run Back to Initial Station—Passenger Awaiting in Car—Renewal of Journey.—Where one is received as a passenger, and while on the way to his destination the journey is interrupted by a wreck on the track, and after waiting some hours for the obstruction to be removed without success, the train is run back to the initial station where he was received as a passenger, at a late hour of the night, and the night is dark and cold, the passenger a stranger, the station a small one in a remote place in the mountains, and on inquiry of the conductor the passenger is told that he knows of no place where he can secure shelter and lodging, and that he might remain on the car until the journey should be resumed in the morning, and the conductor provides him a place to rest on the seats in the car, the relation of passenger and carrier is not then severed, but continues, entitling the passenger to reasonable protection at the hands of the railway company, and from any and all unlawful assaults or imprisonment at the hands of its employees. *Turk v. Norfolk, etc., R. Co.*, 75 W. Va. 623, 630, 84 S. E. 569.

4. Treatment and Protection of Passengers.

As to passengers, the contract of carriage imposes upon the carrier the duty not only to carry safely and expeditiously between the termini of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort and peace throughout the journey. *Norfolk, etc., R. Co. v. Birchfield*, 105 Va. 809, 822, 54 S. E. 879; *John v. Baltimore, etc., R. Co.*, 82 W. Va. 149, 95 S. E. 589.

"And this same duty is of course, upon the carrier's agents. They are under the duty of protecting each passenger from avoidable discomfort, and from insult, from indignities, and from personal violence." *Norfolk, etc., R. Co. v. Birchfield*, 105 Va. 809, 822, 54 S. E. 879. See post, "Injuries to the Feelings and Sensibilities," V, D, 2; "Unlawful or Unjust Treatment by Servants," V, D, 3.

Power of Corporation Commission to Require Proper Accommodations at Depots.—Under the constitution and statutes of Virginia, the state corporation commission is clothed with ample jurisdiction to entertain a proceeding to require a railway company to provide proper accommodations at its depots, and proper schedules, and to this end make such order or requirement as it may think just and reasonable under all the circumstances, but in the case at bar no requirement is considered necessary. *Com. v. Norfolk, etc., R. Co.*, 10 Va. Law Reg. 720.

Times at Which Passenger Stations Shall Be Kept Open.—*Barnes Code*, p. 774, ch. 54, § 71g.

Times at Which Waiting Room Must Be Kept Open—Must Be Kept Comfortably Warm.—*Va. Code* 1919, § 3940.

Duty to Provide Water-Closets at Stations.—*Barnes Code*, ch. 54, § 71g. Chapter 69 of the Acts of 1891, § 71g

of chapter 54 of the Code, § 2382, Code of 1906, requiring railway companies and persons operating railroads, to provide and keep, among other things, for the accommodation of travelers, suitable water closets, "at all stations," does not contemplate the maintenance and keeping of such retiring places at what are commonly known as "flag stations," mere open platforms in connection with which no station buildings, offices or agents are kept. *State v. Baltimore, etc., R. Co.*, 61 W. Va. 367, 56 S. E. 518.

Platform Not Required at Flag-stop—When Light Not Required—Condition of Premises—Lights.—A railroad company is not bound to have a platform at a mere road crossing at which trains stop on signal simply for the convenience of those desiring passage, nor to have a light at such flag-stop at a time when no train is expected and there is no occasion to provide a light. *Mitchell v. Southern R. Co.* 118 Va. 642, 88 S. E. 56.

Towels for Common Use Prohibited in Stations and Trains.—Va. Code 1919, § 1517.

Requirements as to Lighting Passenger Cars.—Va. Code 1919, § 3975.

Conductors and Certain Other Employees Conservators of the Peace.—Va. Code 1919, § 3944, 3981; Barnes Code, ch. 145, § 31.

In order that conductors may be clothed with authority commensurate with their duty, they are in Virginia made conservators of the peace by Code, 1904, § 1294d, clause 10 (Code 1919, § 3944). *Norfolk, etc., R. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879.

The conductor has the power, and it is his duty, to preserve order on the train; if necessary, stopping the train and calling to his assistance all the train employees and such passengers as are willing to assist him. Until, at least, he has put forth the forces at his disposal, he has no right to abandon the scene of conflict. *Norfolk, etc., R.*

Co. v. Birchfield, 105 Va. 809, 54 S. E. 879.

Protection of Passenger from Assault.—In case of a threatened assault upon a passenger in a railroad train by a fellow passenger, it is the duty of the company's employees to protect the party threatened from injury, and if they negligently fail to do so, the carrier is liable for the consequences. *Norfolk, etc., R. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879.

In an action by a passenger against a railroad company for an assault by a fellow passenger, it was proper to instruct the jury, in response to a request from them for instructions, that if they believe from the evidence that the conductor of the train believed, at the time of the difficulty, between the plaintiff and the other passenger, that such other passenger was a special officer of the railroad company, then this was a circumstance that could be considered by them on the question as to whether or not the conductor had notice of the impending assault on the plaintiff, and believed that he was in danger of such assault; but that although he may have believed that such passenger was an officer, still, if he had reasonable grounds to believe that he was about to make an assault on plaintiff, it became his duty to interfere and prevent the same, if possible. *Norfolk, etc., R. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879.

Protection of Passengers from Unlawful Arrest and Expulsion.—Upon a carrier the law imposes the duty to exercise reasonable care to protect passengers from unlawful arrest and expulsion from its trains, whether caused by strangers or intruders or by its agents and servants; and if, by failing or refusing to afford protection, such unlawful arrest and expulsion is effected, the carrier must respond in damages therefor to the person so injured when its servants know, or in the exercise of ordinary care ought to know, the arrest and expulsion is unlawful. *Anania v.*

Norfolk, etc., R. Co., 77 W. Va. 105, 87 S. E. 167. See post, "Ejection," V, F.

A carrier is not liable in damages for the failure of its agents to prevent an arrest and removal of a passenger from its train by an officer of the law acting under proper authority. But if such agent knows, or in the exercise of reasonable diligence could have known, the arrest was unwarranted and unjustifiable or without sufficient foundation or cause, and fails to protest, or, without the use of force, to prevent such arrest, the carrier is liable, and must respond in damages to the person so unlawfully arrested and removed from its train. *Anania v. Norfolk, etc., R. Co.*, 77 W. Va. 105, 87 S. E. 167; *Clark v. Norfolk, etc., R. Co.*, 84 W. Va. 526, 100 S. E. 480.

In such case the carrier's agents are not bound to make inquiry into a known officer's authority. *Clark v. Norfolk, etc., R. Co.*, 84 W. Va. 526, 100 S. E. 480.

Protection of Passengers from Accident—Drunken Passenger.—A conductor should not wait until a drunken passenger has committed some disturbing act before taking some action, but should take proper action commensurate with the probable danger whenever such passenger gives reasonable cause to believe that an accident is likely to happen. *Virginia R., etc., Co. v. Hubbard*, 120 Va. 664, 91 S. E. 618.

Officers of Wharf on Landing and Masters of Vessels to Be Conservators of the Peace.—Va. Code 1919, § 4025.

5. Right to Make Rules and Have Them Obeyed.

A carrier has the right to make reasonable rules and regulations for the conduct of its affairs, and they are binding upon passengers and the public dealing with the carrier when brought to their notice. Whether or not such rules and regulations are reasonable is a question of law addressed to the court. *Virginia R., etc., Co. v. O'Flaherty*, 118 Va. 749, 88 S. E. 312.

But railroad passengers are not required to know the rules and regulations made by the directors of the railroad company for the control of the actions of its agents in the management of its affairs. *DeBoard v. Camden Interstate R. Co.*, 62 W. Va. 41, 57 S. E. 279.

6. Duty to Furnish Sufficient Accommodation for Transportation.

Va. Code 1919, § 3907, 3990; Barnes Code, p. 222, ch. 150, § 8.

Accommodation Required for Sick or Injured Passenger Traveling on Cot or Stretcher.—W. Va. Code, Supp. 1918, ch. 54, § 71i, I, 71i, III.

Order of Service Commission Requiring Attachment of Additional Car to Certain Trains.—An order, made by the public service commission, commanding the Chesapeake & Ohio Railway Company to attach to its train No. 34, scheduled to leave Huntington daily at 7:45 a. m., and transport to Charleston a car, denominated the *Wheeling Sleeper*, carried to Huntington by the Ohio River Division of the Baltimore & Ohio Railroad, and to return the same to Huntington on the same day, by means of its train No. 33, scheduled to leave Charleston at 7:15 p. m. and arrive at Huntington at 9:00 p. m. is held to impose an unreasonable and unnecessary burden upon said company, in view of facilities already furnished by its trains, Nos. 33 and 34, and unjust and unfair to the carrier, because of the unnecessary burden imposed upon it and the pecuniary loss incurred by it in performing the extra service. *Chesapeake, etc., R. Co. v. Public Service Comm.*, 78 W. Va. 667, 89 S. E. 844.

But that performance of the extra service will cause a pecuniary loss to the carrier, is not alone sufficient to prove it to be confiscatory. In order to determine that question petitioner's entire intrastate earnings, from its passenger traffic, must be taken into account. *Chesapeake, etc., R. Co. v.*

Public Service Comm., 78 W. Va. 667, 89 S. E. 844.

7. Duty to Announce Name of Station Before Arrival Thereat — Announcement to Be Made at Junctions.

Va. Code 1919, § 3940.

8. Duty to Post Notices of Time of Trains and of Delay.

Va. Code 1919, § 3941; Barnes Code, p. 774, ch. 54, § 71g.

9. Duty to Take up and Set down Passengers at Regular Stopping Places.

Penalty for Failure to Take up or Set down Passengers.—Va. Code 1919, § 3938.

Duty to Stop at Station and Allow Passenger to Alight Safely.—In the performance of its duty, a carrier of passengers must stop its train at a station to which a passenger is destined, and keep the same stationary a sufficient length of time to allow him to alight therefrom in safety. *Barlett v. Baltimore, etc., R. Co.*, 84 W. Va. 120, 99 S. E. 322.

10. Separation of White and Colored Passengers and Powers and Duties in Relation Thereto.

On Steam Railroads.—Va. Code 1919, §§ 3962-3968.

On Electric Railways.—Va. Code 1919, §§ 3978-3983.

On Steamboats.—Va. Code 1919, §§ 4022-4024.

11. Changing Time Table.

Steam Railroad Can Not Change Time Table without Authority from Public Service Commission.—Barnes Code, p. 221, ch. 150, § 4.

12. Duties in Relation to Transportation of Troops.

See post, "Tolls on Troops in Military or Naval Service," V, C, 10.

Va. Code 1919, § 3942; Barnes Code, p. 275, ch. 18, § 44.

C. FARES AND TICKETS.

¼. Rates to Be Fixed by State Commission.

Va. Const., § 156; Va. Code 1919, §§ 3709, 3711; Barnes Code, p. 227, ch. 150, § 22.

½. Classification and Limitation of Rates.

a. Power of State.

A state may prescribe a maximum scale of rates, but it cannot compel a railroad company to contract with any individual or class for carriage at a charge less than the established or regular scale of fares. *Com. v. Atlantic, etc., R. Co.*, 106 Va. 61, 67, 55 S. E. 572.

It cannot arbitrarily fix a maximum passenger rate of two cents a mile on mileage books of five hundred miles or over and require the carrier always to keep the same on sale to all who apply therefor, and to redeem them at a later period than they have heretofore redeemed mileage books. Such legislation is class legislation, and it is not for the protection of all the people, but of the favored few. It discriminates in favor of the wholesale buyer, and also invades the right of the carrier to conduct and manage his own affairs. It denies to the carrier the equal protection of the laws, and deprives him of his property without due process of law, and so is unconstitutional. *Com. v. Atlantic, etc., R. Co.*, 106 Va. 61, 55 S. E. 572. See also *Com. v. Baltimore, etc., R. Co.*, 12 Va. Law Reg. 302; *Com. v. Atlantic, etc., R. Co.*, 12 Va. Law Reg. 399. See post, CONSTITUTIONAL LAW.

b. Under West Virginia Statutes.

Barnes Code, ch. 54, § 71a (1), 71a (2), 71a (3), 71a (6), 71f.

Chapter 41 of the Acts of 1907 (Barnes Code, ch. 54, § 71f) divides steam railroads into two classes for the purpose of passenger rate regulation, subjecting all railroads, as above defined, fifty miles long and over, to a limit of two cents per mile, in the case of adults,

with trivial exceptions, and leaving all others subject to the former legislation, applicable to them at the date of the passage of said act. *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

Said act is in all respects, valid on its face. *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

As said act covers only a part of the subject of railway rate legislation, it does not wholly repeal former legislation, relating to the same subject, either by implication or express provision. It impliedly amends chapter 227 of the Acts of 1872-3, as amended by chapter 42 of the Acts of 1885, repealing such former legislation only so far as it is clearly inconsistent therewith. *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

For the purposes of chapter 227 of the Acts of 1872-3, as well as chapter 41 of the Acts of 1907 (Barnes Code, ch. 54, § 71f), two railroads, operated in connection with one another, under a lease of one by the other, or otherwise, constitute a single railroad. *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

The proviso in said chapter 41 of the Acts of 1907 (Barnes Code, ch. 54, § 71f), saying "Nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles in length, operating wholly or in part in the state," is construed as meaning the same as if it had said, "Nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, whose entire length is over fifty miles." *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

The words, "under the control, management or operation," are used in the appositive, not the alternative, sense, and mean the same as the words,

"a part of." *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

Chapter 41, Acts of the Legislature, 1907 (Barnes Code p. 774, ch. 54, § 71f), limiting railroads to the rate of two cents per mile for carrying intrastate passengers and baggage remains the paramount law, binding upon the carrier, until in the first instance upon application by the carrier, or by some one injuriously affected thereby, or upon the initiative of the public service commission, such rate has been investigated by the commission and judicially determined to be unreasonable or confiscatory as to a particular carrier, and therefore invalid, and until then or until such law has been otherwise amended or lawfully nullified, the public service commission has jurisdiction, as prescribed by the act creating it, to compel observance by a carrier of such law. *State v. Baltimore, etc., R. Co.*, 76 W. Va. 399, 85 S. E. 714.

Until the public service commission, pursuant to the authority conferred upon it by said act, has investigated and determined that a particular rate complained of is unreasonable, and invalid as to a particular carrier, the courts can not interfere by injunctive process, or otherwise, to stay the hand of the commission in the performance of its proper duties and functions. *State v. Baltimore, etc., R. Co.*, 76 W. Va. 399, 85 S. E. 714.

34. Transfers.

As to transfer check as evidence of contract, see post, "The Ticket." V, C. 1.

While the state corporation commission has full and complete jurisdiction to prescribe rules, regulations and rates for an electric railway lying wholly outside of the city of Richmond and connecting at the corporate limits with a street railway lying wholly within said city, it would be unjust and inequitable to compel the former to accept transfers from the latter

when the city councils have relieved the latter of the obligation to accept transfers from the former and it declines to give such transfers. *Com. v. Richmond, etc., R. Co.*, 115 Va. 756, 80 S. E. 796.

1. The Ticket.

Evidence of Right to Transportation.—Primarily, the function of a ticket is to serve as evidence as between the conductor of the carrier's train and the passenger of the latter's right to transportation. *Louisville, etc., R. Co. v. Riely*, 121 Va. 469, 93 S. E. 574.

Ticket as Evidence of Contract.—In *Virginia*.—A railroad ticket being delivered to the passenger to be used for its primary function to serve as evidence, as between the conductor and the passenger, and being accepted and so used by him, may also afford evidence of the contract of carriage between the passenger and carrier to the extent that such contract is expressed by the ticket, if the passenger knowingly assents to the matters so expressed. *Louisville, etc., R. Co. v. Riely*, 121 Va. 469, 93 S. E. 574.

Where there exists evidence of actual knowledge on the part of the passenger of the stipulations on the ticket, and acquiescence therein, there can be no question that the ticket evidences a contract as well as serves its primary function as evidence as between the conductor and the passenger. *Louisville, etc., R. Co. v. Riely*, 121 Va. 469, 93 S. E. 574.

Custom and usage may have an important bearing on whether stipulations on a ticket may, in particular cases constitute a contract, as well as at the same time serve in part the primary function of a ticket. *Louisville, etc., R. Co. v. Riely*, 121 Va. 469, 93 S. E. 574.

In West Virginia.—A street railway ticket or transfer check, in the hands of a purchaser thereof for use on the car lines of the company issuing it, constitutes the complete evidence of

the contract between the purchaser and the company, and the privileges evidenced by its terms are not subject to limitation by a mere rule of the company, knowledge of which the purchaser did not have and could not conveniently have ascertained. *De-Board v. Camden Interstate R. Co.*, 62 W. Va. 41, 42, 57 S. E. 279.

Time Limit.—In general, it may be said that a time limit on a railroad ticket may be, at the same time, both a contract of carriage between a passenger and carrier, and a regulation of the carrier for the conduct of its business. *Louisville, etc., R. Co. v. Riely*, 121 Va. 469, 93 S. E. 574.

When a ticket is serving as evidence between the conductor and the passengers of the latter's right to transportation, the time limit contained on it (whether on its face, or back, or within its folds, is immaterial) is a regulation of the carrier for the conduct of its business, the validity of which is to be determined upon the sole inquiry of its reasonableness as such regulation, and not upon any inquiry as to its validity as a contract between a passenger and carrier. *Louisville, etc., R. Co. v. Riely*, 121 Va. 469, 93 S. E. 574.

Where a train of defendant carrier runs daily, from the place of departure to the place of destination of the passenger, and there is no statutory regulation on the subject, or regulation of somebody having authority in the premises, such as the state corporation commission, to the contrary, a time limit on a ticket in the following language: "Good continuous passage beginning date of sale only on train scheduled to stop at destination, otherwise passenger transfer to local train," printed on the face of a regular first-class ticket, is a reasonable regulation and valid. *Louisville, etc., R. Co. v. Riely*, 121 Va. 469, 93 S. E. 574.

Remedy for Breach of Contract in Relation to Ticket.—"Where a passenger has purchased a ticket and the

conductor does not carry him according to its terms, or, if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract." *Virginia, etc., R. Co. v. Hill*, 105 Va. 729, 736, 54 S. E. 872.

2. Schedules of Rates.

Va. Code 1919, §§ 3908, 3911; Barnes Code, ch. 150, § 12.

3. Advancements and Reductions.

As to power of public service commission to change unjust or unreasonable charge, see post, "Overcharges," V. C. 8. Va. Code 1919, §§ 3909, 3920; Barnes Code, ch. 150, §§ 9, 22.

Section 1294-c (6) of the Code (1904 [Code 1919, § 3909]) providing that "no advance shall be made in the rates, fares and charges of public service corporations until the same have been submitted to and approved by the state corporation commission," must be read in connection with § 156-b of the constitution, which gives to cities, towns and counties the right to prescribe rules, regulations and rates of charge to be observed by public service corporations in connection with any services performed by them under a municipal or county franchise granted by such city, town or county so far as such services may be wholly within the limits of the city, town or county granting the franchise. So, reading the two, the statute must be construed to apply to rates which are not lawfully and definitely fixed by contract and which need approval of the state corporation commission, whereas the rates and transfer privileges involved in the case at bar are fixed by municipal ordinance, embodying a definite contract. *Com. v. Richmond, etc., R. Co.*, 115 Va. 756, 80 S. E. 796.

4. Opening of Ticket Office.

Times at Which Ticket Office Must Be Kept Open.—Va. Code 1919, § 3940.

4½. Posting Law as to Rates.

Barnes Code, p. 770, ch. 54, § 71a (4).

5. Rights in Connection with Ticket.

See ante, "The Ticket," V. C. 1.

6. Free Passes.

When Free Transportation May Be Furnished.—Va. Acts 1920, p. 618; Pollard's Code Biennial, p. 185, Amending Code 1919, § 3918; Barnes Code, p. 226, ch. 150, § 20.

Free Transportation to Public Officers Prohibited — Exceptions.—Va. Const. § 161.

Conditional Passes Granted to Sheriffs Held Free and Invalid.—A railroad company granted passes to sheriffs upon the condition that said passes should be in full payment and compensation (a) for all fees and charges for any and all services which said sheriffs should be called upon to perform for the year for which the pass was granted or (b) to which such sheriffs might be entitled on account of an action growing out of any litigation in which the company was interested, and (c) of all fees and charges in favor of said sheriffs against the company for the said year and of all commissions that might become due by virtue of any executions against the company which might be placed in the sheriff's hands during the year. It was held that (1) the passes were free passes and their issuance was not only forbidden by Va. Const. § 161, but the so-called contracts under which they were granted were immoral and condemned by the common law. (2) The company was guilty of unjust and unlawful discrimination within the provisions of ch. III of the Act concerning Public Service Corporations (§ 129c, Va. Code 1904; Code 1919, § 3905). *Com. v. Southern R. Co.* 3 Va. Law Reg., N. S., 431. See post, "Discrimination," V. C. 8½.

Free Transportation to Be Fur-

nished to Members of State Corporation Commission.—Va. Code 1919, § 3749.

8. Overcharges.

Statutory Prohibitions against and Penalty for Demanding and Receiving More than Is Lawful.—Va. Code 1919, § 3910, 3925; Barnes Code, ch. 150, § 4; ch. 54, §§ 71a (5), 71a (13), 71b.

Power of Public Service Commission to Change Unjust or Unreasonable Charge.—Barnes Code, p. 221, ch. 150, § 5.

8¾. Discrimination.

As to when free transportation may be furnished, see ante, "Free Passes," V, C. 6. Va. Code 1919, §§ 3907, 3910; Va. Acts 1920, p. 234; Pollard's Code Biennial, p. 185, amending Code 1919, § 3908; Va. Acts 1920, p. 618; Pollard's Code Biennial, p. 185, amending Code 1919, § 3918; Barnes Code, ch. 150, §§ 8, 20.

Discrimination between Students of Two Colleges.—Where a street railway company under an ordinance of a city, which requires that pupils of schools be given reduced rates of transportation, grants reduced rates to the students of one college, they can not deny the same to students of another college. Any discrimination between the students of the two colleges would be arbitrary and capricious. *Northrop v. Richmond*, 105 Va. 341, 53 S. E. 963.

8½. Charge for Sick or Injured Passenger.

W. Va. Code, Supp. 1918, ch. 54, § 71i. II.

10. Tolls on Troops in Military or Naval Service.

Va. Code 1919, § 3942.

11. Charges on Horse Railroads.

What Horse Railroad May Charge for Transportation of Passengers—Not Applicable to Street or Suburban Railroads.—Barnes W. Va. Code, p. 772, ch. 54, § 71d.

D. INJURIES TO PASSENGERS OR PERSONS ACCOMPANYING THEM.

1. In General.

a. Statement of Duty as to Care and Safety.

(1) Of Passengers.

A carrier is an insurer of the safety of its passengers. *Derring v. Virginia R., etc., Co.*, 122 Va. 517, 95 S. E. 405; *Perkins v. Monongahela Valley Tract Co.*, 81 W. Va. 781, 95 S. E. 797; *Kennedy v. Chesapeake, etc., R. Co.*, 68 W. Va. 589, 70 S. E. 359.

It is not an insurer of their safety against all contingences except those arising from the act of God and the public enemy as are carriers of goods. For an injury happening to the person of a passenger without fault on the carrier's part it is not responsible. *Norfolk, etc., R. Co. v. Rhodes*, 109 Va. 176, 182, 63 S. E. 445; *Norfolk, etc., R. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879.

But passengers are entitled to expect and demand from carriers the highest degree of care for their protection and safety. *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. (70 Va.) 431, 445; *Pendleton v. Richmond, etc., R. Co.*, 104 Va. 813, 52 S. E. 574; *Washington, etc., R. Co. v. Vaughan*, 111 Va. 785, 794, 69 S. E. 1035; *Murphy's Hotel v. Cuddy*, 124 Va. 207, 97 S. E. 794; *Davidson v. Washington, etc., Railway*, 129 Va. 99, 105 S. E. 669; *Virginia R., etc., Co. v. Cherry*, 129 Va. 262, 105 S. E. 657; *Mannon v. Camden Interstate R. Co.*, 56 W. Va. 554, 49 S. E. 450; *Brogan v. Union Tract Co.*, 76 W. Va. 698, 86 S. E. 753; *Bartley v. Western Md. R. Co.*, 81 W. Va. 795, 95 S. E. 443; *Bartlett v. Baltimore, etc., R. Co.*, 84 W. Va. 120, 99 S. E. 322.

Carriers of passengers in the execution of their contracts of carriage are charged with the exercise of the highest degree of care and diligence of which human skill and foresight is capable. *Norfolk-Southern R. Co. v.*

Tomlinson, 116 Va. 153, 81 S. E. 89; Perkins v. Monongahela Valley Tract Co., 81 W. Va. 781, 95 S. E. 797; Norfolk, etc., R. Co., v. Birchfield, 105 Va. 809, 54 S. E. 879; Kennedy v. Chesapeake etc., R. Co., 68 W. Va. 589, 70 S. E. 359.

The slightest degree of negligence causing a passenger injury renders the carrier liable. Norfolk, etc., R. Co. v. Rhodes, 109 Va. 176, 182, 63 S. E. 445; Washington, etc., R. Co. v. Vaughn, 111 Va. 785, 794, 69 S. E. 1035; Norfolk-Southern R. Co. v. Tomlinson, 116 Va. 153, 81 S. E. 89; Mannon v. Camden Interstate R. Co., 56 W. Va. 554, 49 S. E. 450; Kennedy v. Chesapeake etc., R. Co., 68 W. Va. 589, 70 S. E. 359; Bartly v. Western Md. R. Co., 81 W. Va. 795, 95 S. E. 443.

But carriers are not required to exercise a guardianship over passengers who are adults and mentally competent, or to undertake to coerce them to the exercise of ordinary care for their own safety. Davidson v. Washington, etc., Railway, 129 Va. 99, 103 S. E. 669.

In *Brogan v. Union Tract Co.*, 76 W. Va. 698, 86 S. E. 753, the court said: "As we understand the meaning of the words there is no difference in meaning between 'highest degree of care,' 'extraordinary care' and 'utmost care.'"

A railway company owes to one occupying the relation of a passenger, actually or constructively, a different and higher degree of care than it does to a traveller about to cross its track at a highway. Washington, etc., R. Co. v. Vaughan, 111 Va. 785, 69 S. E. 1035.

Where an accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the carrier is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can

afford no redress in the form of a pecuniary compensation. Roanoke R., etc., Co. v. Sterrett, 108 Va. 533, 538, 62 S. E. 385.

Duty to Provide Safe Approaches and Walkways.—It is the duty of a railroad company to provide reasonably safe approaches and walkways for the use of its passengers to and from its stations. Chesapeake, etc., R. Co. v. Mathews, 114 Va. 173, 180, 72 S. E. 288.

Care Due Passenger Mentally or Physically Incompetent.—If an untended person, who is so sick, aged or otherwise infirm as to be unable to assist or care for himself, be accepted as a passenger, the carrier, if he has notice of the passenger's condition, is bound to exercise for his safety a degree of care commensurate with the responsibility assumed, and that would be such care as would be reasonably necessary to protect him from injury in view of his physical or mental condition. Walters v. Norfolk, etc., R. Co. 122 Va. 149, 94 S. E. 182.

Care Required of One Maintaining Elevator in Public Building.—The prevailing doctrine with respect to the duty of one maintaining a passenger elevator in a hotel or other public building is, that he is a common carrier and governed by the same rules as other common carriers. That is to say (although not an insurer of the safety of his passengers), he is required to exercise the highest degree of care and diligence in the maintenance and operation of the elevator to prevent injury to passengers. Murphy's Hotel v. Cuddy, 124 Va. 207, 97 S. E. 794.

(2) Of Persons Accompanying or Assisting Passengers.

"Persons going upon a carrier's premises or entering a carrier's vehicle to assist a passenger, to greet an arriving passenger, or to take leave of a departing passenger cannot be deemed passengers themselves. Nor are they trespassers, properly speaking;

they should be considered rather in the light of licensees, to whom the carrier owes certain duties." *Chesapeake, etc., R. Co. v. Fortune*, 107 Va. 412, 415, 59 S. E. 1095.

A person who, in conformity with a custom acquiesced in by a carrier, goes to a railroad station to assist passengers in entering or leaving the train, is an invitee to whom the carrier owes the duty of ordinary care to see that he is not injured by reason of defective station facilities or approaches thereto. If he enters the train and his purpose is known, it is the duty of the carrier to give him a reasonable time within which to leave the train, but, if his purpose is not known, and there are no circumstances to put the carrier upon notice, then the carrier is not bound to hold the train till he has had time to alight, nor to notify him before the train starts. *Chesapeake, etc., R. Co. v. Paris*, 107 Va. 408, 59 S. E. 393; *Chesapeake, etc., R. Co. v. Paris*, 111 Va. 41, 68 S. E. 398.

It is the duty of a railroad company to provide reasonably safe approaches and walkways for the use, not only of its passengers, but of those who accompany them to and from its station. *Chesapeake, etc., R. Co. v. Mathews*, 114 Va. 173, 180, 72 S. E. 288.

One who accompanies his wife and small children to a railway station, where they expect to take a train and become passengers, is there by the implied invitation of the railroad company, and it is the duty of the company to exercise ordinary care for his safety and protection. *Chesapeake, etc., R. Co. v. Fortune*, 107 Va. 412, 59 S. E. 1095.

d. Illustrative Cases Involving the Nonperformance of Duty to Protect from Injury.

(1) Taking on Passengers.

It is the duty of a railroad company to stop its trains a reasonable time at stations to enable passengers and baggage to be put on; and passengers and

their attendants have a right to presume that the company will do so. *Chesapeake, etc., R. Co. v. Fortune*, 107 Va. 412, 59 S. E. 1095. See, also, *Norfolk v. Wheeling Tract Co.*, 57 W. Va. 132, 49 S. E. 1030.

"It is actionable negligence for a conductor or other servant of a railroad company to start a train while passengers are obviously in the act of getting on it." *Duty v. Chesapeake, etc., R. Co.*, 70 W. Va. 14, 73 S. E. 331.

(2) In Transitu.

Passengers Riding on Platform.—If a railroad company negligently and unreasonably fails to provide sufficient cars so that passengers are compelled to ride on the platforms and then accepts passengers for carriage in such hazardous places, it is liable for damages to one injured therein, unless he has contributed to the injury by negligence on his part. *Norvell v. Kanawha, etc., R. Co.*, 67 W. Va. 467, 68 S. E. 288. See post, "In Transitu," V, E, 2, b, (2).

The carrier owes to a passenger involuntarily, necessarily and rightfully riding on the platform the high degree of care commensurate with the circumstances and its act in undertaking to carry him there. *Norvell v. Kanawha, etc., R. Co.*, 67 W. Va. 467, 68 S. E. 288.

The conductor of a train represents the railroad company in relation to the transportation of passengers on his train, and his acts in receiving and carrying passengers on the platforms when the train is overcrowded binds the company. *Norvell v. Kanawha, etc., R. Co.*, 67 W. Va. 467, 68 S. E. 288.

But the liability of the carrier to one excusably riding on the platform is not absolute. If it used reasonable diligence to provide cars for his safe carriage, and, with fair excuse for failing to provide them, exercised the increased care demanded by the passenger's enforced position on the platform, it is not liable for injury to

him. *Norvell v. Kanawha, etc., R. Co.*, 67 W. Va. 467, 68 S. E. 288.

Derailement Resulting in Injury to Passenger.—It is the duty of a carrier of passengers to use the highest degree of care for their safety known to human prudence and foresight, and this degree of care is required and applies not only to the manner in which its train is being run by its engineer, but also to the running gear and equipment of the engine, tender and cars, and to the way in which its road bed is constructed, and its ties and rails are laid and maintained, and if the carrier fails to exercise such care in any of these particulars, and such failure causes a derailment which results in injury to a passenger the carrier is liable therefor. *Norfolk-Southern R. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89.

Injury Inflicted by Falling of Bridge.—In an action by a passenger against a railroad company to recover for injury inflicted by the falling of a railroad bridge, it is not error to instruct the jury that "the slightest neglect against which human prudence and foresight might have guarded, and by reason of which the injury may have been occasioned rendered the company liable for damages for such an injury." *Roanoke R., etc., Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385.

Directing Passenger to Unsafe Place.—Where a carrier's roadbed became submerged and an employee of the carrier in charge of the car directed a passenger to follow a certain course to reach another car provided, or to be provided, for the continuation of the journey, it was held, that the relation of carrier and passenger continued, that the carrier owed the duty of directing the plaintiff to take a safe course, and that the defendant was negligent in directing the plaintiff, without light or guide, into a place the dangers of which were unknown to him and not obviously apparent to reasonable men under similar conditions. *Killmyer v. Wheeling Tract. Co.*, 72

W. Va. 148, 77 S. E. 908. See ante, "When Relation of Carrier and Passenger Terminate," V, B, 3½.

Removal of Safety Bar Resulting in Injury to Railway Mail Clerk.—If in the case at bar, the plaintiff, a railway mail clerk, went to the door of the poorly lighted car in the performance of his duties, while the train was in motion, not knowing that the safety bar upon which he had been accustomed to rely had been removed, and without any contributory negligence on his part, sustained the injury complained of, as appears from his testimony, then he is entitled to recover. *Carter v. Washington, etc., Railway*, 122 Va. 458, 95 S. E. 464.

But if the proximate cause of injury to a railway mail clerk was the removal of a safety bar on the car, which removal was effected by an employee of the railroad company sent to clean up the car, who stated to the mail clerk that he intended to remove the bar because it was in his way, but promised the mail clerk to replace it, but failed to do so, there can be no recovery against the railroad company. *Washington, etc., Railway v. Carter*, 117 Va. 424, 432, 85 S. E. 482.

(3) Announcing Station and Setting down Passenger.

Misleading Announcement of Station.—Although under section 1294-d, clause 6, Code of 1904 (Code 1919, § 3940), it is the duty of a railroad company to have a station announced, yet it is negligence to announce it in such way and under such circumstances as to mislead a passenger to her injury. *Johnson v. Atlantic, etc., R. Co.*, 125 Va. 136, 99 S. E. 558. See ante, "Duty to Announce Name of Station Before Arrival Thereat—Announcement to Be Made at Junctions," V, B, 7.

If a carrier of passengers announces a station, throws open the door of the car and apparently stops the train, and then when a passenger, misled

thereby, comes out of the car to alight, suddenly and without warning starts the train with a violent jerk and throws the passenger off, the latter, unless he has himself been guilty of negligence, has a cause of action for resulting injuries. And the fact that the stop, or the apparent stop, was due to a proper operation of the locomotive, due to the crossing of another railroad, does not affect the passenger's case, where she was not apprised of this fact. *Johnson v. Atlantic, etc., R. Co.*, 125 Va. 136, 99 S. E. 558.

Failure to Notify Passenger to Alight from Rear End of Car. — A carrier is not negligent in not giving a passenger notice that she was expected to alight from the rear end of the car, when the construction of the car was in itself such a notice to any reasonably thoughtful person. *Davidson v. Washington, etc., Railway*, 129 Va. 99, 105 S. E. 669.

Permitting Doors of Baggage Compartment to Be Left Open. — Where there was nothing to show that the doors of the baggage compartment of a combination baggage and passenger car were opened by any employee, or pursuant to any authority of the carrier, and the employees of the carrier attempted to deter passengers from their exit through the baggage compartment, and it appeared at a glance from either door of the baggage compartment that passengers were not expected to go out that way, defendant carrier was not negligent in permitting the doors of the baggage compartment to be left open. *Davidson v. Washington, etc., Railway*, 129 Va. 99, 105 S. E. 669.

Interference of Brakeman to Prevent One Stepping Off Moving Train. — It is the duty of a brakeman on a passenger train to endeavor to prevent one from stepping off a moving train when it is dangerous to do so, and if, while acting in good faith to prevent

an apparent danger, his efforts fail, and the person steps or falls and is injured, there can be no recovery against the company, although it is probable he might have alighted in safety but for the interference of the brakeman. *Chesapeake, etc., R. Co. v. Paris*, 107 Va. 408, 59 S. E. 398; *S. C.*, 111 Va. 41, 68 S. E. 398.

Starting Train while Passenger Is Alighting. — A carrier is liable to a passenger who is injured without fault on his part by the starting of the train while he is in the act of alighting from it. *Duty v. Chesapeake, etc., R. Co.*, 70 W. Va. 14, 73 S. E. 331.

It is actionable negligence for a conductor or other servant of a railroad company to start a train while passengers are obviously in the act of alighting therefrom. *Duty v. Chesapeake, etc., R. Co.*, 70 W. Va. 14, 73 S. E. 331.

Train Moved or Jolted while Passenger Is Alighting. — Where a passenger, after the station to which he is destined has been announced, and the train upon which he is riding has come to a stop at such station, immediately proceeds to alight from such train, and while he is so doing the same is so suddenly and abruptly moved or jolted as to throw him down and cause him injury, the carrier will be liable, in the absence of an explanation upon its part of such sudden movement of its train attributing the same to a cause beyond its control. *Bartlett v. Baltimore, etc., R. Co.*, 84 W. Va. 120, 99 S. E. 322. See also, *Guerin v. P. C. C. & St. Louis R. Co.*, 72 W. Va. 725, 79 S. E. 739.

Failure to Provide Steps at Exit Not Intended for Passengers' Use. — A carrier is not negligent in failing to provide steps from the door of the baggage compartment of a combination passenger and baggage car to the ground, as the carrier is under no obligation to provide steps for passengers at a place plainly not intended

for their use. *Davidson v. Washington, etc., Railway*, 129 Va. 99, 105 S. E. 669.

Passenger Using Exit Not Intended for Passengers' Use, Injured while Alighting.—A passenger was injured while alighting from the front end of a combination passenger and baggage or mail car. The front end of the car was the baggage or mail compartment and there were no steps from the front platform to the ground. The passenger had entered from the rear of the car. Over the door of the baggage or mail compartment was a sign "No admittance." Accepting the passenger's statement that she did not see this sign, its existence was one of several circumstances which justified the company in assuming that passengers would not undertake to use that door as a means of exit. There were other circumstances to admonish the passenger that she was not expected to go out that way. Held: that the defendant company had the right to assume that passengers would exercise their senses, and would use the means that were plainly provided for their use, and not undertake to use those which were plainly not so intended, and that no negligence was shown on the part of the defendant company. *Davidson v. Washington, etc., Railway*, 129 Va. 99, 105 S. E. 669.

A carrier is not negligent in failing to warn a passenger of an unusually long step which she would have to take in alighting from the top of a stool to the ground, where it was not shown that the carrier was responsible for the use of the stool by passengers in alighting from a platform not intended for the use of passengers. *Davidson v. Washington, etc., Railway*, 129 Va. 99, 105 S. E. 669.

Where a passenger was injured in alighting from the baggage platform of a combination baggage and passenger car, the fact that the motor-

man's stool was used at the door by passengers in alighting does not establish the negligence of the carrier, where there was nothing in the evidence to show that any employee of the company, or anybody with the company's authority made such use of the stool. *Davidson v. Washington, etc., Railway*, 129 Va. 99, 105 S. E. 669.

(4) Injury after Alighting.

Passenger Falling Into Hole after Alighting.—A passenger alighting at a flag-stop at which there is a passenger station the location of which he knows and which he sees, and the approach to which is smooth and safe can not recover for an injury received by falling into a hole while going for assistance in a different direction to a signal tower of a railroad company which was not designed for the accommodation of passengers, but to regulate the movement of trains, and which the company was under no obligation to make safe for passengers. *Mitchell v. Southern R. Co.*, 118 Va. 642, 88 S. E. 56.

Death of Helpless Passenger Resulting from Station Agent's Negligence.—If a passenger who is known to be in a helpless condition, mentally and physically, is removed from a train by the conductor and placed in charge of a station agent of the company, and the latter, knowing his condition and without effort to prevent it, permits him to wander off alone in a deep snow, when the weather is severe and night rapidly approaching, and die of exposure, the company is liable. *Bragg v. Norfolk, etc., R. Co.*, 110 Va. 867, 67 S. E. 593.

The fact that the pass way used by an alighting passenger in going to the station, is a public highway, does not affect the degree of care owed the passenger by the carrier. *Washington, etc., R. Co. v. Vaughan*, 111 Va. 785, 69 S. E. 1035.

c. To Whom Liable and When.

Postal Clerk.—A postal clerk upon a railway mail car is a passenger, and therefore, entitled to the very highest degree of care from the carrier. *Carter v. Washington, etc., Railway*, 122 Va. 458, 95 S. E. 464.

Person Who Has Paid No Fare Riding with Carrier's Consent.—A person riding on another's vehicle with his consent is entitled to the protection of a passenger, even though he has paid no fare. *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808.

A person riding gratuitously on a truck or hand car maintained and operated by a coal mining company to haul its express matter over a spur track of a railway company, leading from the main line to its coal mine, with the consent of its general manager having control of the operation of such car, is a passenger, and not a trespasser or mere licensee, and such company owes him the duty to use reasonable care for his safety. *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808.

Hirer of Car Loading It on Side-Track.—Where the plaintiff, who had hired a box-car from a common carrier, was loading the car on a side-track, he sustained personal injuries from a fall occasioned by the sliding door being in a rotten condition and giving way when he caught hold of it in attempting to enter the car. It was held, that, the carrier was liable to the plaintiff for its negligence in providing a decayed and unsafe door. *Roach v. Southern R. Co.*, 114 Va. 440, 76 S. E. 953.

2. Injuries to the Feelings and Sensibilities.

A breach of the obligation of a common carrier to its passenger, working injury to him, is a cause of action standing upon a higher plane than that of one arising from an injury by mere negligence, because the relation subsisting between them is founded

upon a direct, special, and personal obligation, peculiar in its nature, and not upon general law constituting the basis of the relation subsisting between many other persons, such as neighbors or strangers, who stand upon an equal footing and deal with each other at arm's length, wherefore conduct on the part of a carrier working grievous injury only to the feelings and sensibilities of a passenger is actionable. *John v. Baltimore, etc., R. Co.*, 82 W. Va. 149, 95 S. E. 589. See post, "Unlawful or Unjust Treatment by Servants," V, D, 3.

3. Unlawful or Unjust Treatment by Servants.

a. In General.

A carrier of passengers is under an absolute contractual duty to protect them from willful and unlawful injury at the hands of its servants. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

"That a carrier is chargeable with the consequences of the unlawful acts of its employees while engaged in the performance of the duties entrusted to them, and as a part of such duties, is a doctrine generally recognized and frequently applied. The chief difficulty lies in its proper application to the facts proved in each case. Most of the decisions are predicated upon proof of wrongs done to passengers, as to whom the law requires the exercise of a very high degree of care, due to the contract for safe carriage. The courts hold the carrier to a strict accountability for any unlawful imposition of restraint or divergence from a just and reasonable treatment by its servants, so long as the passenger refrains from violation of the terms of the contract or the reasonable rules and regulations of the company and from disorderly or riotous behavior." *Comisky v. Norfolk, etc., R. Co.*, 79 W. Va. 148, 153, 90 S. E. 385. See also *Virginia R., etc., Co. v. Mc-*

Demmick, 117 Va. 862, 86 S. E. 744.

b. Insulting Treatment or Assault.

Insulting and Humiliating Treatment Inflicted by Conductor. — A common carrier of passengers is liable to a passenger for insulting and humiliating treatment inflicted upon him by its conductor in charge of the train on which he had taken passage, although unattended by physical injury or deprivation of the transportation contracted for. *John v. Baltimore, etc., R. Co.*, 82 W. Va. 149, 95 S. E. 589.

Assault by Conductors. — Where a passenger was assaulted by a conductor, it was held, that, section 1294-d, paragraph 45, of the Code (See Code 1919, sec. 3981), which constitutes the conductor of a railroad train a peace officer of the state, was never intended to release common carriers from the high and important duty resting upon them to diligently care for and protect their passengers. Its object was to increase their facility for affording the traveling public protection by making their conductors conservators of the peace. *Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749. See ante, "Treatment and Protection of Passengers," V, B, 4.

The authority conferred by ch. 145, § 31 of the Code making conductors conservators of the peace does not relax the duty owed by a carrier to a passenger nor relieve the carrier from liability for an assault or other tort of the conductor committed while engaged in the actual discharge of his official functions. *Wilhelm v. Parkersburg, etc., R. Co.*, 74 W. Va. 678, 82 S. E. 1089. See ante, "Treatment and Protection of Passengers," V, B, 4.

A special police officer appointed by the governor at the instance of a railway company, though prima facie a public officer, is, when specially employed by the company to enforce its rules and to protect the passengers on its trains, in that regard a servant of

the company, and if while on a train as such servant he inflicts injury on a passenger, not acting in his capacity as a public officer for the vindication of the law, or not justified by the law of self defense, the company is liable, notwithstanding the injurious act is prompted by motives purely personal to the servant. *Moss v. Campbell's Creek R. Co.*, 75 W. Va. 62, 83 S. E. 721, citing Code 1913, ch. 145, § 31; *Layne v. Chesapeake, etc., R. Co.*, 56 W. Va. 607, 67 S. E. 1103; 4 *Elliott on Railroads*, § 1638; 2 *Hutchinson on Carriers*, § 1093. See ante, "Appointment by Governor of Special Police Officers for Railroad Company," II, A, 4.

Insult and Assault by Servant of Taxicab Company. — "Where a traveler enters a taxicab, which is the vehicle of a common carrier, the relation of passenger and carrier is established, and the carrier becomes bound to protect him, not only from insult and assault by outsiders, but from its own servants." *Carlton v. Boudar*, 118 Va. 521, 527, 88 S. E. 174.

Provocation on the part of a passenger, such as interference with the servants in the exercise of their functions, abusive language, threats and assault upon servants, although justifying expulsion from the train or other vehicle of carriage, does not bar recovery for injury inflicted upon him by the exercise of more force than is actually or apparently necessary to repel the assault or prevent other threatened injury. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103; *McDade v. Norfolk, etc., R. Co.*, 67 W. Va. 582, 584, 68 S. E. 378. See post, "Ejection," V, F.

The evidence must at least show a present injury reasonably to be apprehended, in order that the company may escape liability for an assault and battery upon a passenger by one of those in charge of the train, however abusive may have been the language

or reprehensible the conduct of the passenger. *Norfolk, etc., R. Co. v. Brame*, 109 Va. 422, 63 S. E. 1018.

Provocation by insulting words alone does not justify an assault upon a passenger by the conductor. *McDade v. Norfolk, etc., R. Co.*, 67 W. Va. 582, 68 S. E. 378.

A brakeman is not justified in making an assault upon a disorderly passenger whom he has removed to the smoker, when the passenger makes a movement toward his hip pocket accompanied by the statement, "I'll see you later." *Norfolk, etc., R. Co. v. Brame*, 109 Va. 422, 63 S. E. 1018.

But those in charge of a train have the right to protect themselves against an injury, actual or threatened, and if in so doing, an injury is inflicted upon the passenger under such circumstances that he could not recover damages against the company's servant, neither can he recover against the company. *Norfolk, etc., R. Co. v. Brame*, 109 Va. 422, 63 S. E. 1018.

4. Injuries by Other Passengers or Strangers.

"While the relationship of passenger and carrier continues, the carrier is held to a very high degree of care in protecting its passengers not only from the wrongs and injuries of its servants, but of strangers also. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243; 6 Cyc. 598; 2 *Hutchinson on Carriers* (3rd ed.), sec. 980; *Brunswick & Western R. R. Co. v. Ponder* (Ga.), 97 Am. St. Rep. 152; *Dwinelle v. N. Y. Cent. & H. R. R. Co.*, 120 N. Y. 117, 17 Am. St. Rep. 611, 612." *Turk v. Norfolk, etc., R. Co.*, 75 W. Va. 623, 630, 84 S. E. 569.

"The general rule is that the carrier is bound to use and exercise the utmost skill and care of a prudent man in taking precautions to prevent one passenger from being injured by the

ignorant, negligent or reckless acts of another." *Norfolk, etc., R. Co. v. Birchfield*, 105 Va. 809, 822, 54 S. E. 879. See also, *Virginia R., etc., Co. v. Hubbard*, 120 Va. 664, 91 S. E. 618.

While it is the duty of a carrier of passengers to protect them against violence or disorderly conduct on the part of other passengers and strangers, when such violence or misconduct may be reasonably expected or prevented, yet it is not liable to an action for damages when it is not shown that the company had any notice of any act which justified the expectation that a wrong would be committed. The wrong or injury done to passengers by strangers must have been of such a character, and perpetrated under such circumstances, as that it must reasonably have been anticipated and naturally expected to occur in order to hold the carrier liable. *Virginia R., etc., Co. v. McDemmick*, 117 Va. 862, 86 S. E. 744.

"If there is danger of any one being injured, and the employees fail to remove, subdue or overpower the turbulent individual after knowing that there is danger, or after they ought to have known that there was danger if they exercised proper care, that failure is negligence, for the consequences of which the company is answerable." *Norfolk, etc., R. Co. v. Birchfield*, 105 Va. 809, 822, 54 S. E. 879.

Where a passenger in such an intoxicated condition that the conductor in charge of the car knew, or by the exercise of proper care ought to have known, that his condition would probably become a source of danger or menace to other passengers on the car, long enough before the happening of the injury complained of to the conductor to take proper precautions to prevent it, then it was his duty to take such precautions as were in his power to prevent the accident. *Virginia R., etc., Co. v. Hubbard*, 120 Va. 664, 91 S. E. 618.

D½. WHAT RISKS A PASSENGER ASSUMES.

A passenger on a railway carriage does not assume the risk due to the negligence of trainmen in making couplings, though he may have taken passage on a mixed train on a branch line. The duty of the carrier to carry him safely to destination is not limited by the character of the train on which the passenger is invited to travel. *Kennedy v. Chesapeake, etc., R. Co.*, 68 W. Va. 589, 70 S. E. 359.

Passenger Thrown to Floor by Lurching of Train. — The fact that a passenger, walking along the aisle of a coach, is thrown to the floor by the lurching of the train while passing rapidly over a curve in the road must be deemed to be an accident for which no one is responsible. The danger of such an accident is one of the risks which the passenger assumes. *Norfolk, etc., R. Co. v. Rhodes*, 109 Va. 176, 63 S. E. 445.

A person who rides on a vehicle not designed for carrying passengers assumes only such risks as are incident to the particular mode of conveyance. *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808.

E. NEGLIGENCE.

1. In General.

See ante, "In General," V, D, 1.

2. Contributory Negligence.

a. In General.

"Nothing is better settled than that a passenger can not recover where his own negligence has contributed to his injuries, no matter that the carrier may have also been negligent." *Lowry v. Baltimore, etc., R. Co.*, 74 W. Va. 791, 796, 82 S. E. 1101; *Pendleton v. Richmond, etc., R. Co.*, 104 Va. 813, 52 S. E. 574.

The fact that a man is a passenger does not relieve him from the duty of taking ordinary care for his own safety. *Pendleton v. Richmond, etc.,*

R. Co., 104 Va. 813, 52 S. E. 574; *Wright v. Atlantic, etc., R. Co.*, 110 Va. 670, 66 S. E. 848.

The rule which requires a person to look and listen before crossing a railroad track has little, if any, application to a passenger where, by arrangement of the railway company, it is necessary for him to cross the track in passing to and from the depot and the cars which he is to take or leave. *Washington, etc., R. Co. v. Vaughan*, 111 Va. 785, 69 S. E. 1035.

b. Cases Illustrative of Principles.

(1) Entering Conveyance.

Where one intending to become a passenger, and while the work of preparing the train on which he intends to take passage is going on, necessitating dangerous switchings and coupling of the cars, of which he has notice, and at a point where the carrier is not accustomed to receive passengers, and without notice to or invitation by any officer or agent of the carrier with authority, enters one of the coaches, and in attempting to go from one coach to another, is injured by a jolt or impact given to the coaches in making such switches or couplings, the carrier is not liable to him in damages for his injuries thus sustained. *Raines v. Chesapeake, etc., R. Co.*, 68 W. Va. 694, 70 S. E. 711.

(2) In Transitu.

Riding upon Open Platform. —

It is negligence in a passenger, under ordinary circumstances, to stand upon an open platform of a rapidly moving railroad car. If one voluntarily and unnecessarily takes such position and is injured in it he can not recover damages. *Norvell v. Kanawha, etc., R. Co.*, 67 W. Va. 467, 68 S. E. 288.

But to ride on a car platform is not always a negligent act. If the train is so crowded that one can not reasonably enter a car, it is not negligence to ride on the platform when the carrier

acquiesces in the use of such accommodations by collecting fare for the same or some other indicative act. *Norvell v. Kanawha, etc., R. Co.*, 67 W. Va. 467, 68 S. E. 288. See ante, "In Transitu," V, D, 1, d, (2).

Contributory Negligence of Railway Mail Clerk.—If in the case at bar, the plaintiff, a railway mail clerk, went to the door of the poorly lighted car in the performance of his duties, while the train was in motion, knowing that the safety bar had been removed, and was thrown out of the car because he failed to take proper precautions for his own safety, then it is clear that he was guilty of such contributory negligence as bars any recovery. *Carter v. Washington, etc., Railway*, 122 Va. 458, 95 S. E. 464.

(3) Leaving Conveyance.

Alighting from Moving Train. — Generally it is negligence per se for a passenger, in full possession of his senses and faculties, to alight from a train while it is in motion. *Hoylman v. Kanawha, etc., R. Co.*, 65 W. Va. 264, 64 S. E. 536; *Bartley v. Western Md. R. Co.*, 81 W. Va. 795, 95 S. E. 443.

But an attempt to alight from a moving car does not necessarily constitute negligence per se; but is a fact to be submitted to the determination of the jury under proper instructions of the court. *Newport News, etc., R. Co. v. McCormick*, 106 Va. 517, 56 S. E. 281.

Negligence of a railroad company in failing to stop its train long enough at a station to permit passengers to alight will not absolve a passenger from negligence in attempting to alight from the train after it has again been put in motion. *Farley v. Norfolk, etc., R. Co.*, 67 W. Va. 350, 67 S. E. 1116.

Where a passenger has been wrongfully carried by his station, or has not been given a reasonable time to leave

his train, it is his duty to submit for the time to the situation, secure in his right to recover ultimately for the inconvenience he may suffer, but he has no right to step from a moving train and engraft the consequences of his own rash act upon the antecedent negligence of the company and recover for both. *Chesapeake, etc., R. Co. v. Paris*, 111 Va. 41, 68 S. E. 398; *Newport News, etc., R. Co. v. McCormick*, 106 Va. 517, 56 S. E. 281.

The failure of a brakeman, who happens to be near by, to warn a passenger, standing on the steps of a car ready to alight, does not excuse the contributory negligence of the passenger in alighting while the car is in motion. *Bartley v. Western Md. R. Co.*, 81 W. Va. 795, 95 S. E. 443.

A railroad company is not liable for the act of its agent or conductor in negligently directing a passenger to jump from a moving train, when the circumstances show that the danger was obvious to the passenger himself, and when no force or threats were used to eject him. *Farley v. Norfolk, etc., R. Co.*, 67 W. Va. 350, 67 S. E. 1116.

Alighting at Places Other than Those Provided. — Where a railway company provides at its stations reasonably safe and convenient places or platforms from which to receive and discharge passengers, and makes reasonable and proper proclamation of the arrival of its trains, to enable passengers to leave the same by the ways provided, passengers traveling in the day time must use their senses and use the ways provided for alighting from trains; and if they neglect to do so, and attempt to alight elsewhere and at places plainly and obviously dangerous, and are injured by passing trains on parallel tracks without the fault of the railway company, they will not be entitled to recover from the railway company damages for the injuries thus sustained.

Lowry v. Baltimore, etc., R. Co., 74 W. Va. 791, 82 S. E. 1101.

Where a passenger alighted from a car at the wrong end of the train and on the wrong side of the car when he could have alighted safely at either of the other points, it was held that the carrier was not liable for injuries sustained by such passenger from stepping into a ditch and being struck by a freight train on the adjoining track. *Lowry v. Baltimore, etc., R. Co.*, 74 W. Va. 791, 795, 82 S. E. 1101.

Alighting, upon Conductor's Invitation, at Unsuitable Place and in Unsafe Manner.—The act of departing from a railroad train is usually of necessity a hurried act, and where a train has stopped at a station, and the conductor by his manner and attitude, is inviting a passenger to alight, and assists her in doing so, and it is getting late in the afternoon and the passenger can not see very well, but by a deliberate and careful inspection, could probably have discovered that she was about to alight at an unsuitable place and in an unsafe manner, it is not error to leave it to the jury to determine whether or not she was guilty of contributory negligence in alighting as she did. *Chesapeake, etc., R. Co. v. Tinsley*, 119 Va. 423, 89 S. E. 860.

Plaintiff was an employee of a locomotive works and was accompanying two dead locomotives, new engines, moving on their own wheels as freight, from Richmond, Virginia, to Chicago, Illinois, the two dead engines forming parts of a long through freight train. Upon a stoppage of the freight train, plaintiff hurriedly alighted from his engine immediately next to one of the main line passenger tracks of the company, upon which from his knowledge and experience of twenty years as a locomotive engineer he must have known that trains were likely to pass at any moment, and as to which danger he had been cau-

tioned twice upon that very morning. Plaintiff was struck by a passenger train just as he stepped from his dead engine, or he was struck just before he straightened up, after making an examination of the engine for the purpose of discovering whether it would be necessary because of the hot boxes to take it out of the train. The physical facts showed that plaintiff could not have looked, because if he had he would have seen the rapidly approaching passenger train which injured him. Held: That plaintiff was guilty of such gross negligence that he could not recover. *Pennsylvania R. Co. v. Jenkins*, 123 Va. 211, 96 S. E. 170.

In the instant case, an instruction upon the theory that the doctrine of discovered peril or the last clear chance might be applied by the jury was clearly erroneous, as appears from all of the accounts given of the accident by the plaintiff himself. It is manifest that if he was struck just as he stepped from his engine, there was no opportunity to save him from the consequences of his own negligence. It is equally evident that while a part of his body was across the rail and his head under the engine, a large part, if not all, of his body must have been concealed by the overhang of the tender and freight cars from the engineer of the approaching train on the parallel track, and that when he suddenly got up from under the engine in front of the passenger train by which he was immediately struck there was then no possible chance to save him from the consequences of his own negligence. *Pennsylvania R. Co. v. Jenkins*, 123 Va. 211, 96 S. E. 170.

The fact that the engineer of a train that was pulling a dead engine as a part of his train may have promised the passenger accompanying the dead engine to stop the train in a safe place to enable him to inspect said engine, did not relieve the passenger from the obligation to use ordinary care for his

own safety. *Pennsylvania R. Co. v. Jenkins*, 119 Va. 186, 89 S. E. 96.

Plaintiff accompanied, as care-taker, two new locomotives (dead engines) over the line of the defendant company. His fare as a passenger was paid, and he traveled in one of the engines, both of which were being hauled on their own wheels as parts of a through freight train. Plaintiff inquired of the conductor when and where the train would stop, so as to give him an opportunity to oil his engine. The conductor replied that there would be frequent stops and plaintiff would have ample time to oil and inspect the engine. The train stopped for a moment on an automatic block signal. Plaintiff, without communicating with the train crew, within a minute after the train stopped, alighted from the cab of his engine and stood on the piston-rod, for the purpose of examining and oiling the engine. Held, that plaintiff was guilty of contributory negligence, which barred his recovery for injuries occasioned by the starting of the train while he stood upon the piston-rod. *Chesapeake, etc., R. Co. v. Jones*, 120 Va. 784, 92 S. E. 820.

(4) After Leaving Conveyance.

Where a passenger in alighting from a north-bound train was forced to alight next to the south-bound track, she can not be excused for remaining upon the south-bound track, or in such close proximity thereto, as to be struck by a passing train thereon, when it appears that she had ample opportunity to get to a position of safety as all the other passengers who alighted from the same train did on that occasion. While there may be circumstances under which a pedestrian is forced to occupy such a position of danger, and hence is not negligent, he can not escape the imputation of negligence if he continues to occupy it when it is unnecessary to do so.

Gordon v. Director General, 128 Va. 426, 104 S. E. 796.

While a passenger has the right to pass from the place where the car is stopped for him to alight to the station building or off its premises, and the railway company should furnish him reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care and caution in avoiding danger. The degree of care to be exercised by him is governed by the danger to be encountered and the circumstances attending its exercise in the particular case. *Washington, etc., R. Co. v. Vaughan*, 111 Va. 785, 69 S. E. 1035.

2½. Negligence of Intervening Agency.

A carrier of passengers can not excuse the slightest negligence on its part, resulting in injury to a passenger, by showing negligence of an intervening agency, contributing to or proximately causing the injury. It must be wholly free from negligence on its part. *Brogan v. Union Tract. Co.*, 76 W. Va. 698, 86 S. E. 753.

5. Proximate Cause.

"While carriers of passengers for hire are held to the highest degree of care and diligence in guarding their safety, and the slightest imputation of negligence against which human care and skill can provide will make them responsible for any defect of machinery, or for any negligence on the part of their servants, to warrant a recovery for an injury to a passenger, the negligence complained of must stand as the proximate cause of the injury sustained—that is, it must be the direct and efficient cause of the injury. Under no circumstances is a carrier of passengers held as an insurer of their safety. *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467." *Virginia R., etc., Co. v. McDemmick*, 117 Va. 862, 869, 86 S. E. 744. See ante,

"Statement of Duty as to Care and Safety," V, D, 1, a.

Collision Only Proximate Cause of Injury.—Plaintiff is not guilty of negligence in riding on a truck unprovided with seats or rails, when it appears that a collision of the truck with a train of cars was the only proximate cause of his injury. *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808.

Act of Passenger or Invitee Proximate Cause of Injury.—Where a conductor wrongfully carries a passenger beyond his destination, it does not justify him in hazarding life and limb by leaping from a moving car; if he is injured, recovery is barred upon the principle that the negligence of the company in failing to stop the car was the remote cause, while the negligence of the passenger in leaping from the car while in motion was the proximate cause of the injury. *Newport News, etc., R. Co. v. McCormick*, 106 Va. 517, 56 S. E. 281. See ante, "Leaving Conveyance," V, E, 2, b, (3).

Passenger Entering Wrong Train.—Although a railroad company may have been negligent in causing a passenger to enter the wrong train, and be responsible to him for whatever loss or damage he sustained which could have been reasonably expected to result from such negligence, if the passenger, upon his own responsibility land without the knowledge of the company of his situation, steps from the train while it is in motion and is thrown under it and injured, he can not recover damages from the railroad company for the injury so inflicted, as his own conduct was the proximate cause of the injury complained of, even though the train was moving very slowly, and a person of ordinary care and prudence would not have apprehended any danger from alighting under like circumstances. *Chesapeake, etc., R. Co. v. Wills*, 111 Va. 32, 68 S. E. 395.

If a railroad company prematurely starts one of its trains, it is an act of negligence for the proximate results of which it is liable to one who is injured thereby, but as against an invitee on the train who seeks to alighting therefrom after it has gotten in motion, its negligence has ceased to operate, and if, without the knowledge of the company, he voluntarily attempts to alight and, in consequence thereof, is injured, there can be no recovery, as his own act is the proximate cause of his injury. It is immaterial whether he was negligent or not. The negligence of the company having ceased to operate, there could be no recovery against it on that account, and if he also was free from fault then the injury must be classed as an accident. *Chesapeake, etc., R. Co. v. Paris*, 111 Va. 41, 68 S. E. 398.

6. Exemptions and Limitations.

No Agreement for Exemption from Liability Valid.—Va. Code 1919, sec. 3930.

An express messenger who is injured through the negligence of a railroad company, over whose road he is being hauled, may recover from the railroad company, notwithstanding he has contracted in advance with the express company to release it and the railroad company from all liability for such injury. The contract is contrary to public policy, and void both at common law and by statute. Virginia Code (1904), § 1294c (25) (Code 1919, § 3930). *Shannon v. Chesapeake, etc., R. Co.*, 104 Va. 645, 52 S. E. 376.

F. EJECTION.

1. In General.

In expelling a passenger, the servants of a carrier act at their peril. *Fanshaw v. Norfolk, etc., Tract., Co.*, 108 Va. 300, 61 S. E. 790.

Misapprehension of Servants Will Not Excuse Carrier.—If a passenger is wrongfully expelled from a carrier's vehicle, the fact that the servants acted

under a misapprehension in supposing that he had been guilty of some misconduct will afford the carrier no excuse. *Fanshaw v. Norfolk, etc., Tract. Co.*, 108 Va. 300, 61 S. E. 790.

Expulsion for Conduct Interfering with Comfort or Endangering Safety of Other Passengers.—The right of a carrier to expel a passenger, or to restrict his privilege in the conveyance when his conduct is such as to seriously interfere with the comfort of other passengers, or to endanger their safety, is undoubted. *Fanshaw v. Norfolk, etc., Tract. Co.*, 108 Va. 300, 61 S. E. 790.

2. From Railroad Trains and Street Cars.

a. For Failure to Produce Valid Ticket or Pay Fare.

A regulation of a railway company requiring a passenger to produce a ticket to his destination or pay fare, under penalty of expulsion from the train, is a reasonable regulation and within the power of the carrier to make; but while a carrier may enforce this rule, it has no right to inflict wrongs and injuries upon a passenger in ejecting him from the train. The right to eject the passenger under such circumstances will not excuse the carrier from using more force or violence in doing so than is necessary, and if unnecessary force and violence be used, resulting in wrongs and injuries to the passenger, the carrier is liable for damages therefor. *Virginia, etc., R. Co. v. Hill*, 105 Va. 729, 54 S. E. 872.

It is the duty of a passenger on a railway train, if he has not the required ticket or token evidencing his right to travel on that train, to pay his fare or quietly leave the train when requested, and resort to his appropriate remedy for the damages he has sustained. If he attempts to retain his seat without paying his fare, and is expelled by the conductor, using no more force than is necessary, the carrier is not liable for

the expulsion. Nor in such case is the carrier liable for an injury to the passenger resulting from the use of force in ejecting him, made necessary by his own resistance and misconduct. In this case it appears that the plaintiff violently resisted the ejection, and received the injuries complained of in a subsequent altercation with another passenger who had assisted in ejecting him, but the instructions given by the trial court did not distinguish between the force used for which defendant was liable and that for which it was not liable, and hence were misleading. *Virginia, etc., R. Co. v. Hill*, 105 Va. 729, 730, 54 S. E. 872.

As between the conductor of a railway train and a passenger, the face of the passenger's ticket is conclusive evidence as to the extent of his right to ride, and a passenger has no right to ride beyond the destination indicated by his ticket, although he may have purchased and paid for a ticket to a point beyond, and, as explained by him to the conductor, his failure to have a proper ticket is due to the mistake of the ticket agent in giving him a ticket to an intermediate point. In such case, if ejected by the conductor for failure to pay the additional fare, the passenger's right of action against the carrier is not for the ejection, which is lawful but for the breach of contract. *Virginia, etc., R. Co. v. Hill*, 105 Va. 729, 54 S. E. 872.

As between the passenger and conductor, the conductor is the sole judge of the validity of the ticket tendered in payment of the fare. If he decides that the ticket is invalid, he has the right, upon so notifying the passenger, to require the passenger to pay his fare, and, if he refuses to do so, to eject him from the train. If the passenger is acting in good faith and honestly believes his ticket is good and that he is entitled to ride thereon, he is entitled to a reasonable time and a fair opportunity to

decide whether or not he will pay his fare. After he has had such time and opportunity, if he refuses to pay his fare, the conductor may eject him, and, when once lawfully ejected at a point at which that train would not otherwise have stopped, he has no right to re-enter that train upon tender of fare. The passenger's right to tender his fare and continue his journey, after having refused payment, continues until the conductor has rightfully given the engine the signal to stop the train, no longer. A tender after the signal to stop has been rightfully given comes too late to re-vive the right of the passenger which he lost by refusal to pay his fare. He may not thus interfere with the proper conduct of the carrier's business, and the convenience and safety of the traveling public. *Mangum v. Norfolk, etc., R. Co.*, 125 Va. 244, 99 S. E. 686.

In the instant case the passenger tendered a ticket that was out of date. Upon being told by the conductor that it was no good he tendered a second ticket that was out of date. The passenger gave no explanation of his conduct, and the conductor was not chargeable with knowledge of his thoughts. When told that his second ticket was no good, and he must pay his fare or get off, his reply was, "Well, pull it down," thereby refusing to pay his fare. If the conductor had then "pulled it down" and put him off, he would have been without fault, but before he could do so, the passenger recanted and offered to pay his fare. Aggravating as the situation was, the conductor should have accepted the fare when tendered, and not have put the passenger off. *Mangum v. Norfolk, etc., R. Co.*, 125 Va. 244, 99 S. E. 686.

A regulation by a railway company, restricting the holder of a certain class of tickets to special trains, nothing of the kind appearing on the tickets, will not justify the expulsion of the holder

of such ticket from a regular train, he having taken passage thereon without knowledge of the regulation. *De-Board v. Camden Interstate R. Co.*, 62 W. Va. 41, 57 S. E. 279.

b. For Riotous or Disorderly Conduct.

Va. Code 1919, § 4533; Barnes Code, p. 1203, ch. 145, § 31.

Right of Ejection Not Dependent Solely on Interference with Other Passengers.—Chapter 145, § 31 of the Code authorizes the ejectment, whether a passenger or not, of one who "behaves in a riotous or disorderly manner." The court held that, an amendment to an instruction which made the right of ejection for disorderly conduct depend solely on the safety of other passengers or interference "with their reasonable comfort or convenience" was erroneous because it misstated the law. *Wilhelm v. Parkersburg, etc., R. Co.*, 74 W. Va. 678, 684, 82 S. E. 1089.

Ejection for Angry Words Disturbing the Public Peace.—A conductor as a conservator of the peace has authority, under section 31, c. 145 (sec. 5233), Code 1913, to arrest without a warrant and eject from a car or train of cars conveying passengers any person, whether a passenger or not, who in his presence and the presence of other passengers and the public then assembled contends with angry words to the disturbance of the public peace and tranquility. And an instruction that tells the jury a conductor has no such right is erroneous. *Marcuchi v. Norfolk, etc., R. Co.*, 81 W. Va. 548, 94 S. E. 979.

What Force May Be Used—Right Not Limited to Necessity of Self-Defense.—A passenger on a railway car may lawfully be ejected therefrom, by the use of such force as is reasonably necessary for the purpose, for disorderly conduct or for the use of profane or vulgar language; and, in a case where the carrier relies on such

justification, an instruction limiting the right of ejection by a conductor to the necessity of self-defense is erroneous. *Frank v. Monongahela Valley Tract. Co.*, 75 W. Va. 364, 366, 83 S. E. 1009.

It is the duty of those in charge of a passenger train to preserve order and to remove disorderly persons to such safe and convenient place as will prevent annoyance to passengers and trainmen, and it may be necessary to stop the train and eject disorderly persons therefrom, employing only such force as is necessary to accomplish these ends, and overcome any resistance offered; but they have no right to commit any unnecessary violence, and if they do their principal must answer in damages. *Norfolk, etc., R. Co. v. Brame*, 109 Va. 422, 63 S. E. 1018.

c. For Refusal to Occupy Car, Compartment or Seat Assigned.

Va. Code 1919, §§ 3965, 3983.

d. Of Passenger Carried Beyond His Destination.

A railroad company which has carried a passenger beyond his point of destination has the right to put him off, but if it knows that he is in a helpless and irresponsible condition, although voluntarily imposed, it should not exercise its right of removal at a time or place, or under circumstances, where he will be exposed to great hazard. The company must exercise its right with due regard to the life and safety of such passenger. *Bragg v. Norfolk, etc., R. Co.*, 110 Va. 867, 67 S. E. 593.

e. Ejection from Freight Trains.

Manner. — Whether a man may be rightfully or wrongfully on a freight train, the conductor has no right to force him to jump from the train at a considerable height while it is in motion and in a dangerous place. *Styles v. Chesapeake, etc., R. Co.*, 62 W. Va. 650, 59 S. E. 609.

f. Right of Passenger to Re-Enter Train after Illegal Ejection.

If a passenger was illegally ejected from a train in the first instance, he did not lose his rights as a passenger, and had the right to re-enter it, though not put off at a regular station, and to continue his journey, upon tender of the regular fare; and, if the tender was refused, the subsequent acts of the servants of the company in arresting and confining him and bringing him before a police justice, were illegal, and he had the right to recover damages therefor. *Mangum v. Norfolk, etc., R. Co.*, 125 Va. 244, 99 S. E. 686.

g. For Whose Acts in Wrongfully Expelling Passenger Carrier Is Liable.

Although one is a special agent of a carrier, the carrier will not be liable for his action in assisting in the expulsion of a passenger from the carrier's train, where in doing so he was not acting as the carrier's agent, but as an officer deputized by the prohibition officers to assist them. *Clark v. Norfolk, etc., R. Co.*, 84 W. Va. 526, 100 S. E. 480.

h. Liability of Carrier for Acts Following Wrongful Ejection.

Where the ejection of a passenger is wrongful, all of the subsequent acts of the conductor and other employees of the company in arresting and confining the passenger and taking him before a magistrate are likewise wrongful, and for these wrongs the carrier is liable. *Mangum v. Norfolk, etc., R. Co.*, 125 Va. 244, 99 S. E. 686.

3. From Steamboats.

Ejection of Passenger on Steamboat for Refusal to Occupy Place Assigned Him or for Behaving in a Disorderly Manner.—Va. Code 1919, sec. 4024.

G. BAGGAGE.

What May Be Carried as Baggage. —The passenger may, as an incident of the contract for transportation,

carry with him as baggage such personal effects as are reasonably necessary for the convenience and comfort of one in his position in life and consistent with the purpose of the journey. *Schuster v. Norfolk, etc., R. Co.*, 85 W. Va. 658, 102 S. E. 476.

But the baggage service afforded by the carrier is only for the convenience of the passenger, and, except in rare cases, is limited to his own personal effects, and does not include those carried by him as a favor to another. *Schuster v. Norfolk, etc., R. Co.*, 85 W. Va. 658, 102 S. E. 476.

Carrier an Insurer of Passenger's Baggage—Duration of Liability. — A common carrier of passengers is an insurer of its passengers' baggage during transportation. A carrier's liability, as such, for a passenger's baggage continues during transportation, and for such a time thereafter as affords the passenger a reasonable opportunity to remove it. In determining what is a reasonable time for removing the baggage after reaching its destination, the peculiar circumstances surrounding each case must be looked to, such as the character of the station, the opportunities afforded by the common carrier for delivering baggage when called for, etc. *Chesapeake, etc., R. Co. v. Beasley*, 104 Va. 788, 790, 52 S. E. 566. See also, *Louisville, etc., R. Co. v. Riely*, 121 Va. 469, 93 S. E. 574.

Thus where a passenger reached his destination at twenty-five minutes after seven in the evening and his baggage was taken by agents of the railroad company to its baggage room to be weighed, and an hour afterwards the agent locked up the baggage and went home, the destruction of the baggage by fire about midnight rendered the railroad company liable as a common carrier. *Chesapeake, etc., R. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566.

"If a passenger does not call for his

baggage on arrival, the company can not leave it uncared for, or abandon it. Its strict responsibility as a carrier will cease after a reasonable time has elapsed, to enable the owner to claim it, and a modified liability like that of warehousemen will supervene. The neglect of the owner to call for the baggage within a reasonable time, changes the character of the liability, but does not terminate it." *Brown Shoe Co. v. Hardin*, 77 W. Va. 611, 615, 87 S. E. 1014.

Liability of Carrier as to Property Accepted as Baggage but Not Belonging to Passenger. — "Since the carriage of baggage is incidental to the contract for the transportation of the passenger, it follows that if the property accepted by the carrier as the personal baggage of the passenger does not belong to him, but to another with whom no contract for transportation has been made, the owner, in the absence of proof that the carrier has been guilty of negligence, can not recover for its loss or injury. And although property not owned by the passenger, but accepted by the carrier as his personal baggage, has been lost or injured through some negligent act on the part of the carrier, if such property did not constitute, or was not properly a part of the personal baggage of the passenger, the carrier would not be liable to the owner, since he could not be charged with liability for property which, had he been informed of its true ownership, he would have had the right to refuse." *Schuster v. Norfolk, etc., R. Co.*, 85 W. Va. 658, 102 S. E. 476, 477, quoting from 3 Hutchinson, Carriers (3rd ed.), sec. 1276.

"An exception to the rule is recognized which permits members of the same family, traveling together, to carry their effects in the same trunk, or one to carry in his trunk the effects of the others. In such cases it is generally held each may recover for

any loss to his baggage. 10 C. J. 1189. The closeness of the family relation and the community of property interests usually incident thereto afford ample justification for the exception." *Schuster v. Norfolk, etc., R. Co.*, 85 W. Va. 658, 102 S. E. 476, 477.

Where a passenger, without disclosing to the carrier the true ownership thereof, carries as her own baggage the personal effects of another, a relative, but not a member of her own immediate family, and who does not accompany her on the journey, the carrier is responsible therefor only in the capacity of gratuitous bailee, and the owner can not recover for loss or injury thereto, in the absence of proof that the carrier has been guilty of gross negligence or willful misconduct. *Schuster v. Norfolk, etc., R. Co.*, 85 W. Va. 658, 102 S. E. 476.

The mere presence of the name of the owner upon the trunk is not notice to the carrier that its contents are not those of the passenger. *Schuster v. Norfolk, etc., R. Co.*, 85 W. Va. 658, 102 S. E. 476.

Limitation of Carrier's Liability. — The carrier's liability with respect to the baggage of the passenger can only be limited by express contract between the passenger and carrier. It can not be done by notice of any ex parte regulation of the carrier, however reasonable. And an ex parte stipulation on a ticket limiting the common-law liability of a carrier with respect to the baggage of the passenger, is no evidence of a contract in the absence of all evidence of any knowledge or assent to it by the passenger, at the time the ticket was purchased. *Louisville, etc., R. Co. v. Rieley*, 121 Va. 469, 93 S. E. 574.

A passenger was traveling on a mileage ticket purchased at a reduced price, and signed a contract providing that in case of loss or damage to baggage no claim should be made therefor in excess of \$100. Baggage worth

\$600 was lost through the negligence of the carrier, and it was held liable for the full amount. *Chesapeake, etc., R. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566. See ante, "Contracts or Rules of Exemption and Limitation," III, C. **Railroad Companies Required to Check Baggage.** — Va. Code 1919, § 3990.

Right to Sell Unclaimed Baggage for Transportation and Storage Charges—Notice of Sale.—Va. Code 1919, § 3933.

How Proceeds of Sale After Payment of Charges Disposed of. — Va. Code 1919, § 3934.

VI. ACTIONS.

½A. AGAINST UNINCORPORATED CARRIERS.

Against Whom Suit May Be Brought.—Va. Code 1919, § 3931; Barnes Code, p. 1044, ch. 103 § 9.

On Whom Process against, or Notice to, Carrier, May Be Served. — **Service by Publication.** — Va. Code 1919, § 6067; Barnes Code, p. 1108, ch. 124, § 9.

A. AGAINST CARRIERS OF GOODS.

1. Right of Action.

Right of Action of Consignor and of Consignee.—A consignor of goods who has made a special contract with a common carrier to carry them, whether he has any interest in them or not, or who has any interest or property in them, general or special, may maintain an action against such carrier for failure to deliver the goods within a reasonable time, or for the loss of or injury to them. An action may also be maintained by the consignee, if he have any interest in the goods, but there can be but one recovery. *Norfolk, etc., R. Co. v. Norfolk, etc., Exch.*, 118 Va. 650, 88 S. E. 318.

A consignee of a bill of lading under a contract of shipment by a common

carrier has a beneficial interest therein, entitling him to sue for and, upon proper proof, recover damages for loss or injury thereto, or for unreasonable and negligent delay in delivery. *Williamsport, etc., Lumber Co. v. Baltimore, etc., R. Co.*, 71 W. Va. 741, 77 S. E. 333.

Where goods are sold f. o. b. cars of a common carrier at a designated point, and are delivered to the carrier at such point and are accepted by him without any limitation on his common-law liability and are injured in transit, the right of action therefor is in the consignee-purchaser. *Vaughan Mach. Co. v. Stanton Tanning Co.*, 106 Va. 445, 56 S. E. 140.

Right of Action of Consignor against Initial Carrier for Loss of or Damage to Goods Received for Carriage to Ultimate Destination.—Va. Code 1919, § 3926.

Demand for goods, wrongfully delivered by a common carrier, is not a prerequisite to the maintenance of an action for breach of the contract of carriage. *Clarke-Lawrence Co. v. Chesapeake, etc., R. Co.*, 63 W. Va. 423, 61 S. E. 364.

Receipt by the owner of the proceeds of the sale of goods wrongfully delivered is no bar to an action against the carrier for damages for the wrongful delivery. *Clarke-Lawrence Co. v. Chesapeake, etc., R. Co.*, 63 W. Va. 423, 61 S. E. 364.

Assignability of Right of Action.—A right of action against a common carrier for injury to goods while in course of transportation is assignable. *Williamsport, etc., Lumber Co. v. Baltimore, etc., R. Co.*, 71 W. Va. 741, 77 S. E. 333.

2. Pleading and Practice.

a. Form and Nature of Action.

An action against a common carrier for failure to deliver goods within a reasonable time, or for the loss of or injury to them, may at the election

of the consignor, be either upon the special contract, or in tort for failure by the carrier to perform its duty. *Norfolk, etc., R. Co. v. Norfolk, etc., Exch.*, 118 Va. 650, 88 S. E. 318.

"Not every wrongful act on the part of a common carrier authorizes an action against it as for a conversion.

Where goods, intrusted to a common carrier, are injured only, the owner's remedy is for damages for the injury, not their value. *Hutch. Com. Car. § 770a*. For delay in delivery, the action must be for damages, resulting, not the value of the property. *Hutch. Com. Car.*, § 328; *Ryland v. Chesapeake, etc., R. Co.*, 55 W. Va. 181, 46 S. E. 923." *Dudley v. Chicago, etc., R. Co.*, 58 W. Va. 604, 607, 52 S. E. 718.

An inspection of property shipped by a common carrier in sealed cars, unauthorized permitted by such carrier, at the point of destination, in consequence of which the consignor who was also the consignee, was prevented from consummating a contemplated sale thereof, does not amount to a wrongful delivery by the common carrier, so as to make it liable for the value of the property, as for a conversion thereof. *Dudley v. Chicago, etc., R. Co.*, 58 W. Va. 604, 52 S. E. 718.

b. Proper Parties to Proceedings.

In Whose Name Action Should Be Brought.—"When the carrier has subjected himself to liability for the loss of the goods, or for injury done to them while in his custody, and it becomes necessary to compel him to make compensation to the injured party by an action at law, the first question to be determined is in whose name the action must be brought. This is, however, a question about which there can be but little difficulty. The presumption of the law is that the party to whom the goods are consigned is their owner and the person who is entitled to sue for the damage, and the action should in most cases be

commenced in his name." *Vaughan Mach. Co. v. Stanton Tanning Co.*, 106 Va. 445, 450, 56 S. E. 140.

Owner May Sue When Goods Billed in Agent's Name. — The owner of goods may sue in his own name to recover damages for an injury negligently inflicted thereon by a carrier, although they were billed in the name of the owner's agent, where the contract of shipment was made for the benefit of the owner and that fact was known to the carrier. This is all the privity that is necessary. *Norfolk, etc., R. Co. v. Crull*, 112 Va. 151, 70 S. E. 521.

c. Process.

Service of. — *Barnes Code*, ch. 124, § 9.

d. The Declaration or Petition.

Declaration in Assumpsit upon Express Contract. — A declaration against a common carrier for failure to deliver goods which sets forth the consideration, the promise, and the breach, and that notice in writing was given by the plaintiff to the defendant as prescribed by the bill of lading, is good as a declaration in assumpsit upon an express contract. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161.

In an action against an interstate carrier for loss of goods, it is not necessary to declare specially on the receipt or bill of lading; the averment of defendant's undertaking and the breach of it, in general terms, is sufficient. *McCormick v. Southern Exp. Co.*, 81 W. Va. 87, 93 S. E. 1048, 1049.

Averment of Consideration. — The averment in a declaration against a common carrier, that the defendant, in consideration of the delivery to it of certain goods, issued its bill of lading, by which it "undertook, promised, and agreed" to carry the goods to their destination, is not such an averment of consideration as is necessary in assumpsit, and renders the count one in

tort and not in assumpsit. The averment of consideration must be direct and explicit, and not by way of inducement merely. *Pennsylvania R. Co. v. Smith*, 106 Va. 645, 56 S. E. 567.

If a carrier is liable because of a connecting carrier the relationship of the carriers must be averred in the pleadings when it appears that the loss occurred on another line. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161.

If, in an action against a common carrier to recover for a loss on a connecting line, it be averred in the declaration that the two carriers were joint contractors, and in an amended declaration this averment be omitted and nothing equivalent or akin to it be inserted, and there is a verdict against the defendant, it should be set aside, for without some such averment, or an averment of some kind to fix the liability of the defendant, there could be no recovery against it, and it is impossible to tell on what count the jury found their verdict. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 98, 51 S. E. 161.

"In suing the last of several connecting carriers for a loss, it is necessary to allege that the carriers were joint contractors, or that the property was delivered to and received by the defendant." *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 105, 51 S. E. 161.

"If, however, several carriers associate and form a continuous line, and contract to carry goods through for an agreed price, which the shipper pays in one sum, and which the carriers agree to divide among themselves, they are jointly and severally liable for a loss on any part of the line, and the word "partners," or any particular word to describe the relation existing between the carriers, need not be used in the petition." 3 *Ency. Pl. & Pr.* 853." *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 105, 51 S. E. 161.

d $\frac{1}{2}$. Notice of Motion for Judgment.

The notice in the instant case sufficiently alleged that the plaintiff delivered to the defendant 269 barrels of potatoes to be transported from Concord, Va., and delivered to the plaintiff at Pitcairn, Pa., that the defendant negligently failed to transport said potatoes to their destination with reasonable dispatch, and that by reason thereof the plaintiff sustained the damages stated in the notice. If these facts were proved, the notice stated a case for recovery, and it is immaterial whether the notice stated the correct measure of damages or not. The extent of plaintiff's recovery was to be fixed by evidence. *Chandler v. Baltimore, etc., R. Co.*, 125 Va. 63, 99 S. E. 794.

A notice of motion for a judgment for damages against a carrier for negligently failing to transport potatoes delivered to it by plaintiff with reasonable dispatch, under section 3211 of the Code of 1904, as amended by Acts 1916, p. 760 (Code 1919, § 6046), was demurred to by defendant because it showed that plaintiff was seeking to recover special damages and there was no allegation in the notice that the defendant was given any notice that special circumstances or urgency required unusual dispatch, or that special damages would be required. Plaintiff denied that the notice made a claim for special damages. The supreme court of appeals held that it was unnecessary to pass on that question. If the notice stated with necessary particularity a case which, if proved, entitled the plaintiff to recover, it was sufficient on demurrer. If the plaintiff had sued in assumpsit, he could have united counts for special damages with counts for general damages in his declaration, and it would not have been subject to demurrer, and he may do the same thing in a proceeding by motion. *Chandler v. Baltimore, etc., R. Co.*, 125 Va. 63, 99 S. E. 794.

Such notice of motion for a judgment was also demurred to by defendant because the notice showed that there was a f. o. b. sale of the potatoes shipped, which disentitled the plaintiff to sue. It did not appear from the notice whether any bill of lading was ever issued or not, although the Carmack amendment required one, but it did appear that the consignor was also the consignee, and presumably had never parted with his title to the potatoes. The statement that the potatoes had been sold, taken in conjunction with other allegations of the notice, was no evidence that the plaintiff had parted with his title, even if that could affect the right to maintain the action. Held: That this ground of demurrer should have been overruled. *Chandler v. Baltimore, etc., R. Co.*, 125 Va. 63, 99 S. E. 794.

e. Variance.

In a suit by a passenger against a carrier a declaration, which counts as upon a special contract for carriage between the plaintiff and defendant for hire and reward, is not supported by proof of a contract between the county court and the defendant company, nor by the implied contract between the carrier and passenger; the variance being fatal. *Jenkins v. Chesapeake, etc., R. Co.*, 61 W. Va. 597, 57 S. E. 48.

h. Instructions.

Where the evidence showed that refrigerating cars were not used for the transportation of spinach, it was not error to refuse an instruction which made the failure of the shipper to use such a car for shipping spinach a ground to excuse the carrier from liability for injury to the shipment. *Norfolk, etc., R. Co. v. Norfolk, etc. Exch.*, 118 Va. 650, 88 S. E. 318.

On the trial of an action to recover for loss of goods by fire, when the liability of carrier has changed to that of a warehouseman, it is error to sub-

mit to the jury the question of liability as carrier. *Hurley & Son v. Norfolk, etc., R. Co.*, 68 W Va. 471, 69 S. E. 904.

3. Evidence.

a. Presumptions and Burden of Proof.

When Schedules of Rates Are Prima Facie, the Schedules of the State Corporation Commission.—Va. Code 1919, § 3920.

When Freight Rates Conclusively Presumed Reasonable.—Va. Code 1919, § 3920.

Loss or Damage to Property Received for Transportation Prima Facie Evidence of Negligence.—Va. Code 1919, § 3926.

At common law, upon the proof merely of delivery to a common carrier of inanimate goods for transportation and the proof of their non-delivery, the law implies that they have been lost by the negligence of the common carrier or by reason of some cause for which it is responsible, and the plaintiff suing for damages occasioned by such loss is relieved of the burden of proof of the cause of the loss. *Chesapeake, etc., R. Co. v. National Bank*, 122 Va. 471, 95 S. E. 454.

Effect of Evidence of Delay.—When evidence of unusual delay is adduced, a prima facie case of negligence is made out, and the burden then devolves on the carrier to explain the delay and to show that it arose from some cause other than the carrier's negligence or that of its agents or servants. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684; *Norfolk, etc., R. Co. v. Wilkinson*, 106 Va. 775, 780, 56 S. E. 808.

"It rests on the carrier for the additional reason that such facts are peculiarly within the knowledge of the carrier, and not easily ascertained by the shipper." *Norfolk, etc., R. Co. v. Wilkinson*, 106 Va. 775, 780, 56 S. E. 808, quoting 5 Am. & Eng. Ency. of L. (2d Ed.) 254, 255.

Connecting Carriers — Burden of Proof as to Negligence.

—In Virginia it has been held that where goods shipped on a through bill of lading to a point beyond the line of the initial carrier, arrive at destination in an injured condition and the initial carrier is sued for the injury, the burden is upon him to show that the property was not injured on his line. Section 2941l of the Code of 1904 (Code 1919, § 3926) declares that whenever property is received by a common carrier, loss or injury to it shall be prima facie evidence of the negligence of such carrier. *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17; *Norfolk, etc., R. Co. v. Wilkinson*, 106 Va. 775, 780, 56 S. E. 808.

And in the same state it has been held that in an action for damages, brought under § 1295 of the Virginia Code of 1887 (Code 1919, § 3929) against initial and connecting carriers for delay in the transportation and delivery of goods, if the shipper proves the delivery of the goods to the initial carrier, the delay and the resulting damages, and the defendants introduce no evidence to show by whom the delay was occasioned, the shipper is entitled to a judgment against the initial carrier for the damages shown. Upon such a showing, it was held, the burden is on the initial carrier to show proper delivery to the connecting carrier and freedom from negligence on its part. *Norfolk, etc., R. Co. v. Wilkinson*, 106 Va. 775, 56 S. E. 808.

But in West Virginia it has been held that delivery of the lading to the first carrier in condition for safe transportation over its line warrants the presumption, in absence of proof to the contrary, that the lading remained in such condition when received by each succeeding connecting carrier, including the terminal carrier, and that the loss, injury or delay was occasioned by the latter's negligence. *Williams-*

port, etc., *Lumber Co. v. Baltimore, etc.*, R. Co., 71 W. Va. 741, 77 S. E. 333.

Burden to Prove that Injury Falls Within Exemption Contract.—In an action against a carrier for injury to inanimate goods consigned to it for carriage, where the carrier relies upon a special contract exempting it from liability, the burden of proof is on the carrier to prove that the injury falls within the exception contained in the special contract. *Chesapeake, etc., R. Co. v. National Bank*, 122 Va. 471, 95 S. E. 454.

b. Admissibility.

Admissibility of Parol Evidence to Vary Bill of Lading.—A bill of lading like other contracts in writing, may not be varied by parol in the absence of clear and convincing evidence of fraud, accident or mistake. *Frasier v. Norfolk, etc., R. Co.*, 10 Va. Law Reg. 247. See post, PAROL EVIDENCE.

c. Weight and Sufficiency.

Evidence Sufficient to Support Verdict in Relation to Delay in Transportation.—In the instant case the evidence was sufficient to support the verdict of the jury, which found, in effect, that there was unreasonable delay in the transportation of a load of potatoes delivered to defendant carrier by plaintiff, and that that delay was the occasion of the loss of a sale by the plaintiff to a third party, although the delay was only four days. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684.

4. Questions of Law and Fact.

Proximate Cause of Loss.—Plaintiff being notified by defendant carrier of the arrival of five carloads of Irish potatoes directed the carrier to deliver them to various connecting carriers, which the carrier promised to do promptly and this was the duty of the carrier under its published tariff. After this direction the weather which was already cold, became colder. Five

days later, the carrier addressed a communication to the plaintiff, saying that they were holding the potatoes at its risk, and asking it to arrange to make delivery promptly to avoid freezing. Upon previous occasions, when the carrier could not make prompt delivery, it would request the plaintiff to haul the potatoes away from its dock and this would be done. The commodity, potatoes, was one especially liable to injury from freezing, and the question presented was whether or not, under these circumstances, the alleged negligence of the carrier was an active concurring and contributing cause of the loss from the freezing of the potatoes, so as to make it liable, or whether the freezing weather was the sole proximate cause thereof so as to exempt it from liability. The carrier claimed, as a matter of law, that it was exempt from liability. The trial court, under proper instructions, submitted the question to the jury and its action in so doing was sustained by the supreme court of appeals. *Merchants, etc., Co. v. Upton*, 127 Va. 406, 103 S. E. 616. See ante, "Act of God," III, B, 1, b; "Delay," III, B, 1, c.

Amount of Damages.—"It was the province of the jury to ascertain and determine the amount of damages, especially in view of the evidence before it. With this right and privilege the court improperly interfered. *Riddle v. Core*, 21 W. Va. 530; *Humphreys v. West*, 3 Rand. (24 Va.) 516; *N. & W. R. R. Co. v. Harman*, 83 Va. 553, 8 S. E. 251." *Williamsport, etc., Lumber Co. v. Baltimore, etc., R. Co.*, 71 W. Va. 741, 748, 77 S. E. 333.

5. Damages.

Measure of Damages for Loss of Goods.—In case of loss of goods by a common carrier, the measure of damages is the value of the goods at the place of destination, with interest from the time they should have been delivered, less costs of transportation,

notwithstanding the bill of lading limits liability to value at place of shipment. The limitation will be disregarded as against public policy. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161. See ante, "Contents or Rules of Exemption and Limitation," III, C.

Measure of Damages Where Goods Are Injured in Transit.

Where the goods have not been lost or destroyed during the transportation, but are delivered in a depreciated condition attributable to causes for which the carrier is responsible, the measure of damages is the difference, after deducting the cost of transportation, between their value as actually delivered and as they should have been delivered, with interest, and with such other damages as have naturally and proximately resulted from the injury. *Clarke-Lawrence Co. v. Chesapeake, etc., R. Co.*, 63 W. Va. 423, 61 S. E. 364.

Generally, the place of destination is to be taken as the basis for determining the damages to goods injured in transit; the measure being the difference between what the goods were worth at the place of destination, as injured, and what they would have been worth if delivered in good order. And this rule referring the measure of damages to the place of destination is applicable, where goods are taken for transportation to a point beyond the initial carrier's line. *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17.

Measure of Damages for Delay in Transportation or Delivery.

— The measure of damages in an action against a carrier for delay in the transportation and delivery of goods is the loss which the fulfillment of the contract would have prevented, or which the breach of it has entailed. The general intent of the law is to put the injured party, so far as money can do it, in the same position as if the contract had been performed. Nor-

folk, etc., *R. Co. v. Wilkinson*, 106 Va. 775, 56 S. E. 808.

The general rule is that the measure of damages for loss of the entire value of goods occasioned by delay in the transportation of them is the market value of the goods at the place of destination at the time when the delivery of them should have been made, plus the other proximate damage. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684.

But where, through the unreasonable delay of the carrier and its action in wrongfully disposing of plaintiff's goods to another, plaintiff loses the full value of the goods, plaintiff's damages are to be estimated on the basis of the price that plaintiff was to receive under a contract of sale to a third party, plus the other proximate damage, where the stipulated price at which the goods were sold at the time and place of shipment was much less than the market price at destination when the goods should have arrived, so that the market price at destination was greater than the stipulated selling price, plus the freight. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684.

Where delay in the transportation has caused the loss of a sale at a stipulated price, such delay is the proximate cause of the loss to the plaintiff of the full value of the goods, where the subsequent action of the carrier in the wrongful sale of the goods has prevented the plaintiff from himself selling the goods on the market or taking any other steps to minimize the damage which he has suffered. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684.

But where there is delay merely without conversion, even though the delay is such as to render the carrier liable, and the plaintiff still retains the ownership and control of the property, so that it is within his power to take some steps to minimize the dam-

ages, the measure of damages is not the full value of the goods, but the loss proximately caused by the delay. *New York, etc., R. Co. v. Chandler*, 129 Va. 695, 106 S. E. 684.

Where an action was brought against a railroad company for delay in delivering a car of lumber, the measure of damages was equal to the difference between the market value of the lumber, at the date of shipment, as evidenced by the contract price which had been offered shipper at that date, and the market price of the same lumber when it was sold, after the delay in delivery, with the storage charges during the time the lumber was held for a rising market, the holding for a rising market and the expense incident thereto having been made necessary by the delay in delivering shipment according to contract. *Norfolk, etc., R. Co. v. Wilkinson*, 106 Va. 775, 56 S. E. 808.

Measure of Damages for Delay in Delivery of Goods Reshipped to Consignor.—In an action against a carrier to recover the sale price of goods which the plaintiff has had reshipped to him from a distant state over the lines of connecting carriers because the consignee refused to accept them, but the delivery of which has been delayed after arrival because of the inability of the carrier to get an account of back charges and storage from the connecting carriers, where there is no proof of any such appropriation of the goods as would charge the carrier with the original sale price thereof, and there is no claim in the pleadings or proof of any other loss or damage to the goods, the only damage, if any, which the plaintiff can recover is that resulting from a failure to deliver the goods after their return, and the measure of this damage is the difference between the market value of the goods at the time they should have been delivered to the plaintiff and the

time the defendant did surrender the possession, or was ready and offered to surrender it. *Norfolk, etc., R. Co. v. Potter*, 110 Va. 427, 66 S. E. 34.

Measure of Damages for Wrongful Delivery.—A wrongful delivery by a common carrier is technically a conversion of the goods, and the measure of damages is the value of the goods at the place stipulated for delivery, and interest thereon from the date on which the delivery should have been made; but, if the goods be reclaimed by the carrier and tendered or delivered to the consignee, or the proceeds thereof paid to him, such tender, delivery or payment will mitigate the damages. *Clarke-Lawrence Co. v. Chesapeake, etc., R. Co.*, 63 W. Va. 423, 61 S. E. 364.

Measure of Damages Where Delivery Is at Wrong Destination.—Where the delivery by the carrier is merely at the wrong destination, and the owner ultimately receives his goods, the measure of damages is the same as in cases of delay, with necessary expenses added. *Clarke-Lawrence Co. v. Chesapeake, etc., R. Co.*, 63 W. Va. 423, 61 S. E. 364.

Damages with Reference to Particular Use of Property.—"As said in 3 *Sutherland on Damages* (3rd ed.), section 913: 'Damages are given against a carrier with reference to a particular use for which property is delivered for transportation when such use is brought to his notice at the time of contracting. In a late English case the principle is stated, and said to be settled, that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to him from which the object ought in reason to be inferred, so that it may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.' " *Adams*

Exp. Co. v. Allen, 125 Va. 530, 539, 100 S. E. 473.

In cases involving delay in transportation of traveling theatrical companies or their properties, the authorities are generally in accord in holding the carrier liable for damages occasioned the consignee by the loss of the peculiar use to which the theatrical company and their properties would have been put but for the unreasonable delay in their transportation. As held in these cases, in substance, while the use in question is peculiar and the resultant damages for the loss of such use are peculiar, as compared with cases involving delay in delivery of a different character of shipments, the damages are not for that reason special damages. The damages are different from the ordinary damages in cases of delay in the transportation of ordinary merchandise, but they are, nevertheless, but the ordinary damages from delay in the transportation of such peculiar kind of freight. *Weston v. Boston, etc.*, R. Co., 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825; *Illinois Cent. R. Co. v. Byrne*, 205 Ill. 9, 68 N. E. 720; *Adams Exp. Co. v. Allen*, 125 Va. 530, 539, 100 S. E. 473.

When Notice to Carrier Required of Use to Which Article Is to Be Put.—Special information does not have to be given to a carrier of the ordinary and usual use to which an article shipped is to be put in order to render the carrier liable for damages resulting from the loss of such ordinary and usual use, by reason of unreasonable delay in the transportation of the article. *Adams Exp. Co. v. Allen*, 125 Va. 530, 100 S. E. 473.

Actual notice to the carrier of the precise use to which the article shipped is to be put has never been held by the authorities on the subject as requisite, except when damages are claimed for loss of some special use to which the article was intended to be put, different

from its usual and ordinary use. And, even in such cases, information given the carrier of peculiar features of an article having a special as well as an ordinary use, or that information as given by the name of the consignee and the appearance of the article itself, may often be sufficient to charge the carrier with knowledge of the special use to which the consignee of the goods intends to put them. *Adams Exp. Co. v. Allen*, 125 Va. 530, 100 S. E. 473.

Whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to him from which the object ought in reason to be inferred, so that it may be taken to have been within the contemplation of the parties, damages may be recovered for the natural consequences of the failure of that object. *Adams Exp. Co. v. Allen*, 125 Va. 530, 100 S. E. 473.

If goods, entrusted to a common carrier for shipment, have been sold, in advance of delivery, for use on a special occasion, and in view of peculiar and unusual conditions, at prices yielding profit, and such expected profit is lost by reason of delay in carriage or a wrongful delivery, it is not recoverable as part of the damages, unless the carrier had knowledge of the existence of the contracts or the special purpose for which the goods had been purchased and shipped. *Clarke-Lawrence Co. v. Chesapeake, etc.*, R. Co., 63 W. Va. 423, 61 S. E. 364.

If an article is intended for use in business at destination, and the carrier unreasonably delays its transportation, the owner can not recover for the loss of its use during the delay, or the profits which he would thereby have made if it had been seasonably delivered, unless he alleges and proves that the carrier, at the time the contract for its transportation was made, was informed of the special use to which it was to be put. *Clarke-Lawrence Co. v. Chesapeake, etc.*, R. Co., 63 W. Va. 423, 61 S. E. 364.

Proof that the carrier had knowledge of the general use to which the article was to be put will not be sufficient to charge him with liability for loss of its use or the profits which would thereby have been made. The special circumstances of the case requiring care or expedition must have been brought to his attention in such a way that his acceptance of the article under the circumstances could fairly be said to amount to an assumption of the risk which naturally and proximately would follow from his default. *Clarke-Lawrence Co. v. Chesapeake, etc., R. Co.*, 63 W. Va. 423, 61 S. E. 364.

If two or more articles be shipped under an aggregate valuation thereof agreed upon, and part of them be delivered and the balance lost, the shipper can recover only a portion of the agreed valuation, determinable by the ratio of the aggregate value of the property to the amount stipulated in the agreement as such value. *Fielder v. Adams Exp. Co.*, 69 W. Va. 138, 71 S. E. 99.

B. AGAINST CARRIERS OF LIVE STOCK.

1/2. Right of Action.

For Refusal to Receive, Transport or Deliver.—Va. Code 1919, § 4006.

1. Pleading and Practice.

a. When Joint Action Maintainable against Initial and Connecting Carrier.

A joint action of tort may be maintained against the initial and connecting carrier for failure to deliver in good condition a consignment of horses to be transported by them from St. Louis, Mo., to Norfolk, Va. Both defendants are necessary factors in the connected undertaking to carry the horses from the one point to the other. There is concert of action in consummating a common purpose, and, if the horses are injured in transit, there is joint, concurrent negligence which makes the defendants joint tort feorsors. The de-

fendants being engaged in a connected or common undertaking, the fact that their negligent acts are not simultaneous, but come successively into operation in producing the injury, does not destroy their liability as joint tort feorsors. *Norfolk, etc., R. Co. v. Crull*, 112 Va. 151, 70 S. E. 521.

b. Venue.

The breach of duty of a carrier to deliver goods in good condition takes place where delivery is to be made, and the place of breach is the place where the cause of action arises. Hence upon a shipment of horses from St. Louis, Mo., to Norfolk, Va., the failure to safely deliver at Norfolk gives rise to a cause of action at that place. *Norfolk, etc., R. Co. v. Crull*, 112 Va. 151, 70 S. E. 521.

c. The Declaration.

Declaration Stating Good Cause of Action.—In an action against a common carrier, for loss of live stock in shipment the declaration stated a good cause of action. *Norfolk, etc., R. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 463.

Declaration Held Demurrable—Mistaken in Bill of Lading.—A declaration, averring that plaintiff delivered to defendant, a carrier by railroad, certain cattle requesting that they be consigned to a certain point, and that the bill of lading which was signed by plaintiff and delivered to him before the shipment left the point of consignment, provided that the cattle should be consigned to another and a different point and setting up an alleged mistake of the agent of the carrier in inserting the wrong designation in the bill of lading, is demurrable for failure to disclose such circumstances as would justify parol evidence to vary the written contract. *Frasier v. Norfolk, etc., R. Co.*, 10 Va. Law Reg. 247.

An averment that plaintiff signed the bill of lading without reading it shows him guilty of negligence, and is demurrable, particularly where the declaration shows, aliunde, that at the time

of signing, his shipment of livestock was not actually in transitu. *Frasier v. Norfolk, etc., R. Co.*, 10 Va. Law Reg. 247.

2. Evidence.

a. Presumptions and Burden of Proof.

Burden to Show Cause of Damage.—

In an action for damages to live stock, the burden is upon the carrier when it receives for transportation live stock in good condition, unaccompanied by the owner or his agent, and delivers it in damaged or bad condition, to show the cause of the damage. *Southern R. Co. v. Finley*, 127 Va. 132, 102 S. E. 559.

Burden to Justify Delay.—Proof of failure to deliver cattle at place of destination within the usual or schedule time, establishes a prima facie case of negligence, and makes it incumbent upon the railroad company to justify the delay. *Woodford v. Railroad Co.*, 70 W. Va. 195, 73 S. E. 290.

Burden Where Contract Exception Is Relied on as Defense.—In an action against a carrier for injury to a shipment of live stock, where a contract exception is relied on as a defense, the burden of proof, at the least, is on the carrier in two particulars, namely: (a) It must prove that, at the time the injury may have occurred, the special contract exception relied on was in operation; and (b) it must at least prove (unless such fact appears from the plaintiff's evidence) that the injury was of such a nature that it may, with equal probability, in accordance with the evidence have been occasioned by causes which were within the contract exception relied on. Certainly this is true where the proof of the plaintiff shows that the injury was due to human agency. *Chesapeake, etc., R. Co. v. National Bank*, 122 Va. 471, 95 S. E. 454.

The defendant in this case did not prove by any evidence before the court that the injury complained of was of such a nature that it might with equal probability have been occasioned by

causes which were within the exception from liability clause of the contract relied on by defendant. On the contrary, the evidence for the plaintiff established the affirmative fact that such injury was of such nature that it was not occasioned by causes within the exception. *Chesapeake, etc., R. Co. v. National Bank*, 122 Va. 471, 95 S. E. 454.

b. Admissibility.

Evidence as to Expense of Training

Horses.—If, in an action against a carrier to recover damages for injuries inflicted on horses in transit, the carrier proves the prices paid by the plaintiff for the horses, the plaintiff may, in rebuttal, show that, in addition to the price paid for the horses, he also incurred heavy expenses in training and developing the horses in order to obtain the price he expected to receive on the market for which they were purchased. *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17.

Injury to Horses—Opinion Evidence.

—In an action against a carrier to recover damages for an injury inflicted on horses while in transit, a witness who has had large experience with horses, and who knew the particular horses for whose injury the action is brought, their temperament and characteristics, and who knew the kind of stalls in which they were shipped and is familiar with the effect of such confinement upon horses of that class, may give his opinion as to the effect of shipping horses a long distance in such stalls. This is not common knowledge of which the jury would be possessed independent of such evidence. *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17.

In an action to recover damages of a carrier for an injury received by a horse in transit, a witness who saw the horse immediately before shipment and also six weeks thereafter may give his opinion as to the value of the horse at the latter date. The lapse of time affects the weight of the testimony, not its

admissibility. *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17.

3. Questions of Law and Fact.

What Is Ordinary and Reasonable Diligence.—In view of the character of the freight, it being live stock requiring more rapid transportation than most other kinds of freight, and in view of the evidence concerning defendant's equipment and facilities for handling and transporting such freight, it is for the jury to determine what is ordinary and reasonable diligence as applied to this case. What would be ordinary and reasonable diligence in handling dead freight might not be reasonable diligence, under a similar state of facts, in handling and transporting live stock." *Woodford v. Railroad Co.*, 70 W. Va. 195, 200, 73 S. E. 290.

4. Damages.

Measure of Damages for Unreasonable Delay.—The difference in the market value of cattle at the time when they were actually delivered and at the time when they should have been delivered, is an element of damages in an action against the carrier for unreasonable delay in making delivery. *Woodford v. Railroad Co.*, 70 W. Va. 195, 73 S. E. 290.

Measure of Damages Where There Is an Agreed Valuation.—Under a bill of lading fixing a value upon live stock and providing that in no event shall the shipper recover a greater sum, the shipper is entitled to recover any damages less than such valuation which he can prove resulted from delay in delivery, although he realized in the market more than the amount of such valuation. This rule applies as well to negligent failure to deliver, as to delay in delivery. *Chesapeake, etc., R. Co. v. Rebman*, 120 Va. 71, 90 S. E. 629; *Norfolk, etc., R. Co. v. Steele & Son*, 117 Va. 788, 86 S. E. 124.

Such provision in a bill of lading means no more nor less than that no liability in excess of the valuation named in the contract shall, in any

event, attach to the carrier, whether the damage complained of grows out of delay in transportation of the property, or its loss, destruction or physical injury. *Norfolk, etc., R. Co. v. Steele & Son*, 117 Va. 788, 86 S. E. 124.

C. AGAINST CARRIERS OF PASSENGERS.

1. Pleading and Practice.

a. Form of Action, Parties, Venue.

Where by a contract made between a county court and a railroad company, for the mutual advantage of the parties thereto in preventing the spread of a contagious disease, the carrier agrees, in consideration that the county court shall provide and maintain a pest house for the care and treatment of persons infected with such disease, to furnish and properly equip a car therefor and transport such persons to the pest house, one of the class of persons therein designated in whose interest it is made may maintain in his own name an action against such carrier, either in assumpsit upon contract or in tort, for damages resulting from a breach of its duty to him under the contract, or arising out of the relation of carrier and passenger after he has been accepted as a passenger. *Jenkins v. Chesapeake, etc., R. Co.*, 61 W. Va. 597, 57 S. E. 48.

a½. Service of Process.

Barnes Code, ch. 124, § 9.

b. The Declaration.

Sufficiency of Declaration in Actions for Personal Injury.—While it is not sufficient for a declaration in an action for injury to a passenger merely to allege negligence in general terms as a conclusion of law in a declaration, it suffices if such facts are so alleged as to show that the accident was not one that would have ordinarily have occurred if the defendant had exercised reasonable care. *Houston v. Lynchburg Tract., etc., Co.*, 119 Va. 136, 89 S. E. 114.

In an action by a passenger against a carrier for a personal injury, a dec-

laration which simply charges in different counts that the defendant was negligent in the operation of its train, that it did not have a proper roadbed or track, and that its locomotive, cars and coaches were defective, is not sufficient, but if, in addition, there are charged in each count such facts and circumstances attending the injury, as show that the movement of the train was so unusual and extraordinary as to break the plaintiff loose from his hold on the water closet, and that the accident could not well have happened without negligence on the part of the carrier, the declaration is sufficient, as a prima facie presumption is raised of negligence on the part of the carrier. *Norfolk, etc., R. Co. v. Rhodes*, 109 Va. 176, 63 S. E. 445.

Starting Train While Plaintiff Was Getting on—Count Held Good.—The first count of a declaration stated defendant's duty to stop its train for a reasonable time at a station and its breach of that duty. The second count omitted the averment as to this duty and its breach but stated the defendant's duty not to start the train while the plaintiff was getting on it and the breach of the latter duty by the defendant. The first count was conceded to be good and it was held on demurrer that the second count was good also. *Duty v. Chesapeake, etc., R. Co.*, 70 W. Va. 14, 73 S. E. 331; *Washington-Virginia R. Co. v. Bouknight*, 113 Va. 696, 74 S. E. 1032.

Sufficiency of Declaration in Action for Humiliating Treatment by Conductor.—In an action against a common carrier by a passenger for insulting and humiliating treatment inflicting upon him by defendant's conductor a declaration alleging such a cause of action, is sufficient if it states in general terms the character of the conduct complained of, without specification of the evidential facts or an averment of the exact words used. *John v. Baltimore, etc., R. Co.*, 82 W. Va. 149, 95 S. E. 589.

Charging Offensive Language Used in Plaintiff's Presence.—"In an action by a passenger against a carrier for permitting other passengers to insult and humiliate her by the use of offensive language in her presence, it suffices to charge that such language was obscene, vulgar, profane, and indecent, without an averment of the words used. *St. L. Southwestern, etc., Ry. Co. v. Wright*, 33 Tex. Civ. App. 80, 75 S. W. 565." *John v. Baltimore, etc., R. Co.*, 82 W. Va. 149, 95 S. E. 589.

Declaration in Action for Ejecting Helpless Passenger Bad on Demurrer.

—A declaration which simply alleges that a passenger who has been carried beyond his destination, and who was mentally and physically incapable of caring for himself, was put off in the daytime, at a regular station where there was a depot, that he was not familiar with the place and that it was sparsely settled, but fails to aver that the weather was severely cold, or that the ground was covered with snow, or any fact showing that the character of the place was such as to make it dangerous, fails to show negligence on the part of the carrier, and is, therefore, bad on demurrer. *Bragg v. Norfolk, etc., R. Co.*, 110 Va. 867, 67 S. E. 593.

Charging Higher Degree of Care than Carrier Owes.—A declaration in an action against a carrier of passengers for the wrongful death of a passenger, which properly pleads the facts showing the relationship of passenger and carrier, is not bad on demurrer because it may charge a higher degree of care than is owed by carrier to passenger in executing its contract of carriage. All such matter should be treated as surplusage. *Brogan v. Union Tract. Co.*, 76 W. Va. 698, 86 S. E. 753.

An allegation in the declaration of specific acts of negligence in the same count with the allegations of imputed negligence is not a waiver of the right to rely upon the latter, and may be treated as surplusage. The plaintiff, in such case, is not bound to prove the

whole of what he has alleged. So, likewise, some counts of the declaration may charge affirmative negligence, while others may rely upon the legal presumption of negligence. The former is not a waiver of the latter. *Washington-Virginia R. Co. v. Bouknight*, 113 Va. 696, 74 S. E. 1032.

A declaration in assumpsit, by one entitled to the benefit of a contract, entered into by a county court and a carrier, whereby the carrier was to furnish separate cars for those inflicted with a contagious disease which properly impleads the railroad company thereon and for a breach of its duty to him thereunder, is good upon demurrer. *Jenkins v. Chesapeake, etc., R. Co.*, 61 W. Va. 597, 57 S. E. 48.

b½. Variance.

In actions for personal injuries inflicted by the negligence of a carrier of passengers there is no variance in respect to the specifications of mere matters of detail, concerning the manner or instrumentalities by which the injury is inflicted, if the substantial elements of negligence alleged be proven. *Kennedy v. Chesapeake, etc., R. Co.*, 68 W. Va. 589, 70 S. E. 359.

In an action for personal injuries the declaration charged that defendant, while plaintiff, a passenger, was in the act of alighting and without warning him "carelessly and negligently and suddenly" started its car whereby and with great force and violently he was thrown upon the pavement and injured. The evidence tended to prove that plaintiff was not given a reasonable time to alight, and that the conductor of the car in disregard of his duty signaled the motorman to go ahead, while plaintiff was in the act of leaving the platform. There was no variance. *Cain v. Kanawha Tract., etc., Co.*, 81 W. Va. 631, 95 S. E. 88.

In an action against a carrier for injuries to a passenger while alighting from one of its cars, the declaration alleged that the plaintiff "was compelled

to step down from the car a great distance to the ground, to-wit; two feet," and the evidence showed that the distance was between 26 and 34 inches. Held that this did not constitute such a difference between the allegation and the proof as requires the court to strike out the evidence on the ground of variance. The office of the videlicet being to mark that the party does not undertake to prove the precise circumstances alleged, and in such case he is not required to prove them. *Chesapeake, etc., R. Co. v. Barger*, 112 Va. 688, 72 S. E. 693.

Upon the trial of a declaration in assumpsit by one entitled to the benefit of a contract, entered into by a county court and a carrier, whereby the carrier was to furnish separate cars for those inflicted with a contagious disease, an instruction for the defendant, which told the jury that the plaintiff, having alleged in his declaration that the defendant agreed to carry him for hire and reward and having failed to prove such allegation, was not entitled to recover in an action of assumpsit, was improperly refused. *Jenkins v. Chesapeake, etc., R. Co.*, 61 W. Va. 597, 598, 57 S. E. 48.

In an action against a hotel for death of a guest in an elevator accident, the declaration alleged that the defendant "* * * negligently, recklessly and carelessly employed a certain person to operate the elevator upon which the plaintiff's intestate was a passenger as aforesaid, who was incompetent and should not have been allowed to operate said elevator. By reason whereof," etc. Held, that the court did not err in admitting expert evidence to show the incompetency of the operator from lack of proper instruction, the objection being that no such ground of negligence was charged in the declaration. *Murphy's Hotel v. Cuddy*, 124 Va. 207, 97 S. E. 794.

c. Instructions.

Not Essential to Define "Proximate

Cause.—*Brogan v. Union Tract. Co.*, 76 W. Va. 698, 86 S. E. 753.

When Instruction Presenting Plaintiff's Theory of Case Not Erroneous.—Instructions are to be read as a whole, and if, when this is done, it is seen that the defendant's theory of the case was correctly and strongly presented, it is not error to give an instruction presenting the plaintiff's theory of the case. *Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749.

Instruction as to Degree of Care Required and Liability for Negligence.—In an action against a common carrier for injuries received by a passenger who, being carried past his station alighted from a moving train, following the advice of the conductor, an instruction given relating to the degree of care required of the carrier and its liability for negligence was held to be correct as a general proposition of law, but it was held that to make it applicable to the facts in the case, it should have been qualified. *Farley v. Norfolk, etc., R. Co.*, 67 W. Va. 350, 355, 67 S. E. 1116.

Instruction as to Limit of Carrier's Liability.—After the jury has been instructed as to the duty owed by a carrier to a passenger it is error to refuse, when requested, to further instruct them "that a railroad company is not an insurer of its passengers, but merely has to use the highest degree of practical care for their safety, and if the jury believe from the evidence that the defendant used such care in this case, they must find for the defendant." If the defendant fully performed the duty which devolved upon it, it was entitled to a verdict, and, of course, to such an instruction. *Norfolk-Southern R. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89.

An instruction that a conductor "can only assault a passenger when justified under the law of self-defense," was, under the circumstances of this case, manifestly misleading. *Frank v. Monongahela Valley Tract. Co.*, 75 W. Va. 364, 367, 83 S. E. 1009.

Instruction as to Degree of Force Carrier's Servant May Use.—In an action for damages for an injury inflicted by an assault upon a passenger by the carrier's servant, an instruction, requested by the carrier, telling the jury they should find for the defendant, if they believed he exerted no more force than he deemed necessary, under the circumstances, is properly refused. *Teel v. Coal, etc., R. Co.*, 66 W. Va. 315, 66 S. E. 470.

Instructions in Action for Assault on Passenger by Special Officer.—In the trial of an action against a common carrier for an assault upon a passenger by a special officer, it was held that under the circumstances of the case instructions, telling the jury to find for the defendant, if they believe the actor was, at the time of the injury, a public officer, or performing the duties of such officer, and that the defendant is not responsible for his acts as such officer, are calculated to becloud the issue and mislead the jury, for which reason, the trial court may properly reject them. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

In such case, an instruction which tells the jury the defendant is not responsible for the infliction of death on a passenger, if they find from the evidence that the assault was committed by the actor when he was acting for himself, and as his own master, is calculated to mislead the jury, and the trial court may properly refuse it. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

The trial court may properly refuse, in such case, instructions telling the jury that, if the passenger left the defendant's train for the purpose of engaging in a quarrel or altercation with the servant or officer by whom he was killed, the carrier is not liable. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

The trial court may properly reject an instruction, in such a case, which tells the jury they should find for the

defendant, if they believe the actor was the servant of the defendant and that the injurious act, incident to the particular transaction in which he was engaged, was not within the scope of his duty as such servant. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

Instruction Relating to Servant's Negligence Misleading or Irrelevant.—Where the negligence charged in the declaration and shown by the evidence was on the part of the conductor in charge of the train, it was not error to refuse to instruct the jury that there could be no recovery unless they believed that the servants in charge of the engine were guilty of negligence. If the words "servants in charge of the engine" referred to the conductor, they were misleading. If to the engineer and fireman, they were irrelevant to the case alleged in the declaration and supported by the evidence. *Norfolk, etc., R. Co. v. Crocker*, 117 Va. 327, 84 S. E. 681.

Submission to Jury of Question of Contributory Negligence.—Where there is evidence tending to show contributory negligence that would bar recovery the defendant is entitled to have the question of contributory negligence submitted to the jury fully and clearly and not by implication in instructing on the burden of proof. *Virginian R. Co. v. Bell*, 115 Va. 429, 79 S. E. 396.

Instructions as to Last Clear Chance.—In an action by an administrator for the death of his decedent, who was killed by a train of defendant when standing on or near the track, after having alighted from a train on an adjoining track, an instruction offered by plaintiff directed the attention of the jury to the evidence introduced by the plaintiff, tending to prove that no warning signals of the approach of the train were given, and properly presented the issue of last clear chance which the jury should have been called upon to determine. This instruction, or its equivalent, should have been given, and it was

error to refuse it without giving some other instruction which embodied the last clear chance doctrine as applicable to the case. And it follows that it was also harmful to the plaintiff to give the instructions offered by the defendant which failed to recognize the right of the plaintiff to have the jury pass upon the evidence in support of the theory of last clear chance. *Gordon v. Director General*, 128 Va. 426, 104 S. E. 796.

Instruction as to When Passenger May Be Ejected.—Where the evidence tends to show the passenger's persistence in disorderly conduct and the use of vulgar and profane language, warranting ejection, an instruction is erroneous which forbids the exercise of that right if, at the time thereof, the passenger "had ceased to curse and swear and had ceased his disorderly conduct." *Frank v. Monongahela Valley Tract. Co.*, 75 W. Va. 364, 367, 83 S. E. 1009.

Instructions Diverting Attention of Jury from Real Issue.—"The jury was instructed that it was the duty of the railroad company to employ competent and prudent servants, and, so far as possible, to protect passengers on its cars from unlawful assaults, not only by other passengers but by its own servants. The issue involved was not as to the conductor's competency, but rather as to his tortious conduct towards plaintiff. It was held that the probable effect of the instruction was to divert the attention of the jury from the real issue and it was therefore erroneous." *Wilhelm v. Parkersburg, etc., R. Co.*, 74 W. Va. 678, 682, 82 S. E. 1089.

Instruction Tending to Create Prejudice against Defendant.—Though for the purpose of ejecting plaintiff's husband the servant may have used more force than was reasonably necessary in causing plaintiff to change her position on the car, but he did not attempt to strike or beat her, an instruction directing a finding for plaintiff, based

upon the jury's belief, from the evidence, that the servant "did strike, assault, beat or mistreat her," will be deemed erroneous, because of its apparent tendency to create prejudice against defendant. *Wilhelm v. Parkersburg, etc.*, R. Co., 74 W. Va. 678, 92 S. E. 1089.

Instructions as to Measure of Damages.—In an action by a passenger against a carrier for injuries sustained, where there is a demurrer to the evidence, it is not error for the court to tell the jury if the issue is found for the plaintiff "the damage should be at least one cent." *Nichols v. Camden, etc.*, R. Co., 62 W. Va. 409, 59 S. E. 968.

In an action against a railroad company by a white woman to recover compensatory damages for being forced to ride in a colored car, an instruction on the measure of damages, held obscure, and calculated to confuse and mislead the jury. The jury should be plainly told that the measure of recovery is compensatory damages, and that discomfort, mortification and humiliation, if proved with reasonable certainty, constitute elements of such damage. *Norfolk, etc.*, R. Co. *v. Stone*, 111 Va. 730, 69 S. E. 927.

Instruction as to Compensatory and Punitive Damages.—Instruction held erroneous because tending to lead the minds of the jury to the conviction that plaintiff's right to compensatory damages and defendant's liability for punitive damages were so interdependent that both or neither ought to be included in their verdict. *Wilhelm v. Parkersburg, etc.*, R. Co., 74 W. Va. 678, 682, 92 S. E. 1089.

d. Damages.

Passenger Entitled to Substantial Damages for Humiliation and Discomfort.—Where a passenger was wrongfully ejected from a train, and upon re-entering the train was arrested, confined and taken before a magistrate, he was subjected to such humiliation, discomfort, and disgrace as entitled him to

recover substantial damages. *Mangum v. Norfolk, etc.*, R. Co., 125 Va. 244, 99 S. E. 686.

No Recovery for Fright without Physical Injury.—Where the plaintiff brought an action for fright or mental shock caused by the near approach of an engine without warning, it was held that fright disassociated from physical injury, or mental anguish having no causal connection with physical injury, could not be recovered for although the defendant was admittedly negligent. *Chesapeake, etc.*, R. Co. *v. Tinsley*, 116 Va. 600, 82 S. E. 732.

Aggravation of Injury—Refusal to Submit to Treatment.—Where an injured passenger is attended by physicians of his own choosing as well as by those of the defendant company, and it is claimed by the defendant in an action to recover for such injuries that his injuries were aggravated by his refusal to submit to the treatment and follow the instructions of defendant's physicians, it is proper for the trial court to instruct the jury that the plaintiff's right of recovery for the aggravation of the injury could only be affected by his unreasonably refusing to submit to the treatment, or follow the instructions of physicians. *Roanoke, etc.*, Elect. Co. *v. Sterrett*, 111 Va. 293, 68 S. E. 998.

Exemplary damages are allowable in an action against a railway company for willful injury inflicted by the conductor upon a passenger without lawful justification. *McDade v. Norfolk, etc.*, R. Co., 67 W. Va. 582, 68 S. E. 378.

2. Evidence.

a. Presumptions and Burden of Proof.

(1) Presumptions as to Rates.

Va. Code 1919, § 3920.

Where a railroad is built, maintained and operated essentially for interstate purposes, and the intrastate business is merely incidental, only about five per cent. of its total business, and is so inconsiderable and comparatively of

such minor importance as to render the ordinary methods of distribution of burdens and benefits between the two classes of business impracticable, it is not feasible to fix the maximum rate of compensation for carrying passengers on the basis of comparative values; and where the state corporation commission has, upon other consideration, fixed what it regarded as a reasonable maximum rate, the burden is on the railroad company to show that the rate so fixed is not reasonable, and on appeal from its decision the supreme court, under the express mandate of the constitution, and under the rule of decision adopted by the Supreme Court of the United States, must regard the action of the commission as *prima facie* just, reasonable and correct. Upon the evidence in the case at bar, the supreme court can not say that the rate fixed by the commission is not just, reasonable and correct. *Washington, etc., R. Co. v. Com.*, 112 Va. 515, 71 S. E. 539.

(8) Burden to Prove Negligence.

"As the law does not presume that anyone has been negligent, it is always necessary, in order to recover against a common carrier on that ground, to prove negligence, either directly or by evidence of facts from which it may be reasonably presumed." *Norfolk, etc., R. Co. v. Rhodes*, 109 Va. 176, 182, 63 S. E. 445.

In an action by a passenger for injuries sustained while alighting from a car, the burden is on the plaintiff to prove the negligence complained of, and where the passenger claimed that defendant was negligent in permitting to be standing at the door of the baggage compartment of a combination baggage and passenger car a man in a cap and uniform who was assisting passengers to alight, the burden was on the passenger to show that this man was an employee of the company or acting under its authority. *Davidson v. Washington, etc., Railway*, 129 Va. 99, 105 S. E. 669.

In an action by a passenger against a carrier to recover for a personal injury inflicted by a derailment of the carrier's cars, the burden is on the passenger to establish the negligence of the carrier. This burden does not shift, but continues throughout the case. The passenger makes out a *prima facie* case, by the aid of a legal presumption, upon proof simply of the derailment and consequent injury to him while a passenger, but when evidence is offered to rebut the presumption and tending to show that it has discharged the duty imposed upon it, it becomes a question for the jury to determine, upon the whole evidence, whether or not the carrier has exercised that high degree of care required of it. *Norfolk-Southern R. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89. See post, "When Presumption of Negligence Arises," VI, C, 2, a, (3).

(8) When Presumption of Negligence Arises.

The doctrine of *res ipsa loquitur* applies when an accident happens to a passenger who is himself without fault and is caused by a defect in any of those things which the carrier is bound to supply, or is the result of the failure in any respect of the carrier's means of transportation, or the conduct of its servants in connection therewith. Under such circumstances a presumption of negligence arises against the carrier for injuries thus caused. *Walters v. Norfolk, etc., R. Co.*, 122 Va. 149, 74 S. E. 182.

"'When the physical facts of an accident themselves create reasonable probability that it resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms evidence of negligence, in conformity with the maxim *res ipsa loquitur*.' *Richmond R., etc., Co. v. Hudgins*, 100 Va. 409, 413, 41 S. E. 736." *Washington-Virginia R. Co. v. Bouknight*, 113 Va. 696, 75 S. E. 1032.

If an injury to a passenger is caused by an apparatus wholly under the con-

trol of the carrier and furnished and applied by it, and the accident is of such a character as does not ordinarily occur if due care is used, the law comes to the aid of the plaintiff and raises a presumption of negligence. *Murphy's Hotel v. Cuddy*, 124 Va. 207, 97 S. E. 794.

If an injury happens to a passenger in consequence of the breaking of the vehicle, a defect in the roadway or track, or any of the other appliances owned or controlled by the carrier in making the transit, a prima facie case is made for the recovery of damages, and then the carrier must show the absence of any negligence by itself or its servants causing the accident, and that the utmost diligence and observance of duty on its part could not have prevented the injury. In the absence of proof on the part of the carrier to rebut this presumption of negligence, the presumption becomes conclusive. *Walters v. Norfolk, etc., R. Co.*, 122 Va. 149, 94 S. E. 182.

The presumption of negligence, however, does not arise from the mere fact of an accident to a passenger, but from the nature and quality of the accident being such as does not ordinarily befall to a passenger when due care is exercised by the carrier. *Roanoke R., etc., Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385; *Murphy's Hotel v. Cuddy*, 124 Va. 207, 97 S. E. 794.

In *Richmond R., etc., Co. v. Hudgins*, 100 Va. 409, 416, 41 S. E. 736, the court said: "A presumption of negligence from the simple occurrence of an accident arises where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, or for the management or construction of which he is responsible. *Trans. Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160; *Railroad Co. v. Anderson*, 72 Md. 519,

20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 493; *Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193; *Haynes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410." *Walters v. Norfolk, etc., R. Co.*, 122 Va. 149, 153, 94 S. E. 182.

Where the cause of the injury is plainly outside of the control of the carrier, and has no connection with the machinery and appliances of transportation or the negligence of its servants, in operating such instruments of transportation, such accident raises no presumption of negligence on the part of the carrier, and the burden of showing such negligence is upon the party who avers it. *Walters v. Norfolk, etc., R. Co.*, 122 Va. 149, 94 S. E. 182.

In the absence of any evidence, direct or indirect, of negligence on the part of a carrier in the selection or retention of its servants, or in respect to its appliances or road-bed, and where there is no evidence of excessive speed except the opinion of witnesses who testify to no facts which show extraordinary or unusual speed, it will not be presumed that the carrier was negligent. *Norfolk, etc., R. Co. v. Rhodes*, 109 Va. 176, 63 S. E. 445.

Breaking Down of Bridge.—In an action by a passenger against a carrier for a negligent injury, when the plaintiff shows that he was a passenger, and that his injury resulted from an accident which was caused by the breaking down of one of the carrier's bridges it is sufficient proof of the defendant's negligence to put upon it the burden of establishing by a preponderance of evidence that the accident and resulting damage was occasioned by inevitable casualty, or by some cause which human care and foresight could not have prevented. *Roanoke R., etc., Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385; *Roanoke, etc., Elect. Co. v. Sterrett*, 111 Va. 293, 68 S. E. 998.

A collision or derailment of the train of a public carrier prima facie proves negligence, and, if unexplained, is con-

clusive. *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808; *Washington-Virginia R. Co. v. Bouknight*, 113 Va. 696, 74 S. E. 1032; *Norfolk-Southern R. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89.

The same rule applies in the case of a train or car operated by a private carrier. *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808.

In an action by a passenger against a carrier to recover for an injury inflicted by a derailment no specific act of negligence on the part of the carrier need be proved. The jury may find for the plaintiff upon proof of the mere fact of derailment and injury, under the doctrine of *res ipsa loquitur*. *Norfolk-Southern R. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89.

Where an injury to a passenger is caused by the derailing of a train, by a collision or by other accident to the car in which the passenger is riding, the happening of the accident is *prima facie* evidence of negligence on the part of the carrier, and if the passenger is free from negligence, the burden is on the carrier to show that it performed its whole duty, and that the injury was unavoidable by the exercise of human care and foresight. *Norfolk, etc., R. Co. v. Rhodes*, 109 Va. 176, 63 S. E. 445.

Passenger Riding on Platform.—Injury to a passenger while excusably riding on the platform because of the overcrowding of the train usually constitutes a *prima facie* case of negligence on the part of the carrier. *Norvell v. Kanawha, etc., R. Co.*, 67 W. Va. 467, 68 S. E. 288.

Injury Resulting during Operation of Elevator.—When it is shown that an injured person was a passenger on the defendant carrier's elevator, and that the injury resulted during the operation or movement of the conveyance, a presumption of want of care arises, placing on the defendant the burden of showing freedom from negligence.

Murphy's Hotel v. Cuddy, 124 Va. 207, 97 S. E. 794.

Plaintiff, an invalid, was injured by a fall while being removed in an invalid's chair from defendant carrier's baggage car by her husband and two friends, assisted by the baggage master. The invalid's chair was no part of the equipment of the company. It was entirely under the control of the plaintiff and her friends. Her safety might well have been safeguarded if they had placed a strap or support in front of her fastened to the arms of the chair. That the accident would not have happened if her husband and his friends had not been negligent in lowering the chair was fairly manifest. Held, that the doctrine of *res ipsa loquitur* had no application. *Walters v. Norfolk, etc., R. Co.*, 122 Va. 149, 94 S. E. 182.

(4) How Long Presumption of Negligence Holds.

In the instant case it was not error to instruct the jury that the presumption that the death of a passenger is due to the negligence of the carrier holds until rebutted by evidence satisfactory to the jury. *Murphy's Hotel v. Cuddy*, 124 Va. 207, 97 S. E. 794.

(5) Sufficiency of Evidence to Rebut Presumption of Negligence.

In order to rebut the presumption of negligence on the part of a carrier arising from a derailment resulting in injury to a passenger, the carrier is not bound to satisfactorily account for the cause of the accident. Some accidents are inexplicable, and to hold the carrier bound, under all the circumstances, to explain the cause, would, in such cases, impose an impossibility upon the carrier, and render it practically an insurer of the safety of the passenger injured. *Norfolk-Southern R. Co. v. Tomlinson*, 116 Va. 153, 164, 81 S. E. 89, citing *Norfolk, etc., Railway v. Tanner*, 100 Va. 379, 41 S. E. 721, which it expressly affirms and *Washington-Virginia R. Co. v. Bouk-*

night, 113 Va. 696, 74 S. E. 1032, which it expressly overrules.

(6) What Raises a Presumption of Contributory Negligence.

The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course. *Hoylman v. Kanawha, etc., R. Co.*, 65 W. Va. 264, 64 S. E. 536.

(7) Burden to Show Capacity in Which Conductor Was Acting.

Whether or not, in a given case, the conductor was, in fact and in good faith, acting in the capacity of conservator of the peace, and not in his capacity of conductor, is a question for the jury under all the facts and circumstances of the case, and if it is relied on to shield the company from liability the company must show the necessity and good faith of the transaction. *Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749.

b. Admissibility.

As to exclusion of evidence on the ground of variance, see ante, "Variance," VI, C, 1, b $\frac{1}{2}$.

Evidence of Question of Accommodations Provided for Passengers.—Where the question is as to the sufficiency of the accommodations provided by a railroad company for passengers alighting from one of its trains, it is not error to hear testimony as to accommodations furnished by the same company for like purposes at other nearby stations. *Chesapeake, etc., R. Co. v. Barger*, 112 Va. 688, 72 S. E. 693.

Where one was injured by a train while attempting to put his wife's baggage aboard, it was not error for him to testify that he believed the train would remain standing long enough for his wife to get in the car and for him to put her baggage upon the train. *Chesapeake, etc., R. Co. v. Fortune*, 107 Va. 412, 59 S. E. 1095.

Void Warrant Commanding Search

of Train for Intoxicating Liquors.—A warrant issued by a justice of the peace, commanding search to be made of a certain passenger train, to ascertain if intoxicating liquors are being carried thereon contrary to law, is not proper evidence to be considered by the jury against the plaintiff in the trial of an action by him against the carrier for his unlawful expulsion from the car. Such warrant is void. *Clark v. Norfolk, etc., R. Co.*, 84 W. Va. 526, 100 S. E. 480.

The record of the indictment, conviction and sentence of a special police officer of a railway company, for the murder of the plaintiff's brother, is not admissible in evidence on the trial of an action against such railway company for injuries sustained by the assault or shooting of the plaintiff by the same police officer, and the admission thereof, over the objection of defendant, is reversible error. *Layne v. Chesapeake, etc., R. Co.*, 68 W. Va. 213, 69 S. E. 700.

c. Weight and Sufficiency.

Evidence Insufficient to Establish Carrier's Negligence.—Where a passenger was injured in alighting from the baggage platform of a combination baggage and passenger car, the fact that a man in a cap and uniform was assisting passengers to alight does not establish the negligence of the carrier, where there was nothing else in the evidence upon which to base an inference that he was acting for the company. *Davidson v. Washington, etc., Railway*, 129 Va. 99, 105 S. E. 669.

To justify ejection of a passenger by agents of a carrier for intoxication and disorderly conduct, the proof must show with reasonable certainty that the passenger was intoxicated or was guilty of such conduct. Mere general statements will not avail as a justification. *Phillips v. Ohio Valley Elect. R. Co.*, 78 W. Va. 776, 90 S. E. 342.

Evidence held not sufficient to establish a practice or custom by the defendant company of permitting passengers to alight from the front end of the car.

Davidson v. Washington, etc., Railway, 129 Va. 99, 105 S. E. 669.

Evidence upon Question whether Employee of Carrier Assisted Passenger in Alighting.—A passenger was injured while alighting from the baggage end of a combination passenger and baggage or mail car. The front end of the car was the baggage or mail compartment and there were no steps from the front platform to the ground. She was assisted to alight by a man wearing a cap and uniform, but the passenger was unable to state whether the cap and uniform which this man wore was that of an employee of another transportation company, whose cars were only a few steps away, or the uniform of the defendant company, or the uniform of the United States army. The employees of the carrier testified that they had warned the passengers to keep out of the baggage compartment. Held, that it could not be presumed merely from the presence of the man in the cap and uniform that he was an employee of the defendant company, much less that he was acting for it, and while plaintiff got no specific warning from the employees of the company, their testimony was not contradicted, and was sufficient to show that the defendant did not authorize one of its employees to invite and assist passengers to use that end of the car in alighting. *Davidson v. Washington, etc., Railway*, 129 Va. 99, 105 S. E. 669.

3. Questions of Law and Fact.

Questions Dependent on Conflicting Evidence and Attendant Circumstances.—"The questions of the manner in which plaintiff sustained her injuries; the reasonableness of the stop made at defendant's railway station; whether plaintiff was attempting to board a moving train at the time of her injuries, and whether defendant was guilty of negligence in not seeing her and seeing that she got on the train, and to a place of safety, before giving the signals to go ahead, all depended

on conflicting evidence and attendant circumstances, and were properly submitted to the jury." *Duty v. Chesapeake, etc., R. Co.*, 70 W. Va. 14, 73 S. E. 331.

Negligence of Carrier and Result Thereof.—Where it is shown that a derailment switch of a street railway, near its intersection with a steam railroad, has been plugged up and no longer used by such railway, it is a question of fact for the jury, on the evidence, to say whether the abandonment of such switch constituted actionable negligence of the defendant, and resulted in the injuries complained of. *Brogan v. Union Tract. Co.*, 76 W. Va. 698, 86 S. E. 753.

Negligence of Carrier's Servant.—In the instant case the trial court properly referred to the jury the question of whether or not the baggage master was negligent in assisting plaintiff's husband and friends in lowering her from the baggage car. *Walters v. Norfolk, etc., R. Co.*, 123 Va. 149, 94 S. E. 182.

Contributory Negligence.—Whether a passenger acted with ordinary prudence in leaping from a car in motion, or from a rash apprehension of danger which did not exist, under circumstances of age, time, place, experience and other facts about which reasonable men might differ as a justification for such conduct, is a question of fact for a jury and not a question of law for the court. *Mannon v. Camden Interstate R. Co.*, 56 W. Va. 554, 49 S. E. 450.

Since it depends upon the circumstances of each particular case whether the act of a passenger in using the platform as a place of carriage is negligence on his part, the question is usually one for jury determination. It is always a question for the jury, and is not determinable by the court as a matter of law, when circumstances reasonably excusing the passenger for riding there are not admittedly shown. *Norvell v. Kanawha, etc., R. Co.*, 67 W. Va. 467, 471, 68 S. E. 288.

Whether Conductor Justified in Mak-

ing Assault.—Whether or not a passenger who fails to pay a small extra sum demanded of him because he had not purchased a ticket has lost his right as a passenger, and whether the conductor was justified in making a violent and injurious assault upon him, are questions for the jury to determine, upon all the facts and circumstances of the case, under proper instructions from the court. *Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749.

Whether Force Used in Assault by Carrier's Servant Warranted.—Whether the circumstances warrant the force and violence used in an assault upon a passenger by the carrier's servant, on the ground of real or apparent danger of death or great bodily harm, is a question for the ultimate determination of the jury, viewing the situation from the standpoint of the servant at the time, though he must decide it in the first instance at the peril of himself and his master. *Teel v. Coal, etc., R. Co.*, 66 W. Va. 315, 66 S. E. 470.

When the capacity in which a person, occupying the dual position of public officer and servant of a carrier of passengers, acted in a transaction in which he inflicted wrong and injury upon third persons, is uncertain and dependent upon conflicting oral testimony and inconclusive facts and circumstances, the question is one for jury determination. *Layne v. Chesapeake, etc., R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

4. Verdict.

The verdict of the jury in an action by a passenger against a carrier for injuries sustained, must govern unless the damages allowed are so excessive as to warrant the belief that the jury was influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case. *Nichols v. Camden, etc., R. Co.*, 62 W. Va. 409, 59 S. E. 968.

In the case at bar the plaintiff was furnished by the defendant with a box car in which to load wood. It was necessary for him to enter the car in order

to load it properly, and in doing so he caught hold of the door to assist himself in stepping into the car. The door was rotten and gave way, precipitating him to the ground and causing the injury complained of. The evidence tended to show that the method of entering the car adopted by the plaintiff was the customary way and a reasonably safe way in the circumstances; and it was apparent that the proximate cause of the injury was the defective condition of the car door. Under these circumstances it was error for the trial court to set aside a verdict in favor of the plaintiff. *Roach v. Southern R. Co.*, 114 Va. 440, 76 S. E. 953.

D. TO INVALIDATE A RATE REGULATING STATUTE.

Sufficiency of Bill to Invalidate Rate Regulating Statute.—A bill, filed by a railroad, charging an absolute loss on the transportation of passengers, occasioned by the operation of the statute, and less than a reasonable return for the entire service rendered by it, verified by oath and accompanied by statements, showing in detail the gross income, expenses and net earnings, sworn to and sustaining the allegations of the bill proper, is sufficient as a bill to invalidate a rate regulating statute. *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

A decree, enjoining the enforcement of a rate statute as confiscatory, should contain a clause saving to the defendant the right to proceed at any time in the future, in any appropriate way, to obtain a vacation thereof, if, under altered conditions, it is no longer confiscatory. *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

VII. CRIMINAL OR PENAL LIABILITY.

Violations of Provisions of Public Service Commission Act.—*Barnes Code*, ch. 150, § 17.

Though the word "aid" does not necessarily embrace or imply guilty knowledge or wrongful purpose, yet when

supplemented by "abet," as both are used in the Code, ch. 150, § 17, and in the indictments in this Code they jointly indicate such knowledge and purpose and the intention to encourage the commission of the offense. *State v. Ankrom*, 86 W. Va. 570, 103 S. E. 925.

Section 6, c. 150, Code 1918 (Code 1913, § 641), prohibiting a public service corporation subject to the provisions of that chapter from charging, collection, or receiving a greater or less compensation for a service rendered than it charges, collects, or receives for a like and contemporaneous service under the same or similar circumstances and conditions, and § 17 (§ 652), declaring it a misdemeanor to violate, or to procure, aid, and abet any violation of, this or other provisions of the chapter, when read together, render illegal, except as permitted by § 20 (§ 655), the procurement and use of a pass entitling the holder to free transportation or service from such public service corporation, and subjects such person, if found guilty, to the penalties therein prescribed. *State v. Ankrom*, 86 W. Va. 570, 103 S. E. 925.

An indictment charging such an offense with reasonable certainty and precision is sufficient upon demurrer. *State v. Ankrom*, 86 W. Va. 570, 103 S. E. 925.

Demanding or Receiving More than Lawful Charges.—Va. Code 1919, § 3939; Barnes Code, pp. 772, 774, ch. 54, §§ 71a (15), 71a (15a), 71f.

A railroad company is excepted from the operation of the penalty clause of chapter 41 of the Acts of 1907 (Barnes Code, p. 774, ch. 54, § 71f), during the prosecution by it, in good faith, of a suit to determine whether said statute is confiscatory in its operation and effect, as applied to such company. *Coal, etc., R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

Granting Passes to and Making Illegal Contracts with Public Officers.—Where a railroad company has been confessedly engaged in the practice of

granting passes to public officials in full payment of all fees and charges for services which said officials should be called upon to perform for the company, and has tried to justify its action by making illegal contracts with such officers, the maximum penalty allowed by law should be imposed upon the company. *Com. v. Southern R. Co.*, 3 Va. Law Reg., N. S., 431.

Discrimination against or among Shippers of Coal or Coke.—Barnes Code, p. 765, ch. 54, § 66c.

Fraudulently Inducing Transportation Company to Discriminate in Transportation of Property or Aiding or Abetting in Such Discrimination.—Va. Code 1919, § 3914.

Falsification, etc., by Transportation Company, Officer or Agent in Giving Less than Regular Rates.—Va. Code 1919, § 3912.

Falsification, etc., by Person to Obtain Less than Regular Rates.—Va. Code 1919, § 3913.

Clause ten of § 1294c of Code of 1904 (Code 1919, § 3913) regulating common carriers is modeled after the interstate commerce act, and is practically identical with its provision on the same subject, except that the penalty for its violation is less drastic. Each forbids, under penalty, false billing, weighing, classifying, and the like, of goods offered for shipment, and thereby obtaining transportation at less than the regular rates. The Virginia statute, therefore, is not unconstitutional, because in conflict with the federal act. *Adams Exp. Co. v. Charlottesville Woolen Mills*, 109 Va. 1, 63 S. E. 8.

Duplicate Freight Receipts.—Va. Code 1919, § 3915.

Failure to Keep Ticket Office or Waiting Room Open or to Announce Arrival of Train.—Va. Code 1919, § 3940.

Accommodation of Passengers at Railroad Stations.—Barnes Code, p. 774, ch. 54, § 71g.

Water Closet.—Where upon the trial of an indictment against a railroad

company for violation of § 2382, W. Va. Code of 1906 (Barnes Code, p. 774, ch. 54, § 71), in failing to keep at a particular station on its line a suitable water closet, the evidence shows that a small water closet was kept by the defendant, but fails to disclose conditions and circumstances from which the jury could determine that it was, for any reason, unsuitable, the judgment will be reversed, the verdict set aside and a new trial awarded. *State v. Railroad Co.*, 61 W. Va. 634, 57 S. E. 44.

Accommodations and Charges for Sick or Injured Passengers.—W. Va. Code, Supp. 1918, ch. 54, § 71j, I.

Keeping Towel for Common Use in Railway Station or Train.—Va. Code 1919, § 1517.

Separation of White and Colored Passengers.—Va. Code 1919, §§ 3964, 3966, 3978, 3980, 4023.

Transportation of Dead Bodies.—Va. Code 1919, § 1728.

Transportation of Explosives.—Va. Code 1919, § 3923.

Transportation of Food Products under Insanitary Conditions.—Va. Code 1919, § 1220.

Transportation of Uncertified Nursery Stock.—Va. Code 1919, § 874.

Transportation and Delivery of Mort-

gaged Fertilizer.—Va. Code 1919, § 1118.

Furnishing Drinking Water for Live Stock.—Acts W. Va. 1919, p. 163, ch. 29, § 2.

Quarantine of Live Stock.—Va. Code 1919, § 912.

Keeping Doors of Passenger Cars Locked While in Motion.—Barnes Code, p. 1195, ch. 144, § 18.

Failure to Post Notice of Delay of Passenger Train or Wilfully Posting False Notice.—Va. Code 1919, § 3941.

Failure to Furnish Transportation for Troops or Delay in Transporting Them.—Va. Code 1919, § 3942.

Wilfull or Negligent Injury to Passenger by Person in Charge of Public Conveyance.—Barnes Code, p. 1195, ch. 144, § 17.

Riotous or Disorderly Conduct by Passenger.—Va. Code 1919, §§ 4024, 4533, 4782; Barnes Code, p. 1205, ch. 145, § 31.

Failure to Obey Conductor in Respect to Seats Assigned.—Va. Code 1919, § 3983.

Prohibition by Municipal or County Authorities of Excursions and Picnic Parties to Towns, Villages, etc.—Va. Code 1919, § 4010.

Larceny by Carrier.—Barnes Code, p. 1200, ch. 145, § 20.

CARRIERS OF PASSENGERS.—See ante, CARRIERS; post, STREET RAILROADS.

CARRYING ON BUSINESS.—See post, DOING BUSINESS.

The sporadic act of hauling a single consignment of coal by a nonresident coal company from a railroad siding in the city of Manchester, over the streets of the city, to a customer outside, is not **carrying on business** within the city such as would subject the coal company to the license tax on vehicles imposed by the ordinance of the city. *White Oak Coal Co. v. Manchester*, 109 Va. 749, 64 S. E. 944. See post, LICENSES.

CARRYING WEAPONS.—See post, WEAPONS.

CASE.—See ante, AGREED CASE; post, TRESPASS.

CASE CERTIFIED OR RESERVED.

I. West Virginia Statute.

II. Questions Which May Be Certified.

III. Proceedings in Appellate Court.

CROSS REFERENCES.

See the title CASE CERTIFIED OR RESERVED, vol. 2, p. 728, and references there given. As to rules of court relating to cases certified, see 83 W. Va. xli, xlv.

I. WEST VIRGINIA STATUTE.

Barnes Code, p. 1149, ch. 135, § 1, provides: "Any question arising upon the sufficiency of a summons or return of service, or challenge of the sufficiency of a pleading, in any case within the appellate jurisdiction of the supreme court of appeals, may, in the discretion of the court in which it arises, and shall, on the joint application of the parties to the suit, in beneficial interest, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The forms of the certificates of such questions, as well as the time and manner of the hearing and notice thereof and the portion of the record to be sent up, shall be as prescribed by the supreme court of appeals; but such hearings shall have precedence over those arising upon appeals and writs of error. Entry of such certificate, or the fact that it has been made, upon the record of the case in the trial court, shall be sufficient notice to the parties, of the pendency of the question in the appellate court."

Purpose of Statute.—This provision of the statute was enacted as an aid to the prompt and economical administration of justice. *Wheeling v. Chesapeake, etc., Tel. Co.*, 81 W. Va. 438, 94 S. E. 11.

"Seeing the desirability of settlement of basic questions of procedure, in advance of preparation for final hearing and disposition of causes, with the in-

cident labor, expense and consumption of time, the legislature has provided therefor by this act." *Gulland v. Gulland*, 81 W. Va. 487, 488, 94 S. E. 943.

II. QUESTIONS WHICH MAY BE CERTIFIED.

Jurisdiction on Certified Questions Limited.—Under § 1, ch. 135 W. Va. Code of 1913, the jurisdiction of the appellate court is limited to questions arising solely upon the face of a summons, a return of service or a pleading, or, in the latter case, the faces of the pleading attacked and other pleadings to which it responds. *Tyler v. Wetzel*, 85 W. Va. 378, 101 S. E. 726. See *Jones v. Main Island Creek Coal Co.*, 82 W. Va. 506, 507, 96 S. E. 797; *Sutherland v. Guthrie*, 82 W. Va. 419, 420, 96 S. E. 61; *County Court v. Cottle*, 82 W. Va. 743, 746, 97 S. E. 292.

Necessity for Unequivocal Ruling by Lower Court.—Though section 1, chapter 135 of the Code, permits ruling upon doubtful questions arising upon the sufficiency of pleadings to be certified to this court for review, the statute contemplates an unequivocal original ruling of the lower court as preliminary thereto. *County Court v. Cottle*, 82 W. Va. 743, 97 S. E. 292.

Same—Rule of Court.—"Section 4 of Rule 1 of this court (83 W. Va. p. xli) would deny the right to certify questions to us for decision until the court below has first passed thereon." *Smith v. Thompson*, 85 W. Va. 364, 365, 101 S. E. 723.

Where the lower court, after ruling upon the sufficiency of certain claims

for credits set up in the defendant's answer as a defense to plaintiff's bill, reserves for future determination in the final decree to be entered in the cause the right of defendant to the credits claimed, such ruling is not within the meaning of § 1, chapter 135, Code, and this court is without jurisdiction to pass upon it. *County Court v. Cottle*, 82 W. Va. 743, 97 S. E. 292.

Sustaining Demurrer to Part of Bill.

—Being neither final nor appealable, but nevertheless dispositive of a question of pleading, a decree sustaining a demurrer to a part of a bill and dismissing it as to such part, may be certified for review, under the last clause of § 1 of ch. 135 of the W. Va. Code of 1916. *Gulland v. Gulland*, 81 W. Va. 487, 94 S. E. 943.

Sustaining Demurrer without Dismissing Bill—Dismissal of Parties from Suit.—The correctness of the ruling of a trial court sustaining a demurrer to a bill, but not dismissing it, may properly be considered by this court upon certificate, as authorized by § 1, ch. 135, Code; but the court will not consider that part of the order dismissing from the suit one or more, but not all, of the parties defendant, such action being final as to them, and, if erroneous, correctable only upon appeal. *Heater v. Lloyd*, 85 W. Va. 570, 102 S. E. 228.

Overruling Demurrer to Petition for Removal of Church Trustee.—A petition or motion to appoint or remove church trustees under the provisions of § 4 of ch. 57 of the Code is not a pleading within the meaning of the latter paragraph of § 1 of ch. 135 of the Code, and the action of the circuit court in overruling a demurrer to such petition or motion is not reviewable by this court upon a certificate from the circuit court under the provisions of that paragraph. *Wilsonburg M. E. Church v. Ash*, 87 W. Va. 668, 105 S. E. 915.

Ruling on Motion to Quash Summons.—The appellate court cannot review upon a certificate, a ruling or expression of opinion, made or given

in the disposition of a motion to quash the summons and the return thereon, and recited in the order disposing of it, to the effect that a part of the subject matter of the bill, or what is deemed a second cause of action stated in it, is not within the jurisdiction of the court entering the order. *Tyler v. Wetzel*, 85 W. Va. 378, 101 S. E. 726.

Questions raised by a motion made in a chancery suit, to quash the summons and the return thereon, on the ground of unwarranted direction of the former to the sheriff of a county other than that in which the suit was brought and invalidity of service in such other county because of such direction, are not within the scope of the statute and decisions thereof cannot be reviewed upon a certificate. The motion is based upon the bill as well as the process and is made as a substitute for a plea in abatement. *Tyler v. Wetzel*, 85 W. Va. 378, 101 S. E. 726.

Rulings by the lower court upon exceptions to answers to interrogatories appended to a bill in chancery do not raise a question as to the sufficiency of pleadings such as § 1, chapter 135 of the Code, authorizes to be certified to this court. *County Court v. Cottle*, 82 W. Va. 743, 97 S. E. 292.

Issue of Fact.—Where a circuit court, on an issue of fact joined on a plea in abatement denying jurisdiction, decides the issue and renders final judgment, this court is not empowered by § 1, ch. 135, Barnes' Code, to review the question upon the certificate of the lower court, writ of error being the proper remedy for review. *Jones v. Main Island Creek Coal Co.* 82 W. Va. 506, 96 S. E. 797, citing *Wheeling v. Chesapeake, etc., Tel. Co.*, 81 W. Va. 438, 94 S. E. 511.

Matters relating to mere procedure by the court below cannot be certified to this court under the authority of § 1, ch. 135, W. Va. Code, as amended by the Acts of 1915. *Sutherland v. Guthrie*, 82 W. Va. 419, 96 S. E. 61.

Sufficiency of Bill for Injunction—

Vacation Order Awarding Temporary Injunction Prayed for.—The sufficiency of a bill for an injunction, no plea competent to put that question in issue having been previously filed or disposed by the circuit court, can not, under § 1 of chapter 135 of the Code, be properly certified to this court by the judge of the circuit court, based alone on his vacation order awarding the temporary injunction prayed for. *Wheeling v. Chesapeake, etc., Tel. Co.*, 81 W. Va. 438, 440, 94 S. E. 511.

"The statute says, the court in which it arises shall certify the question, not the judge in vacation, and the form of certificate prescribed by the rule of this court presupposes court action, not the vacation order of the judge." *Wheeling v. Chesapeake, etc., Tel. Co.*, 81 W. Va. 438, 440, 94 S. E. 511.

Question Presented by Bill of Particulars.—This court has no jurisdiction, under § 1 of chapter 135 of the Code, to respond to a question certified thereunder, presented by a bill of particulars, not a pleading nor subject to demurrer or motion to quash. *State v. Tomlin*, 86 W. Va. 300, 103 S. E. 110.

Question as to Process Waived by Defendant's Appearance Will Not Be Considered on Certificate.—Questions sought to be raised on the sufficiency of the process, or the return of service thereon, which the circuit court has decided were waived by the appearance of the defendant to the action, will not be considered here when certified under § 1, Chap. 135 of the Code. *Smith v. Thompson*, 85 W. Va. 364, 101 S. E. 723.

Order Granting or Denying Relief upon Pleading or Process.—An order either granting or denying relief to any party upon pleadings or process, whether interlocutory or final, cannot be certified for review under § 1, ch. 135, W. Va. Code. *Tyler v. Wetzel*, 85 W. Va. 378, 101 S. E. 726.

Questions Raised by Motion Cannot Be Offered as Pleading.—The last paragraph of § 1 ch. 135 of the W. Va. Code

of 1913, does not authorize certificate of questions raised by a motion interposed as or for a pleading, or as a substitute therefor. *Tyler v. Wetzel*, 85 W. Va. 378, 101 S. E. 726.

III. PROCEEDINGS IN APPELLATE COURT.

See ante, "West Virginia Statute," I.

The function of the appellate court, on a certification of the overruling of a demurrer is to test the sufficiency of the pleadings only. *Wheeling v. Chesapeake, etc., Tel. Co.*, 82 W. Va. 208, 217, 95 S. E. 653.

Ponits Not Raised Are Reviewed.—A demurrer to a bill raises the question of its sufficiency for any reason apparent on its face, and where the demurrant states his grounds therefor, omitting to mention a material defect, and the court overrules the demurrer and certifies the questions decided by it for the decision of this court, this court will consider and pass upon the sufficiency of the bill, regardless of whether or not some particular point rendering it defective was decided by the lower court. *Brown v. Smith*, 84 W. Va. 429, 100 S. E. 279.

No Review of Circuit Court's Action Overruling Plaintiff's Motion to Amend Process.—After ruling that certified questions as to sufficiency of process waived by defendant's appearance will not be considered, the supreme court of appeals cannot review the action of the circuit court in overruling the motion of defendant to quash the writ and sustaining the motion of plaintiff to amend the process, the record not then presenting any question reviewable here on such certificate. *Smith v. Thompson*, 85 W. Va. 364, 101 S. E. 723.

Affirmation.—Upon a certification of the overruling of a general demurrer, under the last clause of § 1 of ch. 135 of the Code, the appellate court on finding one part of the bill sufficient, will affirm the decision, without inquiry as to the sufficiency of the other parts.

Wheeling v. Cheseapeake, etc., Tel. Co., 82 W. Va. 208, 95 S. E. 653.

Moot Question.—The validity of a warrant on which a defendant has been required to give bond to keep the peace for a period of six months, being certified to this court under the

provision of § 1, ch. 135, Barnes Code of West Virginia, does not become a moot question because the period covered by the bond expires before the question can be decided by this court. State v. Cowger, 83 W. Va. 153, 98 S. E. 71.

CASHIER.—See ante, BANKS AND BANKING.

CASUALTY INSURANCE. -- See ante, ACCIDENT, CASUALTY, HEALTH AND INDUSTRIAL INSURANCE.

CATTLE GUARDS.—See post, CROSSINGS; FENCES; RAILROADS.

CAUSA MORTIS.—See post, GIFTS.

CAUSED.—Caused is a perfect participle, and imports acts already done. Moore v. Hope Natural Gas Co., 76 W. Va. 649, 652, 86 S. E. 564. As to when a building is caused to be erected. See post, MECHANICS' LIENS.

CAUSE OF ACTION.—See ante, ACTIONS.

CAVEAT.—See post, PUBLIC LANDS.

CAVEAT EMPTOR.—See post, JUDICIAL SALES; MORTGAGES AND DEEDS OF TRUST; SALES; VENDOR AND PURCHASER; WARRANTY.

CEMETERIES.

CROSS REFERENCES.

See the title CEMETERIES, vol. 2, p. 731, and references there given. In addition, see post, CHARITIES; DEAD BODIES; NUISANCES.

Power of Municipal Corporation to Provide.—Va. Code 1919, § 3030; Barnes Code, ch. 47, § 28.

Dedication—Public Use. — Ground conveyed to an incorporated town, for the use of the town as a graveyard, and dedicated by the town to the public use as such, and so used by public, is held in trust by the town for the public for burial of the dead. Ritter v. Couch, 71 W. Va. 221, 76 S. E. 428.

A cemetery devoted by a municipal corporation to public use is just as much for corporate or public purposes as the ground for a street or park. Ritter v. Couch, 71 W. Va. 221, 76 S. E. 428, 432.

Right to Devote Land Dedicated for Cemetery to Other Purpose.—When

property has been dedicated for a burial ground, or where a city has dedicated it for that purpose, and persons have acted upon the faith of such dedication by burying their loved ones there, the city can not devote the property to any other purpose. Ritter v. Couch, 71 W. Va. 221, 76 S. E. 428, 431.

Right to Sell Land Dedicated for Cemetery.—Ground is conveyed to an incorporated town, to be held by it for a burial place for the public. The town accepts the conveyance and devotes the ground to public use for burial, and it is so used by the public, and many dead bodies are interred therein. Without legislative authority the town can not sell and convey the land, and thus disable itself from executing the

trust of maintaining such burial place. *Ritter v. Couch*, 71 W. Va. 221, 76 S. E. 428.

Validity of Disposition of Property for Maintenance of Cemeteries.—Va. Code 1919, § 59; Pollard's Code 1920, p. 18.

Cemetery Corporation Created under General Law.—Barnes Code, ch. 54, § 2.

Creation of Non-Stock Cemetery Corporations.—Va. Code 1919, §§ 3872-3880; Barnes Code, ch. 55, § 1.

Conveyances for Burial Places.—Va. Code 1919, §§ 38, 50; Barnes Code, ch. 57, § 1.

Trustees for Cemeteries.—Va. Code 1919, §§ 51, 52; Barnes Code, ch. 57, § 4a.

Condemnation of Land.—Va. Code 1919, § 53; Barnes Code, ch. 42, §§ 2, 3.

Location—Limitation as to Quantity of Land.—Va. Code 1919, § 56; Barnes Code, ch. 57, § 7.

Damage to Adjacent Lands.—Section 1414 Code of Virginia as amended by Acts, 1906, p. 10 (Code 1919, § 56), declaring that when damage is done to adjacent lands by the establishment of a cemetery the owner whose lands have been damaged shall have a right of action against the persons or corporation establishing said cemetery, and that no cemetery, shall be established within one hundred yards of a residence, seeks to protect two objects, namely, residences and land. *Lambert v. Norfolk*, 108 Va. 259, 61 S. E. 776.

The provision in the statute that no cemetery shall be established within one hundred yards of a residence affects residences alone and has nothing to do with the right of action given to an adjacent landowner for damage done thereby. *Lambert v. Norfolk*, 108 Va. 259, 61 S. E. 776.

The word "damaged" in the statute is used in the same sense that it is in the constitution. It means damage done to the corpus of the property, or to some right enjoyed in connection therewith. The mere fact that private

property is rendered less desirable for some purposes, or that the establishment of a cemetery will offend the taste or feelings of the adjacent owners, or may affect the sentiments of prospective purchasers and thereby render the property less desirable and even less salable, does not constitute damage within the meaning of the statute. *Lambert v. Norfolk*, 108 Va. 259, 61 S. E. 776.

Right of Lot Owner—License—Discontinuance.—The purchaser of a lot in a cemetery does not acquire absolute rights in, or over, such lot. According to the weight of authority such purchaser acquires a mere license or privilege to make interments in the lot exclusively of other as long as the burying ground or cemetery remains as such. This license or privilege is subject to the condition that if in the course of time, it becomes necessary to vacate the ground as a burial place he shall have notice and the opportunity of removing the bodies and monuments to some place of his own selection, or, on his failure so to do, such removal shall be made by others. *Grinnan v. Fredericksburg Lodge*, 118 Va. 588, 88 S. E. 79.

Exemption from Taxation.—Va. Const. § 183; Va. Code 1919, § 2272; W. Va. Const. Art. 10, § 1; Barnes Code, ch. 29, § 57, ch. 32, § 138.

Right of Burial in Public Cemetery.—"The right of burial in a public cemetery is not an absolute right of property, but a privilege or license to be enjoyed so long as the place continues to be used as a burial ground, subject to municipal regulation and control, and legally revocable whenever the public necessity requires it." Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481." *Ritter v. Couch*, 71 W. Va. 221, 76 S. E. 428, 435.

Power of City of Richmond to Prohibit Burials in Certain Cemeteries.—Va. Code 1919, § 57.

Sale of Land by Cemetery Association.—Barnes Code, ch. 57, § 7a.

Removal of Graves—Sale of Vacated Burial Place.—Va. Code 1919, § 58; Pollard's Code 1920, p. 473.

Every removal of graves is not a desecration. On the contrary, such removal is often dictated by the highest considerations of duty and respect for the dead. In many instances not only graves but whole cemeteries are removed to another and different locality, and the idea that such removal is a desecration is negated by our statute which permits the removal of cemeteries under certain circumstances and conditions. In the case in judgment, the removal of the graves, instead of desecrating the sepulchre of compliants' dead, will rather tend to preserve and beautify their resting place. *Grinnan v. Fredericksburg Lodge*, 118 Va. 588, 88 S. E. 79.

Same—Power of Court of Equity.—A court of equity has the power, not-

withstanding the absence of legislation on the subject, to authorize, in its sound judicial discretion, the removal of graves or cemeteries in a proper case after due consideration of all the facts and with due regard to the rights and feelings of all concerned. *Grinnan v. Fredericksburg Lodge*, 118 Va. 588, 88 S. E. 79.

Condemnation of Cemeteries.—Va. Code 1919, §§ 54, 55; Barnes Code, ch. 54B, § 7.

Violation of Sepulture—Injuries to Cemeteries—Punishment.—Va. Code 1919, §§ 4552, 4553; Barnes Code, ch. 149, § 13.

Superintendent to Have Power of Constable.—Va. Code 1919, § 2820.

Exclusion of Motor Vehicles from Burial Grounds.—Barnes Code, ch. 43B, § 10.

Public Improvements through Cemeteries.—Barnes Code, ch. 47, § 49c, 11.

CENSUS.—As to census of the deaf, dumb and blind, see Va. Code 1919, § 654.

CERTAINTY.—See post, CHARITIES; CONTRACTS; PLEADING; SPECIFIC PERFORMANCE; TRUSTS AND TRUSTEES.

CERTIFICATE.—As to certificate of acknowledgment, see ante, ACKNOWLEDGMENT. As to certificate of deposit, see ante, BANKS AND BANKING. As to certificate of election, see post, ELECTIONS. As to certificate of bill of exceptions, see post, EXCEPTIONS, BILL OF. As to certificate of birth, see post, STATE. As to certificate of stock, see post, STOCK AND STOCKHOLDERS. As to certificate of probate of will, see post, WILLS.

CERTIFIED CASE.—See ante, CASE CERTIFIED OR RESERVED.

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CROSS REFERENCES.

See the title CERTIORARI, vol. 2, p. 734, and references there given. In addition, see ante, APPEAL AND ERROR; post, ELECTIONS. As to certiorari to election officers, see post, ELECTIONS. As to certiorari being cumulative and not exclusive of the common law remedy by writ of habeas corpus, see post, HABEAS CORPUS. As to rules of court relating to certiorari, see 83 W. Va. xlv.

I. DEFINITION, NATURE AND PURPOSE.

A. DEFINITION AND NATURE.

"Certiorari is a common-law writ, issued from a superior court directed to one of inferior jurisdiction, commanding the latter to certify and return to the former record in the particular case." *Appalachia v. Mainous*, 121 Va. 666, 93 S. E. 566.

Distinguished from Appeal and Writ of Error.—At common law when not ancillary to other process, certiorari is in the nature of a writ of error. It has the same functions to inferior tribunals whose proceedings to the course of the common law as the writ of error has to common-law courts. There is this difference, however, certiorari brings up the record for inspection only, while on error the proceedings below are superseded. It differs from appeal in that it brings up the case on the record, while on appeal the case is brought up on the merits; and from mandamus, for by that writ the case is proceeded with in the inferior court, in accordance with the order of the court granting it. *Appalachia v. Mainous*, 121 Va. 666, 93 S. E. 566.

Mandamus and Statutory Certiorari.

—See *Goff v. Board*, 56 W. Va. 675, 677, 49 S. E. 588. See also post, "City, Town or Village Councils," II, B, 3, c.

B. FUNCTIONS AND SCOPE OF WRIT.

1. Original Writ.

a. At Common Law.

The writ of certiorari is an extraordinary common-law remedy, except in so far as it has been altered by statute. Originally, it could be invoked only to review judicial proceedings and

to correct errors of law, apparent on admitted and established facts. *Wheeling, etc., R. Co. v. Triadelphia*, 58 W. Va. 487, 497, 52 S. E. 499.

"Professor Minor, in discussing the writ of certiorari, says: 'It is issued from a superior court to one of inferior jurisdiction commanding the latter to certify to the former the record or proceedings in a particular case. When the record or the proceedings are thus certified to the court which awards the writ, sundry uses may be made of the possession thereof, thus: 1. The cause may be removed, just as it is, to the court issuing the writ, not to be there reviewed, but to be thenceforward proceeded with in that court, as though it had originated there. 2. The cause may be removed, when the proceedings are summary, and not according to the course of the common law, in order that the court issuing the writ may inspect the proceedings and determine whether there has been any material irregularity therein. 3. The object of the writ may be merely as an auxiliary process, in order to obtain a fuller and more complete transcript of the record when by accident or design the copy first returned to be imperfect (citing *Bouv. Dict. Certiorari and Bac. Ab. Certiorari*); 4 *Minor's Insts., Part I, pp. 300-1.*'" *Danville, etc., Co. v. Wooding*, 2 Va. Law Reg. 244, 246.

"The same author, in his *Synopsis of the Law of Crimes*, says: 'A writ of certiorari is employed to remove proceedings from an inferior court to a higher jurisdiction, and thus it comes to be used to procure a complete copy or a record to be certified to the appellate court when it is suggested that yet remains in the inferior court, which was not copied with the transcript first

made off. Another use made of this writ was to cause the proceedings pending before a court of record to be removed into a superior court charged with the duty of superintending them in order to correct any irregularity of proceeding which may have occurred therein, but not any errors in the judgment. See edition of 1894, p. 308-3f.' " *Danville, etc., Co. v. Wooding*, 2 Va. Law Reg. 244, 246.

b. Statutory Remedy.

In *West Virginia*.—The scope of common-law certiorari has been broadened by statute. *Goff v. Board*, 56 W. Va. 675, 677, 49 S. E. 588.

By *Barnes W. Va. Code*, p. 1071, ch. 110, § 2, certiorari applies not only as it was by common law, but it is enlarged so as to apply to "every case, matter or proceeding before a county court, council of a city, town or village, justice or other inferior tribunal." See *Wheeling, etc., R. Co. v. Triadelphia*, 58 W. Va. 487, 521, 52 S. E. 499.

In *Wheeling, etc., R. Co. v. Triadelphia*, 58 W. Va. 487, 522, 52 S. E. 499, Brannon, President, said: "The legislature knew that in cases before inferior tribunals rights of property of great importance are sometimes involved, and I think it designed to make certiorari, in such cases, commensurate for relief with appeal and writ of error."

In *Virginia* there is no statute enlarging the scope of the writ of certiorari. Its use must be measured by the common law, and except to transfer a record from an inferior to a superior court, is so rare as to be almost obsolete. *Appalachia v. Mainous*, 121 Va. 666, 93 S. E. 566.

Certiorari brings up the record for inspection only, or in order that the court issuing the writ may inspect the proceedings and determine whether there has been any material irregularity therein. *Appalachia v. Mainous*, 121 Va. 666, 93 S. E. 566.

Under the practice in *Virginia* the writ of certiorari is used merely for the purpose of ancillary relief. It can-

not be used as a mere substitute for a writ of error, or supersedeas. *Danville, etc., Co. v. Wooding*, 2 Va. Law Reg. 244. See post, "Mayor Acting as Justice," II, B, 3, f.

"With the exception of the decision of the general court in *Mackaboy's* case, in 1821 (2 Va. Cases, 268), no *Virginia* case sustaining the writ of certiorari when issued in cases other than for mere ancillary relief can be found. And in that case it was employed to correct irregularities in a verdict, before judgment, in an inquisition proceeding before justices against rioters. The court held that the writ would lie after verdict, and before a judgment; and that an inquisition in case of rioters, not being a verdict, it would lie to bring up such inquisition. Nine years after that decision, sixty-five years ago, the same court, in *Hay's Administratrix v. Pistor*, where the writ was sought to be applied to a similar purpose as in this case, said 'it might be regarded as almost obsolete in this commonwealth.' And it was further said: 'We know of no instance in which this writ has been used in *Virginia*, as a mere substitute for the writ of error or supersedeas.' 2 Leigh, p. 707." *Danville, etc., Co. v. Wooding*, 2 Va. Law Reg. 244, 247.

2. Ancillary Writ.

See ante, "Statutory Remedy." I, B. 1; post, "Award as Auxiliary Writ for Defects of Record," II, D.

II. WHEN PROPER.

B. WHAT PROCEEDINGS REVIEWABLE.

1. General Rule.

b. Under Statute.

Only judicial action is reviewable by the writ of certiorari under §§ 2 and 3 of ch. 110 of the *West Virginia Code*. The scope of the writ is not altered by the statute in respect to the nature of the proceedings for the review of which it may be had. In this respect it re-

mains as it was by the common law. *Wheeling, etc., R. Co. v. Triadelphia*, 58 W. Va. 487, 488, 52 S. E. 499.

"It is not essential, however, that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice, but it is sufficient if they are quasi judicial. It is enough if they act judicially in making their decision, whatever may be their public character." *Wheeling, etc., R. Co. v. Triadelphia*, 58 W. Va. 487, 497, 52 S. E. 499.

West Virginia Statute.—Barnes W. Va. Code, p. 1071, ch. 110, § 2, provides: "In every case, matter or proceeding, in which a certiorari might be issued, as the law heretofore has been, and in every case, matter or proceeding before a county court, council of a city, town or village, justice or other inferior tribunal, the record or proceeding may after a judgment or final order therein, or after any judgment or order therein abridging the freedom of a person, be removed by a writ of certiorari to the circuit court of the county in which said judgment was rendered, or order made; except in cases where authority is or may be given by law, to the circuit court or the judge thereof in vacation, to review such judgment or order in motion, or on appeal, writ of error or supersedeas, or in some manner other than upon certiorari."

3. Proceedings, Judgments or Orders of Particular Tribunals.

b. County Courts.

(2) In West Virginia.

See ante, "Under Statute," II, B, 1, b.

Removal of Public Officer.—"The action of the county court in removing defendant in error from office is reviewable by certiorari. *Dunlevy v. County Court*, 47 W. Va. 513, 35 S. E. 956; *Dryden v. Swinburne*, 20 W. Va. 89; *Swinburn v. Smith*, 15 W. Va. 483." *Helmick v. County Court*, 65 W. Va. 231, 233, 64 S. E. 17.

Granting Leave to Get Liquor

License.—A circuit court has no jurisdiction, at the suit of a protestant against the grant by a county court of leave to get license to sell intoxicating liquors, to allow a writ of certiorari from the order of a county court granting such leave, and a writ of prohibition will issue from the supreme court to prohibit the entertainment and prosecution of such certiorari. Such order is final and no process lies to reverse it. *Myers v. Circuit Court*, 64 W. Va. 444, 63 S. E. 201.

d. Justices of the Peace.

(2) In West Virginia.

See ante, "Under Statute," II, B, 1, b.

e. City, Town or Village Councils.

See ante, "Under Statute," II, B, 1, b.

"Construing § 23, chapter 47, of the Code, in connection with § 2, of chapter 110, it was decided in *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770, and again in *Moore v. Holt*, 55 W. Va. 507, 510, 47 S. E. 251, that certiorari, and not mandamus, is the proper remedy, to review the proceedings of a municipal council under said section and that the council of the city, town, or village has sole and exclusive cognizance thereof, within the limitations prescribed by law. Section 23 is: 'All contested elections shall be heard and decided by the council.' The facts in *State v. McAllister*, were substantially the same as in this case, and it was decided that the statute covered such cases. Judge Brannon dissented, and in the last paragraph of his opinion, citing authorities, he takes a decided stand against the proposition that certiorari, and not mandamus, is the proper remedy. While the points adjudicated, as stated in the syllabus are correct, we do not think they were properly applied to the facts in that case. The cases cited by Judge Brannon, and other cases, we think, completely demonstrate this conclusion." *Trunick v. Northview*, 80 W. Va. 9, 11, 91 S. E. 1081.

A property owner claimed that, without his fault, he had been deprived of

the appeal given him by a statute by the action of a street committee in overruling, without his knowledge, his objections to the ascertainment of damages to his premises by grading the street in front thereof. Defendants demurred on the ground that complainant had a full, adequate and complete remedy at law by a writ of certiorari. As counsel for defendant admitted that the proceedings of the committee and council were regular on their face, and as certiorari brings up the record for inspection only, or order that the court issuing the writ may inspect the proceedings and determine whether there has been any material irregularity therein, the writ would have been of no value to complainant. In such case equity has jurisdiction, and the demurrer was properly overruled. *Appalachia v. Mainous*, 121 Va. 666, 93 S. E. 566.

f. Mayor Acting as Justice.

Where the charter of a city declares that the judgment of the mayor shall be final when the penalty imposed by him is a fine not exceeding \$10, a judgment of such mayor imposing a fine of \$2 for violation of a city ordinance cannot be reviewed on a writ of certiorari. *Danville, etc., Co. v. Wooding*, 2 Va. Law Reg. 244.

C. NECESSITY FOR JUDGMENT OR ORDER.

Under Statute.—Barnes Code, p. 1071, ch. 110, § 2.

D. AWARD AS AUXILIARY WRIT FOR DEFECTS OF RECORD.

"In Virginia, as early as *Terrell v. Ladd*, 2 Wash. (2 Va.) 150, 151, certiorari was awarded to supplement the record filed on mere suggestion of counsel." *State v. Crawford*, 66 W. Va. 114, 117, 66 S. E. 110.

Va. Code 1919, § 6345 provides that the appellate court or any judge thereof in vacation, may, in any case, after reasonable notice to counsel in the appellate court, award a writ of

certiorari to the clerk of the court below, and have brought before it, when part of a record is omitted, the whole or any part of such record. Cited in *McMenamin v. Southern R. Co.*, 115 Va. 822, 80 S. E. 596. *Bowen v. Bowen*, 122 Va. 1, 94 S. E. 166. [Ed. Note. This is identical with § 3463 of the Code of 1887 except the words "counsel in the appellate court" are used in lieu of "the adverse party."]

Va. Code 1919, § 4933, provides that upon a suggestion of a diminution of the record, a writ of certiorari may be awarded by the court, or judge in vacation.

Instance of Certiorari to Complete Record.—*Bowen v. Bowen*, 122 Va. 1, 94 S. E. 166.

In West Virginia the appellate court may award certiorari to have brought before it, when part of a record is omitted, the whole or any part of such record. Barnes Code, p. 1151, ch. 135, § 7.

Where necessary to correct errors, defects, or omissions in the original transcript or return filed in an appellate court, an additional or supplemental transcript or return may be obtained on proper application, and, when filed in the appellate court, will be considered as part of the original transcript or return, and a writ of certiorari is proper for that purpose. *State v. Crawford*, 66 W. Va. 114, 66 S. E. 110.

III. JURISDICTION.

A. ORIGINAL JURISDICTION.

1. In Whom Vested.

In Circuit Court.—Barnes Code 1919, §§ 5890, 6053; Barnes Code, pp. 1071, ch. 110, § 2; p. 1107, ch. 123, § 3.

W. Va. Const. Art. 8, § 12, gives the circuit court supervision and control of all proceedings before justices and other inferior tribunals certiorari. *State v. Crawford*, 66 W. Va. 114, 117, 66 S. E. 110.

2. As Dependent on Amount in Controversy.

No certiorari shall be issued in civil cases before justice when the amount in controversy, exclusive of interest and costs, does not exceed fifteen dollars. Barnes Code, p. 1071, § 2.

3. Award in Vacation.

By Circuit Judge.—Barnes Code, p. 1072, ch. 110, § 4, p. 1107, ch. 123, § 3.

B. APPELLATE JURISDICTION.

See post, "Review of Decision on Certiorari," VIII.

IV. APPLICATION.

B. WHO MAY APPLY.

Only a party who feels himself justly aggrieved by the result of a judicial proceeding can have the benefit of a review thereof on certiorari in circumstances warranting its application. *Baker v. O'Brien*, 78 W. Va. 692, 90 S. E. 541.

"One entitled to prosecute a writ of certiorari must not only be a party to the proceeding, but must also have an interest in the litigation." *Myers v. Circuit Court*, 64 W. Va. 444, 63 S. E. 201.

V. THE WRIT.

C. RETURN.

2. Requisites and Sufficiency.

b. Certificate of Evidence and Bill of Exceptions.

In General.—Barnes Code, p. 1072, ch. 110, § 3.

E. EFFECT OF WRIT AS SUPERSEDEAS.

See post, "Bond," VI.

VI. BOND.

Necessity and Requisites of Bond—Stay of Proceedings.—Barnes Code, p. 1072, ch. 110, §§ 5, 6.

VII. PROCEEDINGS IN REVIEWING COURT.

B. FILING AND DOCKETING IN CIRCUIT COURT.

Duty of Clerk. — Barnes Code, p. 1072, ch. 110, § 3.

C. HEARING AND DETERMINATION.

1. Time of Hearing.

Return and Hearing in Vacation.—Barnes Code, p. 1072, ch. 110, § 4.

2. Scope of Review.

c. Under Present W. Va. Code.

Upon the hearing, such circuit court shall, in addition to determining such questions as might have been determined upon a certiorari, as the law heretofore was, review such judgment, order or proceeding, of the county court, council, justice of other inferior tribunal upon the merits, determine all questions arising on the law and evidence. Barnes Code, p. 1072, ch. 110, § 3.

3. Judgment or Order.

b. Under Present W. Va. Code.

(1) General Rule.

By Barnes Code, p. 1072, ch. 110, § 3, it is provided that upon the hearing the circuit court shall "render such judgment or make such order upon the whole matter, as law and justice may require."

(2) Retention for Trial Court.

Statutory Provision.—Barnes Code, p. 1072, ch. 110, § 3.

VIII. REVIEW OF DECISION ON CERTIORARI.

A. IN GENERAL.

Constitutional Provision.—W. Va. Const. Art. 8, § 3, provides that the supreme court of appeals shall have appellate jurisdiction in certiorari cases.

CESTUI QUE TRUST.—See post, TRUSTS AND TRUSTEES.

CHALLENGE.—See post, JURY.

CHAMBERS AND VACATION.

IV. Powers of Judge in Vacation.

- A. In General.
- B. To Issue Writs of Habeas Corpus and Mandamus.
- C. To Appoint Receivers.
- D. To Order an Account.
- E. To Quash or Dismiss Attachment.
- I. To Grant and Dissolve Injunctions.
- J. To Decree Alimony Pendente Lite.
- L. To Require Bill of Particulars.
- M. To Render Judgment or Decree.
- N. To Grant Appeals and Writs of Error.
- O. To Sign Bill of Exceptions.
- P. To Grant Writ of Prohibition.

V. Control over Proceedings during Preceding Vacation.

VII. Confirmation of Sale—Notice.

VIII. Order.

IX. Appeal.

CROSS REFERENCES.

See the title CHAMBERS AND VACATION, vol. 2, p. 767, and references there given. In addition, see ante, ALIMONY; APPEAL AND ERROR; ATTACHMENT AND GARNISHMENT; BAIL AND RECOGNIZANCE; post, COURTS; DETINUE AND REPLEVIN; DISORDERLY HOUSES; DRAINS AND SEWERS; ELECTIONS; EMINENT DOMAIN; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; EXTRADITION; GUARDIAN AND WARD; INFANTS; INSANITY; INTERPLEADER; JUDGES; JUDGMENTS AND DECREES; JURY; LICENSES; NUISANCES; QUO WARRANTO; RECEIVERS; RECORDS; STATUTORY BONDS; TAXATION; TRUSTS AND TRUSTEES; WITNESSES. As to confession of judgment in vacation, see post, CONFESSION OF JUDGMENTS. As to punishment of contempt in vacation, see post, CONTEMPT.

IV. POWERS OF JUDGE IN VACATION.

A. IN GENERAL.

Determination of Matters in Vacation.—Va. Code 1919, §§ 6307, 6308; W. Va. Code Suppl. 1918, § 4557a.

Correction of Errors.—Va. Code 1919, § 6329; Barnes Code, ch. 134, § 1. See post, FILING PLEADINGS AND PAPERS.

Power to Issue Process.—General jurisdiction having been conferred upon

the supreme court of West Virginia, it takes necessarily the power to award through its judges in vacation process to bring the cause within the cognizance of the court, so that the remedy may be always available. *Campbell v. Doolittle*, 58 W. Va. 317, 320, 52 S. E. 260. See post, SUMMONS AND PROCESS.

Stay of Proceedings.—See post, SUPERSEDEAS AND STAY OF PROCEEDINGS.

Process for Apprehension of Per-

son Charged with Crime.—W. Va. Code, ch. 156, § 1.

Powers of Judge of Municipal Court.—Barnes Code, ch. 114A, § 3.

B. TO ISSUE WRITS OF HABEAS CORPUS AND MANDAMUS.

See post, HABEAS CORPUS; MANDAMUS.

C. TO APPOINT RECEIVERS.

See post, RECEIVERS.

D. TO ORDER AN ACCOUNT.

See ante, ACCOUNTS AND ACCOUNTING.

E. TO QUASH OR DISMISS ATTACHMENT.

See ante, ATTACHMENT AND GARNISHMENT.

I. TO GRANT AND DISSOLVE INJUNCTIONS.

See post, INJUNCTIONS.

J. TO DECREE ALIMONY PENDENTE LITE.

See ante, ALIMONY.

L. TO REQUIRE BILL OF PARTICULARS.

See ante, BILL OF PARTICULARS.

M. TO RENDER JUDGMENT OR DECREE.

See post, JUDGMENTS AND DECREES.

N. TO GRANT APPEALS AND WRITS OF ERROR.

See ante, APPEAL AND ERROR.

O. TO SIGN BILL OF EXCEPTIONS.

See post, EXCEPTIONS, BILL OF.

P. TO GRANT WRIT OF PROHIBITION.

See post, PROHIBITION.

V. CONTROL OVER PROCEEDINGS DURING PRECEDING VACATION.

Va. Code 1919, § 6140; Barnes Code, ch. 125, § 60.

VII. CONFIRMATION OF SALE—NOTICE.

See post, JUDICIAL SALES AND RENTINGS.

VIII. ORDER.

Entry of Vacation Orders and Judgments Certified by Judge to Clerk.—

Va. Code 1919, § 6308; Barnes Code, ch. 112, § 10.

IX. APPEAL.

See ante, APPEAL AND ERROR.

CHAMPERTY AND MAINTENANCE.

I. Definitions.

II. Law Controlling.

III. Champertous Contracts.

B. Between Attorney and Client.

D. Conveyance by Party Out of Possession.

1. Operation and Effect in General.

c. Agreement for Further Consideration.

IV. Effect of Champerty.

A. On Contract.

V. Who May Set Up as Defense.

VI. When Defense May Be Set Up.

CROSS REFERENCES.

See the title CHAMPERTY AND MAINTENANCE, vol. 2, p. 773, and references there given. In addition, see ante, ADVERSE POSSESSION; ASSIGNMENTS, post, CONFLICT OF LAWS; ILLEGAL CONTRACTS.

I. DEFINITIONS.

Champerty may be defined to be a bargain with the plaintiff or defendant in a suit for a portion of the land or other matters sued for, in case of a successful termination of the suit, which the champertor undertakes to carry on at his own expense. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421; *Seward v. Camp Mfg. Co.*, 112 Va. 479, 71 S. E. 614.

Division in Kind of Recovery.—In order to establish champerty it is not necessary that it should appear on the face of the contract, nor that the agreement should be for a division in kind of the property sued for. It is sufficient if the champertor and the party with whom he contracted were to share in the fruits of the recovery. *Seward v. Camp Mfg. Co.*, 112 Va. 479, 71 S. E. 614.

II. LAW CONTROLLING.

Common Law Offences.—Champerty is a criminal offense at common law and the common law as to champerty with respect to the validity of contracts is still in force in Virginia. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421;

Roller v. Murray, 112 Va. 780, 72 S. E. 665.

Repeal of Statute Making Champerty a Criminal Offense.—The law of champerty as affecting civil contracts is not obsolete and inoperative in Virginia, nor is it affected by the repeal by implication of the statute, declaratory of the common law, making champerty a criminal offense. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

Whether contract for recovery of land situated in Virginia is champertous or not, is to be determined by the laws of Virginia. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

III. CHAMPERTOUS CONTRACTS.

B. BETWEEN ATTORNEY AND CLIENT.

Contingent Fee.—The old conception that a contract by an attorney for a contingent fee came under the ban of the law against champerty, has been repudiated in many of the American states and among these is Virginia. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

Attorney Paying All Expenses.—When a person agrees to give an attorney one-fifth of the net proceeds of

all lands recovered by him in a suit brought for that purpose, the attorney to pay all expenses, and the client stipulating that she shall not be liable to pay money for anything connected with the business, the contract is champertous. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

In a contract where R. distinctly undertakes to institute and carry on litigation to recover lands and in it he and his client distinctly stipulate that the latter is at no time required to pay any money for anything connected with the litigation in Virginia; and if these expenses are paid by R. he is to be reimbursed out of the proceeds of the lands recovered, here the client is distinctly indemnified against costs by the counsel, and such contract is no less champertous than one in which it is affirmatively provided that counsel shall stand the costs. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

D. CONVEYANCE BY PARTY OUT OF POSSESSION.

1. Operation and Effect in General.

c. Agreement for Further Consideration.

In Case of Recovery.—Where land is conveyed by a grantor out of possession to a purchaser, by a deed absolute on its face, for a nominal consideration, and it is further agreed between the parties, as a part of the consideration that the purchaser, if he so elects, may sue the party setting up an adverse title, to recover the possession thereof, and if he recovers that he will pay an additional consideration to the grantor on the basis of so much per acre for the land recovered, the contract is champertous, and, in an action of ejectment by such purchaser against the adverse claimant, the champerty may be set up under the plea of not guilty, and if shown will defeat the action. Although there was no express contract binding the grantee to bring suit to recover the land, in no other way could he realize

the fruits of his contract; and as the suit to recover the land has its origin and progress in the champertous agreement, the court will not lend its aid to its consummation. *Seward v. Camp Mfg. Co.*, 112 Va. 479, 71 S. E. 614.

No Agreement for Further Consideration.—Where land is conveyed by a grantor out of possession by a deed absolute on its face for a nominal consideration and there is no agreement by the grantee to pay any further consideration in case he recovered the property, the conveyance is not champertous. *Seward v. Camp Mfg. Co.*, 112 Va. 479, 71 S. E. 614.

IV. EFFECT OF CHAMPERTY.

A. ON CONTRACT.

Champertous contracts are unlawful and for that reason void. *Roller v. Murray*, 112 Va. 780, 72 S. E. 665; *Seward v. Camp Mfg. Co.*, 112 Va. 479, 485, 71 S. E. 614; *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

A bond given for a fee due under a champertous contract is void. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

Effect to Pass Title.—As to conveyance by one out of possession in addition to the cases cited in the title CHAMPERTY AND MAINTENANCE, vol. 2, p. 777, see *M'Lean v. Cooper*, 3 Call (7 Va.) 367.

Effect to Pass Title—Ejectment by Grantee.—That the verdict should find precisely whether there was livery of seisin, see *M'Lean v. Cooper*, 3 Call (7 Va.) 367.

No Recovery on Quantum Meruit.—Compensation for services rendered under champertous contracts can not be recovered upon a quantum meruit, any more than upon the contracts themselves. Courts will not permit that to be done by indirection which they refuse to allow to be done directly. An agreement by an attorney to carry on litigation at his own expense is in itself illegal, and there can be no recovery either on the agreement, or for services rendered thereunder.

Roller v. Murray, 112 Va. 780, 72 S. E. 665.

Whether an attorney, who fails to recover on a champertous contract, can recover on a quantum meruit, can not be determined in a suit in equity instituted by him which goes out of court on a demurrer for lack of equity. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

Effect of Subsequent Written Contract.—Where a champertous contract has been entered into between attorney and client, and, after a large portion of the property has been recovered under it, the parties reduce the contract to writing embracing the whole property originally in dispute and therein stipulate that all expenses shall be paid out of the proceeds of the land recovered, and that the attorney shall indemnify and save the client harmless against all costs, the contract is not purged of its illegality, even though the land already recovered be sufficient to pay such costs. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

V. WHO MAY SET UP AS DEFENSE.

Stranger to a champertous contract can not take advantage of it; only a

party to it can do so. *Harrison v. Harman*, 85 W. Va. 538, 102 S. E. 224; *Irons v. Hat, etc., Co.*, 86 W. Va. 685, 104 S. E. 111; *Harness v. Baltimore, etc., R. Co.*, 86 W. Va. 284, 103 S. E. 866.

Under this rule it is error to admit testimony introduced by defendant respecting the alleged champertous nature of the contract of employment between plaintiff and his attorney. *Harness v. Baltimore, etc., R. Co.*, 86 W. Va. 284, 103 S. E. 866.

A donee of land who agrees to "take the shoes" of the donor in a champertous contract with an attorney for the recovery of the land, is not a stranger to the contract, and may set up the defense of champerty to a suit by the attorney for his share of the recovery. *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

VI. WHEN DEFENSE MAY BE SET UP.

Only in Action Based Directly on Contract.—Maintenance or champerty may be interposed as matter of defense, only in an action or suit based directly on the contract affected by the infirmity of maintenance or champerty. *Irons v. Hat, etc., Co.*, 86 W. Va. 685, 104 S. E. 111.

CHANCERY.—See post, EQUITY.

CHANGE.—As to change of title of a possession within meaning of fire insurance policy, see post, FIRE INSURANCE. As to change of grade of street, see post, STREETS AND HIGHWAYS. As to change of domicil, see post, TAXATION.

CHANGE OF VENUE.

I. Right to Change, 933.

B. By Statute, 933.

C. Power to Obtain Jury from Another County, 934.

II. Grounds for Change, 934.

A. Prejudice, 934.

1. In General, 934.

3. Failure to Obtain Impartial Jury, 934.

a. Virginia Rule, 934.

III. Proceedings to Procure Change, 934.

A. Preliminary Proceedings—Motion for Jury from Another County, 934.

A½. Motion for Change, 934.

D. Evidence, 935.

1. Burden of Proof, 935.

2. Affidavits, 935.

b. Requisites and Sufficiency, 935.

(1) In General, 935.

(2) Mere Belief or Fears of Defendant, 935.

3. Effect of Evidence Opposing a Change of Venue, 935.

4. Facts Considered or Established, 935.

5. Renewal of Motion for Change, 935.

E. Discretion of Court, 935.

I. Review, 936.

III½. Accused Admitted to Bail or Remanded to jail, 936.

IV. Proceeding after Change, 936.

A. Certificate of Record, 936.

CROSS REFERENCES.

See the title CHANGE OF VENUE, vol. 2, p. 780, and references there given. In addition, see ante, AFFIDAVITS, post, COURTS; CRIMINAL LAW; JUDGES; JURISDICTION; JURY; REMOVAL OF CAUSES; VENUE.

I. RIGHT TO CHANGE.

B. BY STATUTE.

Constitutional Provisions.—Va. Const., § 63, cl. 2; W. Va. Const., Art. 3, § 14.

The constitution guarantees to one accused of, and about to be tried for a crime, a change of venue upon a showing of good cause therefor. *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450.

Statutory Provisions in General.—Va. Code 1919, § 4914; Barnes Code, ch. 159, § 15. See *Uzzle v. Com.*, 107

Va. 919, 60 S. E. 52; *Jones v. Com.*, 111 Va. 862, 866, 69 S. E. 953.

Construction of Statute.—Statutes conferring the right to a change of venue are enacted with the view of according litigants a fair and impartial trial, and being in furtherance of justice should be liberally construed so as not to defeat the right. *Ramsay v. Harrison*, 119 Va. 682, 89 S. E. 977.

Prosecutions or Actions against Members of National Guard or Militia.—Barnes Code, ch. 18, § 63.

Violation of Laws Relating to In-

toxicating Liquor.—Va. Code 1919, § 4663.

C. POWER TO OBTAIN JURY FROM ANOTHER COUNTY.

See post, JURY.

No provision is made by statute for getting qualified jurors in a civil case from another city or county, and the power to obtain such jurors is not inherent in the court. Va. Code 1904, § 4024 (Code 1919, § 4901), provides for such jurors in a criminal case, but not in a civil case. *Rust v. Reid*, 124 Va. 1, 97 S. E. 324.

In the instant case if an impartial jury could not have been obtained in the city where the case was tried, appellants should have moved for a change of venue and not for a jury from another city or county. *Rust v. Reid*, 124 Va. 1, 97 S. E. 324.

II. GROUNDS FOR CHANGE.

A. PREJUDICE.

1. In General.

Local prejudice of such a character as to prevent a fair and impartial trial in the county or district where the action is brought is a well recognized ground for a change of venue. *Ramsey v. Harrison*, 119 Va. 682, 692, 89 S. E. 977; *Uzzle v. Com.*, 107 Va. 919, 60 S. E. 52; *Burton v. Com.*, 107 Va. 931, 60 S. E. 55; *Jones v. Com.*, 111 Va. 862, 69 S. E. 953.

It is good cause for change of venue under the Virginia statute where it appears that the white people of the country were so greatly aroused against the accused, who was a negro, and that the relations between the races were of such character that it required the promptest and most vigorous action of the executive officers of the state, from the governor down, including the military and the posse furnished the sheriff by the court, to preserve the public peace, and to protect the accused and other members of his race from mob violence; that this state of feeling continued down to and through

the trial of the accused; and that after the conviction of the accused, he had to be confined in the jail of another county, pending his efforts to have the judgment of the trial court reversed. *Uzzle v. Com.*, 107 Va. 919, 929, 60 S. E. 52; *Burton v. Com.*, 107 Va. 931, 60 S. E. 55.

Calling Out Militia to Protect Accused.—Va. Code 1919, § 4914.

3. Failure to Obtain Impartial Jury.

a. Virginia Rule.

See ante, "Power to Obtain Jury from Another County," I, C.

III. PROCEEDINGS TO PROCURE CHANGE.

A. PRELIMINARY PROCEEDINGS —MOTION FOR JURY FROM ANOTHER COUNTY.

Where an application for a change of venue is based simply on the ground of difficulty in obtaining jurors in the county free from exception, it must be preceded by an application to summon jurors from beyond such county, but this rule has no application where the motion for a change of venue is based upon the ground that there exists such prejudice and excitement against the accused as to endanger the fairness and impartiality of a trial conducted in the county. *Jones v. Commonwealth*, 111 Va. 862, 69 S. E. 953; *Looney v. Com.*, 115 Va. 921, 78 S. E. 625; *Uzzle v. Com.*, 107 Va. 919, 929, 60 S. E. 52; *Burton v. Com.*, 107 Va. 931, 60 S. E. 55.

A½. MOTION FOR CHANGE.

Va. Code 1919, § 4914; Barnes Code, ch. 159, § 15.

Renewal of Motion.—See post, "Renewal of Motion for Change," III, D, 5.

Although a motion for a change of venue may have been properly overruled at one term of the court, it is renewable at a subsequent time whenever the exigencies of the situation may call it into replication. *Looney v. Com.*, 115 Va. 921, 78 S. E. 625.

D. EVIDENCE.**1. Burden of Proof.**

The accused bears the burden of proving to the satisfaction of the court the existence of good cause for a change of venue. *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450.

2. Affidavits.**b. Requisites and Sufficiency.****(1) In General.**

Statements of Grounds.—The affidavits in support of the motion for a change of venue, especially where opposed by counter affidavits of disinterested persons, should state the facts and circumstances tending to show that a fair and impartial trial can not be had where the case is pending and not the mere belief or opinion of the affiants. Less than this is not sufficient under the statute permitting a change of venue for good cause shown. *Ramsey v. Harrison*, 119 Va. 682, 89 S. E. 977.

(2) Mere Belief or Fears of Defendant.

"The opinion of the accused that local prejudice exists is not sufficient to support a motion for a change of venue. Facts and circumstances must be shown satisfying the court that a fair trial can not be had." *Wright v. Com.*, 114 Va. 872, 77 S. E. 503.

3. Effect of Evidence Opposing a Change of Venue.

Affidavits, however numerous, merely negative in character, stating that affiants are familiar with the circumstances of the case about to be tried and know of no public prejudice or animosity against the accused that will prevent his having a fair and impartial trial in the county, but stating no facts on which such conclusions are based, do not overcome the evidence of accused, supported by only a small number of witnesses, who swear to facts which clearly show the exist-

ence of a strong and prevailing public prejudice against the accused and a general belief in his guilt. *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450.

4. Facts Considered or Established.

Upon an application for a change of venue in a criminal case, facts stated in the petition for removal which the commonwealth does not ask to controvert and which the accused is not permitted to sustain by proof, must be considered as established. *Uzzle v. Com.*, 107 Va. 919, 929, 60 S. E. 52; *Burton v. Com.*, 107 Va. 931, 60 S. E. 55.

5. Renewal of Motion for Change.

The accused may renew his motion for a change of venue at any time before the jury is sworn, and is entitled to file additional affidavits in support thereof; he should also be allowed to cross-examine affiants for the state then present in court. Evidence on a motion for change of venue may be taken at the bar of the court as well as by affidavits. *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450.

E. DISCRETION OF COURT.

The trial court must be allowed a wide discretion in deciding motions for change of venue or for a jury from another county, and it is the established rule that the supreme court of appeals will not reverse the judgment of the trial court unless it plainly appears that such discretion has been improperly exercised. *Looney v. Com.*, 115 Va. 921, 78 S. E. 625; *Taylor v. Com.*, 122 Va. 886, 94 S. E. 795.

The good cause alleged may be controverted by the state, and the question is one of fact addressed to the sound discretion of the court, and if his ruling thereon is prejudicial to the accused, it is caused for reversal. *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450.

I. REVIEW.**Presumption that Motion Unfounded.**

—Where the motion for a change of venue is based on the ground that an impartial jury can not be obtained in the county, the fact that an impartial jury has subsequently been secured therein is conclusive proof that the motion was without foundation. *Taylor v. Com.*, 122 Va. 886, 94 S. E. 795; *Looney v. Com.*, 115 Va. 921, 924, 78 S. E. 625.

III½. ACCUSED ADMITTED TO BAIL OR REMANDED TO JAIL.

Va. Code 1919, § 4915; Barnes Code, ch. 159, § 16.

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Duty of Clerk to Certify Copies of Recognizances and Record.—Va. Code 1919, § 4916; Barnes Code, ch. 159, § 17.

CHARACTER IN EVIDENCE. — See post, CRIMINAL LAW; EVIDENCE; HOMICIDE.

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I½. HISTORY OF LAW IN RELATION TO.

The statute of charitable trusts, St. 43 Elizabeth, c. 4, passed to make good conveyances to pious uses, not otherwise good, and relating to the administration of such trusts by courts of equity, was repealed by the Legislature of Virginia in 1792. *Ritter v. Couch*, 71 W. Va. 221, 76 S. E. 428, 432; *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827.

II. CREATION.

A charitable trust may be created by precatory words clearly expressive of testator's desire. *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827.

II½. VALIDITY.

Validity of Gifts, Grants, Devises or Bequests for Charitable Purposes.—Va. Code 1919, § 587.

Validity of Gifts of Personal Property of Charitable Purposes.—Barnes Code, ch. 57, § 10.

Section 10 of chapter 57 of the West Virginia Code 1906, by clear and necessary implication, authorizes the giving of personal property in trust for benevolent purposes. *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827.

Conveyances of Land for Charitable Purposes Validated.—Barnes Code, ch. 57, § 3.

The purpose of the state "was evidently to validate conveyances of land, when made for any of the objects and purposes therein named. So anxious was the state to protect the enumerated charities, and to foster and en-

courage a spirit of benevolence and education among its citizens, that the law was made retroactive as well as prospective, provided the conveyance had theretofore been made to trustees. * * *. *Hays v. Harris*, 73 W. Va. 17, 21, 80 S. E. 827.

The statute is a restoration, pro tanto, of charitable trusts, and the word "conveyance," as used in the statute, comprehends a devise. *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827.

"It can not be doubted, that a gift made to erect a hospital, not for private gain, but for the treatment of the sick poor, without expense to them, is a benevolent gift (under Barnes Code, ch. 57, § 3). Webster defines the word 'benevolent' as, 'having a disposition to do good; possessing or manifesting love to mankind, and a desire to promote their prosperity and happiness; disposed to give to good objects; kind, charitable.'" *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827, 830.

"While the word 'benevolent' does not include all those indefinite trusts recognized in chapter 4, St. 43 Eliz. as charities, still it is more comprehensive and wider in its scope of meaning than the word 'charitable,' and may include what are not recognized as charities in the old English law." *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827, 830.

The residuary clause of the will under consideration in this case created a benevolent or charitable trust, valid under section three of chapter fifty-seven of the Code. *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827.

III. LEGISLATIVE CONTROL.

Local or Special Laws Providing for Sale of Property Held for Charitable Uses Prohibited.—W. Va. Const. Art. 7, § 39. See post, CONSTITUTIONAL LAW; STATUTES.

III½. BOARD OF CHARITIES AND CORRECTIONS.

Code of Va., §§ 1888-1904, 1918, 1931, 1933. See post, PUBLIC OFFICERS; STATE.

III½. STATE OR MUNICIPAL APPROPRIATIONS TO.

Limitations on Appropriations by General Assembly.—Const. of Va., § 67.

The Act of the General Assembly of Virginia of March 11, 1908 (Acts 1909, ch. 181), to create a Firemen's Relief Fund, etc., is unconstitutional because it appropriates money to a charitable institution not owned or controlled by the state. *Aetna Ins. Co. v. Button*, 18 Va. Law Reg. 97.

V. BENEFICIARIES.

A. IN GENERAL.

Uses for Which Taken and Held.—Va. Code 1919, § 588.

Charitable Purposes for Which Conveyances of Land May Be Made.—Barnes Code, ch. 57, § 3.

Definiteness Required.—"It is necessary only that the object of a benevolent trust should be certain." *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827, 830.

In *Jordan v. Universalist, etc., Trustees*, 107 Va. 79, 84, 57 S. E. 652, the court said: "It has always been settled as a general rule, that a devise bequest, indefinite as to its object or purposes, was on that account void. In England the subject of charities has long if not always formed an exception to that rule; either at common law or in virtue of the statute of 43 Eliz., commonly called the statute of charitable uses. But ever since the decision of the cases of the Baptist Association *v. Hart's Ex'ors*, 4 Wheat. 1, 1 L. Ed. 499, by the Supreme Court of the United

States and Gallego v. Attorney General, 3 Leigh 450, 24 Am. Dec. 650, by this court, it has been considered to be well settled that the English law of charities does not exist in this state, and that with the exception hereafter made by statute, * * * 'charitable bequests,' in the language of Judge Carr, in the latter case, [stand on the same footing with us as all others, and will alike be sustained by courts of equity.]"

It is an essential element of a benevolent or charitable trust that the individual beneficiaries be indefinite. The purpose of the bounty and the class of persons to be benefited alone need be definite. *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827, 830. See post, "Persons Designated by General Classes," V, B.

Under the statute a conveyance of land may be made to a benevolent trust, even though it may not be made for the use of any designated, or organized society of individuals, but made for the benefit of an indefinite number of unorganized persons. (*Hays v. Harris*, 73 W. Va. 17, 22, 80 S. E. 827.

Beneficiaries Need Not Be Capable of Taxing Title.—"In charitable trusts the beneficiaries are not and need not be capable of taking the title, as when property is given in trust for the poor of the parish, or the education of youth, or for pious uses, or for any charitable purpose, the beneficiaries are generally unknown, uncertain, changing and incapable of taking or dealing with the legal title; but such trusts are valid in equity, and courts of equity will administer them and protect the rights of the cestui que trust." *Perry on Trusts*, § 66." *Ritter v. Couch*, 71 W. Va. 221, 233, 76 S. E. 428.

B. PERSONS DESIGNATED BY GENERAL CLASSES.

"In *Beach on Trusts*, § 322, we find this: 'In distinction from an express private trust, which, by the definition, is designed for the benefit of one or more individuals, the trust for charitable

purposes is a public trust, and from the nature of the case the beneficiaries are, to a greater or less extent, unknown or indefinite. Ordinarily the trust is designed for the benefit of a class, the individuals of which can be designated only in general terms. In a private trust, if the beneficiary or beneficiaries are not definitely and positively named, the trust fails on the ground of indefiniteness. But in a charitable trust the beneficiaries need not be definitely named, and even where there is no adequate designation of a cestui que trust, the trust will be enforced in equity if the intention of the settlor can be ascertained beyond a reasonable doubt. Trusts for charitable purposes are regarded by courts of equity with special favor, and a much more liberal construction will be put upon an instrument creating such a trust than upon one creating a trust for individuals.'" *Ritter v. Couch*, 71 W. Va. 221, 231, 76 S. E. 428.

The residuary clause of a will after providing that certain property be sold and the proceeds bound over to certain named trustees, for the purpose of establishing a city hospital, continued: "It is the desire of the testator that the sick poor should be treated without charge or with as little expense as possible." It was held that the words "sick poor" sufficiently define a class of persons intended as the object of testator's bounty. *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827.

A trust by conveyance of land to an incorporated town for public use as a burial place for the dead is not void because of indefiniteness as to the beneficiary. *Ritter v. Couch*, 71 W. Va. 221, 76 S. E. 428, distinguishing *Brown v. Caldwell*, 23 W. Va. 187.

C. PARTICULAR CAUSES AND PURPOSES.

Bequest to Be Applied to Mission Work in the United States of America.—A bequest to the trustees of the Uni-

versalist General Convention of the remainder in certain real estate, which was to be by them sold and the money applied to mission work in the United States of America, was held to be unobjectionable on the ground of uncertainty. *Jordan v. Universalist, etc., Trustees*, 107 Va. 79, 57 S. E. 652.

Devise to Corporation for General Purposes of Its Incorporation.—While courts of chancery will not undertake to enforce indefinite charities, a devise to a corporation for the general purposes of its incorporation can not be said to be uncertain in any respect, and will be upheld. *Ritter v. Couch*, 71 W. Va. 221, 232, 76 S. E. 428; *Osenton v. Elliott*, 73 W. Va. 519, 81 S. E. 837; *Jordan v. Universalist, etc., Trustees*, 107 Va. 79, 57 S. E. 652.

It is immaterial that the corporation was created by another state, and that its object is to hold property for church purposes. *Jordan v. Universalist, etc., Trustees*, 107 Va. 79, 57 S. E. 652.

Bequests Void for Uncertainty as to Purposes.—Bequests by a testatrix, one of \$40,000, to trustees named, "to be placed and used to the very best of said parties knowledge in helping the poor those who are deserving, in lifting young men up and helping the work along in putting down intoxicant drinks and saving souls. Let this money be used in the way God may direct for His cause;" the other of "\$10,000 to be placed in the Baptist Church to be used for Lord's work in the way he may direct," are void for uncertainty. *Arnett v. Fairmont Trust Co.*, 70 W. Va. 296, 73 S. E. 930.

D. CORPORATIONS.

See ante, "Particular Causes and Purposes," V, C.

Where a gift was to the "Trustees of the Presbyterian Home for Old Ladies, situated in Richmond, Va.," and there was no such institution, but the evidence clearly showed that the "Richmond Home for Ladies," a corporation

in the city of Richmond, chartered for the purpose of providing a home and gratuitous support for indigent and infirm women, and especially those connected with the Methodist Church, South, and the Presbyterian Church, was the object of the testator's bounty, it was permitted to take. *Jordan v. Richmond Home*, 106 Va. 710, 56 S. E. 730.

V½. CY PRES DOCTRINE.

A man dies and leaves his property in trust to establish and support a charitable hospital, but the amount of property is insufficient. Held, that as the terms of the will were plain it is not a proper case for the application of the cy pres doctrine. *Harris v. Neal*, 61 W. Va. 1, 55 S. E. 740.

VII. TRUSTEES.

¼A. CODE DEFINITION.

Va. Code 1919, § 590.

A. WHO MAY BE TRUSTEE.

½. In General.

Authority to Take and Hold.—Va. Code 1919, § 588.

Right to Become Trustee of Personal Property.—The holding of title to land in trust for a benevolent purpose is not a prerequisite to the taking of title to personal property by trustees, upon like trust. *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827.

2. Corporations.

A municipal corporation may hold and execute a trust for charitable objects in accord with, or tending to promote, the purposes of its creation, although such a one as by its character or general laws it might not have authority to establish, or to spend its corporate funds for. *Ward v. Winchester*, 11 Va. Law Reg. 501.

2½. Counties.

The legislature has power to pass an act enabling a county to accept donations or trusts for the benefit of the indigent poor of the county, for it has

supreme legislative power except so far as it is restrained by the state or federal constitution. *Pirkey v. Grubbs*, 122 Va. 91, 94 S. E. 344.

The general assembly of Virginia passed an act (Acts 1912, p. 111), providing that the county of Rockingham should be capable, through its board of supervisors, "to accept any donation or any trust made for benevolent or charitable objects of a public nature, not religious or sectarian, within its external territorial limits, and to perform such conditions and execute such trusts as may be imposed upon it by the terms of the instrument by which the donation is made or the trust is created." Subsequent to this act a testator by his will directed that his estate should be converted into money and gave the proceeds to the county of Rockingham on condition that said county should forever pay interest, at the rate of four per cent. per annum, on the amount received by it, to the Rockingham Memorial Hospital, the hospital to apply the interest or income to the support or maintenance in its hospital of indigent patients from the county of Rockingham and the town of Harrisonburg. Held: That though this bequest might not be technically a trust, it was a donation to the county, upon condition, while the interest thereon when paid by the county to the hospital constituted a trust fund of which the Rockingham Memorial Hospital was the trustee. The general purpose of the act is the aid of benevolent and charitable objects of a public character within the territorial limits of the county of Rockingham, and the county is enabled by the act to effectuate this object, either by the acceptance of donations or the execution of trusts committed to it. *Pirkey v. Grubbs*, 122 Va. 91, 94 S. E. 344.

A¼. WHO TO EXERCISE CONTROL WHERE A VESTRY WAS APPOINTED TRUSTEE.

Va. Code 1919, § 37.

A½. APPOINTMENT.

Va. Code 1919, § 590.

D. ACCOUNTING.

Va. Code 1919, § 590.

E. POWER OF LEGISLATURE TO DIVEST MUNICIPALITY OF ADMINISTRATIVE POWER AND APPOINT NEW TRUSTEES.

The legislature may, in the absence of constitutional restriction on its powers, divest a municipal corporation of the power to administer through its common council a charitable trust conferred upon it, and appoint or provide for the appointment of new trustees independent of the corporation, and vest in them the management of such trusts. In the case in judgment, this has been done at the instance of the council of the city, and the latter can no longer contract a debt against the trust funds. Under the terms of the act of assembly providing for their appointment (Acts 1895-'6, p. 298) the trustees have the power to control the fund and to protect it from the demands of the governing body of the city. The council of the city have only the power to supervise a plan for the ultimate disposition of the funds, to elect the trustees and to require of them annual reports, but it has no power, trust, control or right of any description over the trust funds themselves. The city has the same interest as before, but a new agency has been substituted for its management and control. *Board v. Winchester Memorial Hospital*, 111 Va. 360, 70 S. E. 131.

VIII. DEVISES AND BEQUESTS.

See ante, "Creation," II; "Validity," II½; "Beneficiaries," V; "Cy Pres Doctrine," V½; "Counties," VII, A, 2½.

Right of General Assembly to Suspend or Repeal Authority Given by Devise or Bequest.—Va. Code 1919, § 593.

IX. TAXATION.

Exemption from Taxation. — Va.

Const., § 183; Va. Code 1919, §§ 2272, 2301; W. Va. Const. Art. 10, § 1; Barnes Code, ch. 29, § 57; ch. 32, § 138; ch. 33, § 2.

In *Hays v. Harris*, 73 W. Va. 17, 80 S. E. 827, 830, the court said: "Benevolent charities are peculiarly favored by our constitution and laws. Section 1, art. 10, Constitution, authorizes their exemption from taxation; and, the legislature has exempted from tax 'property used for charitable purposes and not held or leased out for profit; * * * all property belonging to * * * any hospital not held or leased out for profit, house of refuge, lunatic or orphan asylum.' Section 57, c. 29, Supp. 1909, to Code."

While the general rule is that provisions exempting property of individuals and private corporations from taxation should be strictly construed, and taxation of such property is the rule and exemption from taxation the exception, yet, as the policy of the state has been to exempt such property as that held by Young Men's Christian Associations, § 183 of the Constitution, relating to such property, should not be construed with the same strictness as that applicable to provisions making exemptions contrary to the policy of the state, and as to such property exemption is the rule and taxation the exception. *Com. v. Lynchburg Y. M. C. A.*, 115 Va. 745, 80 S. E. 589.

If the dominant purpose in the use made of rooms in a Y. M. C. A. building is to obtain revenue or profit, although it is to be applied to the general objects of the association, the property is liable to taxation. But if, as in the case at bar, the use made of the rooms has direct reference to the purposes for which the association was incorporated, and tends immediately and directly to promote these purposes, then its use is within the provisions of the constitution exempting the property from taxation, although revenue or profit is derived therefrom as in-

cident to such use. *Com. v. Lynchburg Y. M. C. A.*, 115 Va. 745, 80 S. E. 589.

The constitutional convention, in taking away from the legislature the power of exempting property from taxation, did not intend to change the old policy of the state on the subject of exempting property used wholly for certain charitable purposes, but placed limitations on the use of property ex-

empted, so as to prevent the perversion or abuse of the liberality of the state. *Com. v. Lynchburg Y. M. C. A.*, 115 Va. 745, 80 S. E. 589.

X. PROCEDURE.

C. PARTIES.

1. Trustees.

Manner in Which Trustees May Sue or Be Sued.—Va. Code 1919, § 590.

CHARITABLE PURPOSES.—As to hospital not used for profit as property used for **charitable purposes**, and exempt from taxation, see *Reynolds Memorial Hospital v. County Court*, 78 W. Va. 685, 90 S. E. 238. See also, post, **TAXATION**.

CHARITY HOSPITAL.—As to liability of charity hospital for torts, see post, **HOSPITALS AND ASYLUMS**.

CHARTER.—See post, **CORPORATIONS**; **ESTOPPEL**; **MUNICIPAL CORPORATIONS**; **WITNESSES**.

CHASTITY.—See post, **CRIMINAL LAW**; **EVIDENCE**; **RAPE**; **SEDUCTION**.

CHATTEL MORTGAGES.

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CROSS REFERENCES.

See the title CHATTEL MORTGAGES, vol. 2, p. 798, and references there given. In addition, see post, FIRE INSURANCE; FIXTURES; LANDLORD AND TENANT; LIENS; MORTGAGES AND DEEDS OF TRUST; PLEDGE AND COLLATERAL SECURITY; TAXATION. As to conditional sales, see post, SALES.

II. DISTINGUISHED FROM OTHER INSTRUMENTS.

A. DEED OF TRUST.

2. When Construed to Be Mortgages.

Though the deed of trust in this case may not have been recordable, for want of a good certificate of acknowledgment, and may not have constituted a technical deed of trust, it created an equitable or chattel mortgage valid and binding between the parties to it and enforceable in equity. *Clarksburg Casket Co. v. Valley Undertaking Co.*, 81 W. Va. 212, 94 S. E. 549, 551.

III. WHAT MAY BE MORTGAGED.

A. PRESENT INTERESTS.

Mortgage on Property Exempt from Distress or Levy, Void.—Va. Code 1919, § 6564; Barnes Code, ch. 71, § 6.

Code 1919, ch. 71, § 6, Is Not Unconstitutional.—*Taylor v. Belville*, 70 W. Va. 484, 74 S. E. 517.

Goods and Chattels Actively Used in Trade.—A chattel mortgage cannot be given on goods and chattels actively used in trade by one who continues to exercise the dominion of owner over the same. *Boice v. Finance, etc., Corp.*, 127 Va. 563, 102 S. E. 591.

Property bought for the express purpose of daily indiscriminate sale to the general public, exposed for such sale at the place of business of a licensed dealer, and over which the dealer is per-

mitted to exercise the dominion of owner, cannot be made the subject of a valid chattel mortgage regardless of its size, value, or capacity for identification. The powers which the dealer is permitted to exercise over the property in such case are inconsistent with a mortgage thereon. *Boice v. Finance, etc., Corp.*, 127 Va. 563, 102 S. E. 591.

B. PROPERTY TO BE ACQUIRED.

1. At Law.

"That a mortgage or deed of trust upon personal property to be obtained by the grantor after the execution thereof passes no legal title is well settled. *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564; *Jones Chat. Mort.* § 138; 5 A. & E. Enc. L. 979." *Triumph Elect. Co. v. Empire Furniture Co.*, 70 W. Va. 164, 166, 73 S. E. 325.

2. In Equity.

"That a mortgage or deed of trust upon personal property to be obtained by the grantor after the execution thereof * * * gives an equitable line is * * * well settled." *Triumph Elect. Co. v. Empire Furniture Co.*, 70 W. Va. 164, 166, 73 S. E. 325.

IV. FORM AND REQUISITES.

G. RECORDATION.

1¹/₂. Meaning of "Creditors and Purchasers" as Used in Requirements as to Recording.

Va. Code 1919, § 5200; Barnes Code,

ch. 74, § 9. See post, "Necessity," IV, G, 2.

2. Necessity.

Unrecorded Mortgage Void as to Creditors and Subsequent Purchasers Without Notice.—Va. Code 1919, §§ 5194, 5195; Barnes Code, ch. 74, §§ 5, 6.

The creditors protected by § 5 of chapter 74 of the Code against an unrecorded deed of trust or mortgage upon personal property are lien creditors having the right to charge the property directly, not holders of mere personal demands or claims against the vendee. *Birch River Boom, etc., Co. v. Glendon Boom, etc., Co.*, 71 W. Va. 507, 76 S. E. 972. See ante, "Meaning of 'Creditors and Purchasers' as Used in Requirements as to Recording," IV, G, 1½.

If a chattel mortgage is unrecorded for want of good certificate of acknowledgment, it is void as to subsequent purchasers for value without notice. *Clarksburg Casket Co. v. Valley Undertaking Co.*, 81 W. Va. 212, 94 S. E. 549, 551.

The president of a corporation taking a deed of trust on its property, to secure a debt due to him, after it has executed a chattel mortgage on certain parts of its property to secure the purchase money thereof, is presumed to have had actual knowledge of the existence of such mortgage, though unrecorded in the absence of proof or lack thereof. *Clarksburg Casket Co. v. Valley Undertaking Co.*, 81 W. Va. 212, 94 S. E. 549.

3. Place of Recording.

a. County or Corporation.

Recordation in County Corporation Wherein Property May Be.—Va. Code 1919, §§ 5194, 5195, 5199.

Recordation in County Wherein Property May Be.—Barnes Code, ch. 74, §§ 5, 6.

Recording in County or Corporation to Which Property Is Removed.—Va. Code 1919, § 5196; Barnes Code, ch. 74, § 7.

b. State—Conflict of Laws.

Necessity of Recording in Virginia Mortgage on Property Removed from Another State.—Va. Code 1919, § 5197; *Reverses Craig v. Williams*, 90 Va. 500, 18 S. E. 899.

3½. In What Book Recorded.

Va. Code 1919, § 3393.

5. Effect of Recordation.

b. As to Notice.

It is true that, as a rule, the seller of personal chattels cannot confer upon a purchaser any better title than he himself has; but if the owner stands by and permits a seller, who is a licensed dealer in such goods, to hold himself out to the world as owner, to treat the goods as his own, place them with either similar goods of his own in a public showroom, and offer the same indiscriminately with his own to the public, he will be estopped by his conduct from asserting his ownership against a purchaser for value without notice of his title. The constructive notice furnished by a recorded mortgage or deed of trust in such cases is not sufficient. The act of knowingly permitting the goods to be so handled and used by the seller in the ordinary and usual conduct of his business is just as destructive of the rights of the creditor as if such permission had been expressly granted in the mortgage or deed of trust. *Boice v. Finance, etc., Corp.*, 127 Va. 563, 102 S. E. 591.

One cannot take from a retail dealer a chattel mortgage on goods and chattels which he knows the retailer intends to place in his stock and offer for sale indiscriminately to his customers in the usual and ordinary course of business, and thereafter claim them from a purchaser for value from the retail dealer, who had no actual notice of the existence of the mortgage, although the same was recorded. *Boice v. Finance, etc., Corp.*, 127 Va. 563, 102 S. E. 591.

In the instant case a licensed dealer in automobiles gave a chattel mortgage

upon an automobile which he placed, with the knowledge of the agent of the mortgagee, in his salesroom among other automobiles for sale. Held: That although the chattel mortgage was recorded, it was null and void as against a purchaser without actual knowledge. *Boice v. Finance, etc., Corp.*, 127 Va. 563, 102 S. E. 591. See also *O'Neil v. Cheatwood*, 127 Va. 96, 102 S. E. 596.

V¼. WHAT RENDERS A MORTGAGE FRAUDULENT IN LAW.

"To hold a mortgage or deed of trust fraudulent in law, it is not necessary to impute actual or intentional fraud to the grantor, the trustee, or, indeed, to any one concerned. *Catt v. Knabe, etc., Co.*, 93 Va. 736, 26 S. E. 246." *Gray v. Atlantic Trust, etc., Co.*, 113 Va. 580, 583, 75 S. E. 226. See post, FRAUDULENT AND VOLUNTARY CONVEYANCES.

V½. EFFECT OF NOTICE TO MORTGAGEE OF ANOTHER'S OWNERSHIP OF PROPERTY.

Where a mortgagee of personal property takes the mortgage with prior notice that the property did not belong to the mortgagor, but to another, the mortgagee acquires no lien on the property by virtue of the mortgage. *Henry v. Payne*, 126 Va. 1, 100 S. E. 845.

VI½. WAIVER OF PROVISION AGAINST SALE BY MORTGAGOR.

Although a chattel mortgage ex-

pressly provided that if the mortgagor should attempt to sell, secrete, convert, or remove the property without the written consent of the mortgagee, the mortgagee might immediately take possession of the property this provision could be waived by the mortgagee; and where the mortgagor placed the property on sale in his salesroom, with the knowledge of the mortgagee, this constituted such waiver, and it is immaterial whether the permission to use the property as owner was given contemporaneously with or subsequent to the mortgage. *Boice v. Finance, etc., Corp.*, 127 Va. 563, 102 S. E. 591.

VII. CONFUSION OF CHATTEL MORTGAGE WITH MORTGAGE ON REALTY.

See post, FIXTURES.

VIII. PRIORITY OR LIENS.

Priority Where Two or More Mortgages Embracing Same Property Are Recorded on Same Day.—Va. Code 1919, § 5198; Barnes Code, ch. 74, § 8.

XI. FORECLOSURE AND SALE.

Limitation of Enforcement of Mortgage.—Va. Code 1919, § 5827.

XII. CRIMINAL LIABILITY FOR FRAUDULENT REMOVAL OR CONVERSION OF MORTGAGED PROPERTY.

Barnes Code, ch. 145, § 27b.

CHATTELS.—See post, FIXTURES; GIFTS; SALES; WARRANTY. A **chattel real** is an estate in land other than one for life or inheritance. *Bouvier's Law Dictionary* says: "Real chattels are interests which are annexed to or concern real estate, as a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it, and a reversion or remainder in some person." *Harvey Coal, etc., Co. v. Dillon*, 59 W. Va. 605, 610, 53 S. E. 928.

"A **chattel real** is a thing of property, in and of itself, known to the law through centuries, and is not the coal, oil, wheat or corn produced from the soil by virtue of the right arising from it. They are realty while attached to the land, personalty when severed." *Harvey Coal, etc., Co. v. Dillon*, 59 W. Va. 605, 622, 53 S. E. 928. See, generally, post, LANDLORD AND TENANT.

CHEATS.—See post, FALSE PRETENSES AND CHEATS.

CHECKS.—See ante, BANKS AND BANKING; BILLS, NOTES AND CHECKS; post, FORGERY AND COUNTERFEITING. As to seller's acceptance of check from buyer as bar of action against carrier for wrongful delivery of goods without payment of draft, see ante, CARRIERS. As to giving of check as extinguishment of debt, see post, PAYMENT.

"A check was held to be money, being treated as such, in *Spratt v. Hobhouse*, 4 Bing. 179, cited and quoted in the last New Hampshire case cited. *Mathewson v. Powder Works*, 44 N. H. 289, at page 292." *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 271, 69 S. E. 1012. See post, MONEY.

CHEMIST.—See ante, AGRICULTURE; post, FERTILIZERS; FOOD.

CHILD—CHILDREN.—See post, CRUELTY TO ANIMALS AND HELPLESS PERSONS; DEEDS; DESCENDANTS; DIVORCE; HEIR, HEIRS AND THE LIKE; HOSPITALS AND ASYLUMS; INFANTS; NEGLIGENCE; PARENT AND CHILD; WILLS. As to child labor, see post, LABOR. As to cruelty to children, see post, CRUELTY TO ANIMALS AND HELPLESS PERSONS. As to children's home society, see post, REFORMATORIES.

The word *child* as used in sec. 16 of ch. 77 of Barnes Code, means *child* or *children*, the singular number having been adopted for convenience and brevity. *Cunningham v. Dunn*, 84 W. Va. 593, 100 S. E. 410.

Not Synonymous with Issue.—In *Wills v. Foltz*, 61 W. Va. 262, 268, 56 S. E. 473, the court, quoting *Merryman v. Merryman*, 5 Munf. (19 Va.) 440, said: "The term *children* is not to be taken as synonymous with issue, except to effectuate the manifest intention of the testator."

Word of Purchase.—The word *children* in a devise is a word of purchase, not of limitation, unless different intent plainly appear in the will. *Wills v. Foltz*, 61 W. Va. 262, 56 S. E. 473.

Immediate Descendants—Grandchildren.—*Children* has been defined to mean issue in the first degree and does not embrace grandchildren. *White v. Old*, 113 Va. 709, 712, 75 S. E. 182. *Runyon v. Mills*, 86 W. Va. 388, 103 S. E. 112.

Though generally the word "*children*," as used in a deed or will, refers to the immediate descendants of a designated person, it may under some circumstances bear a broader meaning and connote the entire line of descendants. In order to determine the sense in which it was used by the grantor or testator, it is necessary to look to its context, considered in the light of all the provisions of the instrument. *Maddy v. Maddy*, 87 W. Va. 581, 105 S. E. 803.

Children Going to and From School.—The phrase *children going to and from school* would, without doubt, refer to young people in attendance upon institutions of a subordinate character, and in common acceptation embrace only places of primary instruction and establishments for the instruction of *children*. *Northrop v. Richmond*, 105 Va. 335, 338, 53 S. E. 962. See generally, post, ORDINANCES; STREET RAILROADS.

CHILLING BIDDING.—See ante, AUCTIONS AND AUCTIONEERS; post, JUDICIAL SALES.

CHIROPODY.—Statutory regulation.—Va. Code, 1919, sec. 1619 et seq.; Barnes Code, ch. 150, sec. 30.

CHOSSES IN ACTION.—See ante, ASSIGNMENTS; post, GIFTS; RIGHT OF ENTRY.

CHURCH.—A church is defined as “A religious congregation comprising all those who worship together in one church.” *Weaver v. Spurr*, 56 W. Va. 95, 104, 48 S. E. 852. See, generally, ante, CHARITIES; post; RELIGIOUS SOCIETIES.

CIDER.—See *Donithan v. Com.*, 109 Va. 845, 64 S. E. 1050; *State v. Durr*, 69 W. Va. 251, 255, 71 S. E. 787. See, also, post, INTOXICATING LIQUORS.

CIGARETTES.—**Statutory Regulation.**—Va. Code 1919, sec. 4695; Barnes Code, ch. 150, secs. 20e(1)-20e(6).

CIRCUIT COURTS.—See post, COURTS.

CIRCUIITY OF ACTION.—See post, MULTIFARIOUSNESS.

CIRCUMSTANTIAL EVIDENCE.

I. Competency.

A. In General.

B. Particular Circumstances and Instances.

II. Weight and Sufficiency.

A. In Criminal Cases.

2. Should Exclude Every Hypothesis But Guilt.

3. Received with Caution.

B. In Civil Cases.

½. In General.

III. Instructions.

CROSS REFERENCES.

See the title CIRCUMSTANTIAL EVIDENCE, vol. 2, p. 817, and references there given. In addition, see ante, AGENCY; ARSON; post, CRIMINAL LAW; DEEDS; EVIDENCE; FIRES; FRAUD AND DECEIT; FRAUDULENT AND VOLUNTARY CONVEYANCES; HOMICIDE; INSANITY; LIFE INSURANCE; NEGLIGENCE; PRESUMPTIONS AND BURDEN OF PROOF; REASONABLE DOUBT; WILLS. As to proof of corpus delicti by circumstantial evidence, see post, CRIMINAL LAW. As to circumstantial evidence of genuineness of letter, see post, DOCUMENTARY EVIDENCE. As to circumstances showing making contract of guaranty, see post, GUARANTY. As to circumstances showing knowledge of a prior deed of trust, see post, MORTGAGES AND DEEDS OF TRUST.

I. COMPETENCY.

A. IN GENERAL.

Liberality in Admission of Evidence.

—Much must be left to the discretion of the trial judge, but where the proper determination of a fact depends upon circumstantial evidence, the safe practical rule to follow is that in no case is

evidence to be excluded of facts or circumstances connected with the principal transaction, from which an inference can be reasonably drawn as to the truth of a disputed fact. The modern doctrine in this connection is extremely liberal in the admission of any circumstance which may throw light upon the matter being investigated and

while a single circumstance, standing alone, may appear to be entirely immaterial and irrelevant, it frequently happens that the combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion. *Karnes v. Com.*, 125 Va. 758, 99 S. E. 562.

Greater latitude is allowed in the presentation of evidence where it is purely circumstantial than would be admissible where it is sought to establish the contention upon direct and positive testimony. In the reception of circumstantial evidence, great latitude must be allowed. The jury should have before them every fact which will enable them to elucidate the transaction and to come to a satisfactory conclusion. However remote or insignificant a fact may be, if it tends to establish a probability or improbability of a fact in issue, to make it more or less probable, it is admissible. *Hardy v. Com.*, 110 Va. 910, 922, 67 S. E. 522.

Objections on the Ground of Irrelevancy Not Favored. — Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. *Ely v. Gray*, 125 Va. 708, 100 S. E. 660.

B. PARTICULAR CIRCUMSTANCES AND INSTANCES.

The conduct of one accused of crime, after its commission becomes known, is a circumstance to be considered on his trial for the crime.

Hardy v. Com., 110 Va. 910, 67 S. E. 522.

Accident. — While the proof of an accident may be circumstantial, the circumstances proved must point directly to the main fact in issue and not be such as to lead merely into a labyrinth of surmises and conjectures. *General Acci., etc., Corp. v. Murray*, 120 Va. 115, 90 S. E. 620.

Fraud.—See post, FRAUD AND DECEIT.

A fraudulent agreement may be inferred from facts and circumstances. *Harvey v. Nutter*, 66 W. Va. 208, 66 S. E. 363. See *State v. Emblen*, 66 W. Va. 360, 66 S. E. 499.

Injury to Animals by Railroads.—“Lack of direct and positive evidence of the killing of, and injury to, the cattle by one of the defendant's trains, did not preclude a finding of that fact by the jury, for reasons so obvious that it is really unnecessary to state them. Circumstantial evidence, with or without the aid of common knowledge available to juries as well as the courts, supplies lack of direct proof in cases of this kind. *Underwood v. Chesapeake, etc., R. Co.*, 78 W. Va. 409, 89 S. E. 2; *Gould v. Coal, etc., R. Co.*, 74 W. Va. 8, 81 S. E. 529, impliedly asserting the proposition.” *Kay v. Director General*, 86 W. Va. 93, 95, 103 S. E. 108. See post, RAILROADS.

II. WEIGHT AND SUFFICIENCY.

A. IN CRIMINAL CASES.

2. Should Exclude Every Hypothesis but Guilt.

The rule, defining the character and prescribing the quantum of circumstantial evidence, necessary to a conviction, says that the quantum of circumstances shown must be consistent with the hypothesis of guilt, inconsistent with every other hypothesis and conclusive in their nature and tendency. See *State v. Trail*, 59 W. Va. 175, 53 S. E. 17.

This rule operates upon the facts

found by the jury and not upon the mere items of evidence adduced. *State v. Kidwell*, 62 W. Va. 466, 59 S. E. 494.

Each Circumstance Should be Established as if Whole Issue Rested upon It.—*State v. Trail*, 59 W. Va. 175, 53 S. E. 17.

3. Received with Caution.

Circumstantial evidence is always scanned with great caution. *State v. Gunnoe*, 74 W. Va. 741, 83 S. E. 64. See *State v. Gebhart*, 70 W. Va. 232, 73 S. E. 964.

B. IN CIVIL CASES.

½. In General.

Flat contradiction in oral testimony, as to intent and purpose, obscuring the truth and rendering it impossible

to ascertain the same from such evidence with reasonable certainty, justifies resort to the circumstances as the safer guide, and their value and weight are determined by their intrinsic character and tendency to produce mental conviction rather than their number. *Berry v. Colborn*, 65 W. Va. 493, 64 S. E. 636.

III. INSTRUCTIONS.

When the inculpatory evidence against an accused is circumstantial, it is error to refuse him an instruction which correctly states the force of such evidence required for conviction and the principles by which it is to be weighed and considered. *State v. Lewis*, 69 W. Va. 472, 72 S. E. 475.

CITIZENS.—See post, CITIZENSHIP.

CITIZENSHIP.

I. Who Are Citizens.

IV. Relinquishment or Suspension.

CROSS REFERENCES.

See the title CITIZENSHIP, vol. 2, p. 828, and references there given. In addition, see post, CIVIL RIGHTS. As to status of a railroad company chartered in another state but doing business here, see post, FOREIGN CORPORATIONS. As to what constitutes domicile or residence, see post, DOMICILE; RESIDENCE-RESIDENT, etc.

I. WHO ARE CITIZENS.

"A citizen is one who, as a member of a nation or of the body politic of a sovereign state, owes allegiance to and may claim reciprocal protection from its government." *Devanney v. Hanson*, 60 W. Va. 3, 5, 53 S. E. 603.

In *Devanney v. Hanson*, 60 W. Va. 3, 5, 53 S. E. 603, the court says: "To be a citizen one must be a member of an independent political society and as such subject to its law and entitled to its protection in the enjoyment of civil or private rights."

Virginia Statute.—Va. Code 1919, § 62.

West Virginia Statute.—W. Va. Const. Art. II, § 3.

Citizens within Meaning of West

Virginia Statutes.—In *Gartin v. Draper Coal, etc., Co.*, 72 W. Va. 405, 78 S. E. 673, 675, in construing the West Virginia statute exonerating mine owners from liability on employing mine foremen who are citizens, the court said: "The word 'citizen' is sometimes used in the restricted sense of 'inhabitant.' In such cases, the context is supposed to disclose legislative intent to include actual residence as a part of the definition or purpose in the particular instance. Citizenship is broader in meaning than inhabitancy. A man may be a citizen and not an actual resident. No doubt in some connections the word 'citizen' may be regarded as having

been used in the sense of 'inhabitant' only. It depends upon the legislative purposes as well as the terms. Nothing in the context here indicates purpose to narrow the meaning of the word 'citizen' to that of 'inhabitant.' No doubt the mine foreman must be a resident citizen, an inhabitant, as well as a citizen, but there is no indication of intent that simply 'inhabitanacy' of the state shall render a person eligible to employment as mine foreman. Our conclusion is that only citizens, persons actually residing in the state and entitled to participation in the government thereof and management of its affairs, are eligible to employment as mine foremen."

The word "citizens" as used in § 24, chapter 36, Acts of 1905, of West Virginia, means a resident of a county. *Devanney v. Hanson*, 60 W. Va. 3, 53 S. E. 603.

Citizens of County.—A county has no citizens, in a legal sense. *Devanney v. Hanson*, 60 W. Va. 3, 53 S. E. 603.

A person may be a citizen of a state or of the Union, because they are sovereign; but a county is a mere sub-

division of a state with bodies executing functions assigned to them by the sovereign in process of government. *Devanney v. Hanson*, 60 W. Va. 3, 53 S. E. 603.

Presumption of Citizenship.—A person residing in a state is presumed to be a citizen thereof. *Devanney v. Hanson*, 60 W. Va. 3, 53 S. E. 603.

Admissibility of Evidence.—On an issue as to the citizenship of a mine foreman, the court may properly exclude a statement of the foreman as a witness that he considered himself a citizen of the state at the time of his employment, and also a statement that he had voted in the county, unaccompanied by any indication of the time at which he had voted. *Gartin v. Draper Coal, etc., Co.*, 72 W. Va. 405, 78 S. E. 673, 676.

IV. RELINQUISHMENT OR SUSPENSION.

How Citizenship Relinquished.—Va. Code 1919, § 63.

When Relinquishment Not Allowed.—Va. Code 1919, § 65.

When Citizenship Suspended.—Va. Code 1919, § 64.

CITY.—See post, MUNICIPAL CORPORATIONS. As to city courts, see post, COURTS; MUNICIPAL CORPORATIONS. As to city manager, see post, MUNICIPAL CORPORATIONS. As to city workhouses, see post, PRISONS AND PRISONERS.

CIVIL.—As to civil damage acts, see post, INTOXICATING LIQUORS.

Civil and Police Justice.—As to constitutionality of statute creating civil and police justice for certain cities, see *Robinson v. Christian*, 118 Va. 766, 88 S. E. 164. See also post, CONSTITUTIONAL LAW; STATUTES.

Civil Case.—See ante, BASTARDY, p. 117.

Civil Injury.—An offense which is pursued at the discretion of the injured party or his representative is a **civil injury**. An offense which is pursued by the sovereign or the subordinate of the sovereign is a crime. *Jernigan v. Com.*, 104 Va. 850, 852, 52 S. E. 361, quoting *Cooley on Torts*.

Civil Proceeding.—"The distinction (between a civil and a criminal proceeding) taken in the most ancient and approved authorities, is not whether the crown is a party (for so it is in mandamus and quo warranto), but whether the real end or object of the proceedings is punishment or reparation." *Jernigan v. Com.*, 104 Va. 850, 852, 52 S. E. 361, quoting note to *Reg v. Page*, 3 Post. & F. 29.

Civil Death.

See the title, CIVIL DEATH, vol. 2, p. 828, and references there given.

CIVIL RIGHTS.

I. Constitutional Provisions.

II. Rights of Colored Persons.

C $\frac{1}{2}$. Exclusion of Colored Persons from Jury.

D. Right to Trial by Mixed Jury.

CROSS REFERENCES.

See the title CIVIL RIGHTS, vol. 2, p. 829, and references there given. In addition, see post, COLORED PERSONS; CONSTITUTIONAL LAW; ELECTIONS; SEARCHES AND SEIZURES; WEAPONS.

I. CONSTITUTIONAL PROVISIONS.

Natural Rights.—Va. Const., § 1; W. Va. Const., Art. III, § 1.

Right of Assembly.—W. Va. Const., Art. III, § 16.

Equal Representation in the Government.—W. Va. Const., Art. II, § 4.

Religious Freedom.—See post, CONSTITUTIONAL LAW.

No Religious or Political Test Oath Required.—W. Va. Const., Art. III, § 11.

II. RIGHTS OF COLORED PERSONS.

C $\frac{1}{2}$. EXCLUSION OF COLORED PERSONS FROM JURY.

Whenever by any action of the state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand or petit jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him contrary to the Fourteenth Amendment to the Constitution of the United States. *State v. Young*, 82 W. Va. 714, 97 S. E. 134; *State v. Cook*, 81 W. Va. 686, 95 S. E. 792.

Proof that there are some persons of African descent qualified for jury service without showing the number thereof, or the proportion such qualified persons bear to the number of qualified persons of other races, together with the evidence of those charged with the

selection of the jurors that no person of African descent was drawn thereon, but that in making such selection the exclusion did not result from any intention or motive to exclude such persons, but was simply the result of their selection of the persons whom they thought to be most competent for the service, does not show that such persons of African descent were excluded from jury service solely because of their race or color. *State v. Cook*, 81 W. Va. 686, 95 S. E. 792.

The fact that there were no persons of African descent upon the grand jury finding such indictment, or upon the petit jury summoned for the purpose of trying the defendant, does not of itself show the exclusion of such persons solely because of race or color. *State v. Cook*, 81 W. Va. 686, 95 S. E. 792.

Sufficiency of Plea in Abatement.

A plea in abatement in a criminal case charging that the defendant belongs to the Negro race, that there are a large number of men of his race within the county qualified for grand jury service, that none such were upon the grand jury which found the indictment against him, that the list from which the grand jury which indicted him was drawn contained the name of no person of the Negro race, and that the county commissioners in making such list excluded all persons of the Negro race therefrom solely because of their race or color, sufficiently charges that he has been denied the equal protection of the laws in violation of the Fourteenth

Amendment to the Constitution of the United States. *State v. Young*, 82 W. Va. 714, 97 S. E. 134.

D. RIGHT TO TRIAL BY MIXED JURY.

A person of African descent accused

of crime cannot of right demand a mixed jury, some of which will be of his race, nor is a jury of that kind guaranteed by the fourteenth amendment to any race. *State v. Cook*, 81 W. Va. 686, 95 S. E. 792.

CLAIM.—See ante, ATTACHMENT AND GARNISHMENT; post, COUNTIES; EXECUTIONS; STATE; UNITED STATES.

Claim of Title.—A mere claim is an assertion of right without any paper title. *Stover v. Stover*, 60 W. Va. 285, 54 S. E. 350. See ante, ADVERSE POSSESSION, p. 17.

CLAIMANT.—See post, UNKNOWN CLAIMANT.

CLAMS.—See post, OYSTERS.

CLASS LEGISLATION.—See post, CONSTITUTIONAL LAW.

C. L. C.—In *Wynn v. Harman*, 5 Gratt. (46 Va.) 158, 165, it is held that a will certified as "A true copy. John Hunter, C. L. C." was a sufficient certificate that Hunter was the clerk of the court, and the copy of the paper so certified was held to be competent evidence, upon authority of cases there cited. *Hurley v. Charles*, 112 Va. 706, 714, 72 S. E. 689. See post, RECORDS.

CLEAR.—See post, OBVIOUS, CLEAR AND SATISFACTORY PROOF.

"Clear and satisfactory proof," in cases involving fraud or false swearing, may be defined to be a preponderance of evidence sufficient to overcome the presumption of innocence of moral turpitude or crime." *Virginia Fire, etc., Ins. Co. v. Hogue*, 105 Va. 355, 363, 54 S. E. 8.

CLERICAL ERRORS.—See ante, AMENDMENTS; APPEAL AND ERROR, post, INDICTMENTS, INFORMATIONS AND PRESENTMENTS; JUDGMENTS AND DECREES.

CLERKS.—See post, CLERKS OF COURTS; COUNTIES; MUNICIPAL CORPORATIONS.

CLERKS OF COURT.

I. Election, Appointment and Qualification, etc., 953.

- A. Election, Term of Office, etc., 953.
- B. Appointment, 953.
- C. Qualification, Oath, etc., 953.

III. Powers and Duties, 954.

- ½A. In General, 954.
 - 1. Courts in General, 954.
 - 2. Supreme Court of Appeals, 954.
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V. Compensation, Fees, and Offices, 956.

- A. Salaries and Compensation in General, 956.
- B. Fees, 957.
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VII. Liability for Errors, Negligence and Offenses, 957.

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IX. Deputy Clerks, 957.

CROSS REFERENCES.

See the title CLERKS OF COURT, vol. 2, p. 834, and references there given. In addition, see post, EXECUTIONS; FINES AND COSTS IN CRIMINAL CASES; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; JUDGMENTS AND DECREES; RECORDING ACTS; RULES OF COURT; SUMMONS AND PROCESS. As to registration of vital statistics, see post, STATE.

I. ELECTION, APPOINTMENT AND QUALIFICATION, ETC.,

A. ELECTION, TERM OF OFFICE, ETC.

Circuit Courts.—Const. of Va. Schedule, § 8; Va. Code 1919, § 124; Const. of W. Va. Art. 8, § 18; Barnes Code, ch. 4, § 8.

County Courts.—Const. of Va., Schedule, § 8; Va. Code 1919, § 124; Const. of W. Va., Art. 8, § 26; Barnes Code, ch. 4, § 9.

City Courts.—Const. of Va. § 118.

B. APPOINTMENT.

Supreme Court of Appeals.—Va. Code 1919, §§ 3378, 3381, 3382, 5870; Barnes Code, ch. 113, § 6.

Circuit Courts.—Const. W. Va., Art. 8, § 18; Barnes Code, ch. 4, § 8.

County Courts.—Barnes Code, ch. 4, § 9; ch. 7, § 7.

Courts of City of Richmond.—Va. Code 1919, §§ 5924, 5925, 5930.

Civil Justices' Courts.—Va. Code 1919, § 3118.

C. QUALIFICATION, OATH, ETC.

See post, "Bond and Liability Thereon," VI.

Courts of City of Richmond.—Va. Code 1919, §§ 5924, 5925, 5930, 5956.

City Court of Norfolk.—Va. Code 1919, § 5944.

Civil Justices' Courts.—Va. Code 1919, § 3118.

III. POWERS AND DUTIES.

½A. IN GENERAL.

1. Courts in General.

Const. of W. Va., Art. 8, 26; Barnes Code, ch. 117, §§ 3-13b.

Records.—Va. Code 1919, § 6570.

Index for Record Books.—W. Va. Acts 1921, p. 189.

Record Books of Justices of the Peace.—Va. Code 1919, § 6024.

To Enter Amount Paid and Allowance of Jurors.—Va. Code 1919, §§ 6009-6010.

Record Books to Be Delivered to Successors.—Va Acts 1920, p. 341, 595; Pollard's Code 1920, § 5412, p. 257.

Transmission of Copy of Indictment, Conviction, etc., to Penitentiary.—Barnes Code, ch. 160, § 13.

Reports of Vital Statistics.—Pollard's Code 1920, p. 420, Va. Acts 1918, p. 397.

Rules.—Va. Code 1919, §§ 6074-6076.

Pleadings May Be Sworn to before Clerk.—Va. Code 1919, § 6129.

What Clerk or Court to Appoint Administrator of an Estate.—Va. Code 1919, § 5360.

Dismissal of Suit.—Va. Code 1919, § 6079.

Telephones.—Pollard's Code 1920, p. 508, Va. Acts 1918, p. 534.

Accounting.—Pollard's Code 1920, pp. 672-674, Va. Acts 1918, p. 773.

Remitting Funds to Auditor.—Va. Code 1919, § 2406.

2. Supreme Court of Appeals.

Record.—Va. Code 1919, §§ 6357-6360; Barnes Code, ch. 113, § 7.

Preservation of Papers.—Barnes Code, ch. 117, § 3.

Process and Order of Publication.—Va. Code 1919 §§ 6370, 6371, 6373.

3. Circuit Courts.

Const. of W. Va., Art. 8, § 18; Barnes Code, ch. 87, §§ 1-34.

Indexing Records.—W. Va. Supp. 1918, § 3811.

Index System.—Action of the circuit court adopting a general index system was, under the statute formerly

existing on the subject, and is now under the statute at present existing on the subject, a condition precedent to the ascertainment of what general index system, if any, other than that previously in use, it is the duty of a county clerk to use at any given time in current general indexing the records of his office. *Board v. Coons*, 121 Va. 783, 94 S. E. 201.

An order was entered under § 3184, Code of 1887, as amended by Acts of Assembly, 1891-2, page 772, by which the clerk was appointed to make the general index to the deed books, will books, etc., in the clerk's office. Prior to such order there was in use in the county a general index system which was not ledgerized. Acting under the order, the clerk began the general indexing and adopted a ledgerized system known as the "Coons' Index System." The clerk also subsequent to the order indexed all deeds, wills, etc., according to the "Coons' Index System" and continued this current indexing until the county failed to provide him with the "Coons' Index System" and the necessary index books for the work of current general indexing, when he returned to the old general index system, subject to some improvements. Held, that the clerk was, under the circumstances, justified in returning to the old system of general indexing, and that in doing such indexing in accordance therewith he complied with his duty as prescribed by statute; and that it would not be his duty to general index the accumulated records in some general index system which might thereafter be provided and installed in the clerk's office. *Board v. Coons*, 121 Va. 783, 94 S. E. 201.

Reports to Court.—Barnes Code, ch. 133, § 14.

Jurisdiction of Clerk in Cases of Wills and Lunatics, Insane Persons, etc.—Const. of Va., § 101, cited in *McCurdy v. Smith*, 107 Va. 757, 60 S. E. 78.

The probate jurisdiction of clerks of courts is purely statutory; and the statute bestowing the authority defines the limits of its exercise. The statute confers no general equity jurisdiction. *Gooch v. Suhor*, 121 Va. 35, 92 S. E. 843.

Orders—Entry by Court.—Under the provisions of § 60, ch. 125 of the Code, a circuit court has control over the proceedings in causes pending at rules, and in the event that proper orders are not entered by the clerk at rules they may be entered by the court in term. *Moore v. Moore*, 81 W. Va. 17, 93 S. E. 937.

4. County and City Courts.

County Courts.—W. Va. Acts 1921, p. 89.

Same—Indexing Records.—W. Va. Supp. 1918, § 3811.

Same—Transmission of List of County Officers.—Barnes Code, ch. 9, § 7.

Same—Receiving Fees, Costs, etc.—Barnes Code, ch. 137, § 34.

Same—Accounts.—Barnes Code, ch. 39, § 33.

Appointment of Administrator.—The appointment of an administrator by the clerk of a county court, the record of which shows such appointment to have been made in his office in the regular way, and which was reported to the county court at its next regular session after the appointment was made, and by it regularly confirmed, cannot be questioned in a suit brought by such administrator upon a cause of action belonging to the estate of his decedent, upon the ground that such appointment was not made at the clerk's office, but at a point in the country distant therefrom. *Starcher v. South Penn Oil Co.*, 81 W. Va. 587, 95 S. E. 28.

During the recesses of the regular sessions of such county courts, the clerks thereof are clothed with general jurisdiction as to appointment of administrators, etc., subject to the authority of such county courts at the next regular session to review the ac-

tion of such clerks. *Starcher v. South Penn Oil Co.*, 81 W. Va. 587, 95 S. E. 28.

City Courts.—Const. of Va. § 118.

Same—Constitutionality of Statute Conferring Powers on Clerks.—The whole judicial power of the state is vested by art. 4 of the Constitution in certain enumerated courts, and such other courts as are thereafter authorized. The general assembly is authorized by § 101 of the constitution to confer upon the clerks of the several circuit courts jurisdiction to admit wills to probate, appoint guardians, etc., but no mention is made of the clerks of other courts. Held, § 2639a, Code, 1904 (see Va. Code 1919, §§ 5360, 5361) conferring such jurisdiction on the clerks of city courts, is unconstitutional. Such clerks are not within the terms or indentment of § 101 of the constitution; nor is such jurisdiction conferred by § 98 of the constitution authorizing the legislature to provide "additional courts" for certain cities. The "additional courts" authorized must be courts of similar grade, dignity and jurisdiction to existing city courts. *McCurdy v. Smith*, 107 Va. 757, 60 S. E. 78.

Courts of City of Richmond.—Va. Code 1919, §§ 5924, 5925, 5930.

City Court of Norfolk.—Va. Code 1919, § 5944.

Court of Law and Chancery of City of Roanoke.—Va. Code 1919, § 5956.

County and City Courts—Receiving Taxes—Records, etc.—Va. Code 1919, §§ 2405, 2492.

C. AS TO INSPECTION OF RECORDS, OFFICES, ETC.

Records Va. Acts 1920, p. 242; Polard's Code 1920, § 3388, p. 144.

Offices, etc.—Va. Code 1919, § 3382.

F. AS TO PRACTICING LAW.

See ante, ATTORNEY AND CLIENT.

V. COMPENSATION, FEES, AND OFFICES.

A. SALARIES AND COMPENSATION IN GENERAL.

In General.—Barnes Code ch. 137, § 44; W. Va. Acts 1919, p. 278, ch. 74.

Indexing Records.—The extra allowance allowed in § 3184, Code of 1887, as amended by Acts of Assembly, 1891-2, p. 772, to a clerk of court or other suitable person for preparing a general index to the deed books, will books, etc., in the clerk's office, applies only to some person, not necessarily the clerk, specially appointed by the court to make the general index mentioned in the statute, and does not apply to the current general indexing subsequent to the order of the court making such appointment. In the instant case it was the duty of the clerk to do the current general indexing and he was not entitled to any extra compensation therefor other than his salary as county clerk. An order of court allowing such extra compensation would be without authority of law, and the board of supervisors would have no authority thereunder to "direct warrant therefor" or otherwise authorize such payment out of the county treasury. *Board v. Coons*, 121 Va. 783, 94 S. E. 201.

Compensation for Copying List of Voters.—Under the act approved March 3, 1908, fixing the compensation of clerks for copying and certifying the treasurer's list of persons who have paid their poll taxes as a prerequisite to the right to vote, the compensation of the clerk is two cents for each ten words, for the first copy, and one-half cent for each ten words for the whole number of additional copies furnished by him, and not for each additional copy. Looking to the former act which this one amends and the compensation of other officers under the present act, and treating the language of the act as ambiguous, this construc-

tion seems more reasonable and just than to allow compensation far in excess of the value of the services rendered, and will best harmonize with the legislative intent as gathered from the whole legislation on the subject, and will therefore be adopted. *Martz v. Rockingham*, 111 Va. 445, 69 S. E. 321.

Interest on Unpaid Allowances.—An obligation of a county of the state to a clerk for the unpaid amount of allowances made him by order of the board of supervisors, bears no interest. *Board v. Coons*, 121 Va. 783, 94 S. E. 201.

Powers of Supervisors as to Compensation.—See post, COUNTIES.

Supreme Court of Appeals.—Barnes Code, ch. 11, § 1; Barnes Code, ch. 137, § 10; Va. Acts 1920, p. 531; Pollard's Code 1920, § 3465.

Court of Appeals of Richmond.—Pollard's Code 1920, p. 350; Va. Acts 1918, pp. 11, 398.

Circuit Court.—Const. of W. Va. art. 8, § 18; W. Va. Supp. 1918, § 15241; W. Va. Acts 1919, pp. 162, 238, 281, 310, 321, 368, 427, 430.

Recording Deed.—A county clerk is entitled to the fee allowed by § 3505, Code of 1904 (Va. Code 1919, § 3484), for recording a deed to the county, notwithstanding a general allowance to the clerk for road services. *Board v. Coons*, 121 Va. 783, 94 S. E. 201.

Right of Clerk of Circuit Court to Withhold Transcript for Non-Payment of Fees.—If such clerk certifies that the required deposit has been made, when in fact it has not been nor the required bond given, he cannot withhold the transcript for non-payment of his fees and compensation, by reason of an agreement on the part of the appellant to make a further deposit or pay his charges in full before the delivery of the transcript, or his legal right to collect such fees and compensation. *State v. Skeen*, 85 W. Va. 222, 101 S. E. 249.

Circuit Courts of Cities of First Class.—Va. Code 1919, § 5903.

Circuit Court of City of Richmond.—Va. Acts 1920, p. 531; Pollard's Code 1920, § 3465.

Courts of City of Richmond.—Va. Code 1919, §§ 5924, 5925, 5930.

Court of Law and Chancery of City of Roanoke.—Va. Code 1919, § 5956.

County Courts.—Const. of W. Va., art. 8, § 26; W. Va. Acts 1919, pp. 162, 212, 235, 280, 310, 427, 430.

Civil Justice's Courts.—Va. Code 1919, § 3118.

Free Services.—Va. Code 1919, § 3491.

B. FEES.

In General.—Va. Code 1919, §§ 198, 3484-3460.

Fees.—Va. Code 1919, § 3506; Va. Acts 1920, p. 800; Pollard's Code 1920, § 3484, p. 150; Pollard's Code 1920, p. 602; Va. Acts 1918, p. 627; Barnes Code, ch. 137, §§ 23, 25-28.

Courts of Limited Jurisdiction.—Barnes Code, ch. 137, § 9.

Circuit Courts.—Barnes Code, ch. 36, § 16; ch. 137, § 8.

County Courts.—Barnes Code, ch. 13, § 7.

Hustings Court of City of Richmond.—Va. Code 1919, § 3506.

C. OFFICES.

Supreme Court of Appeals.—Barnes Code, ch. 117, §§ 1, 2; Va. Code 1919, § 3385.

Circuit and County Courts.—Barnes Code, ch. 137, § 46.

VI. BOND AND LIABILITY THEREON.

Supreme Court of Appeals.—Barnes Code, ch. 10, § 13; ch. 113, § 6; Va. Code 1919, §§ 3384, 5870.

Court of Law and Chancery of City of Norfolk.—Va. Code 1919, § 5944.

Court of Law and Chancery of City of Roanoke.—Va. Code 1919, § 5956.

Civil Justices, Courts.—Va. Code 1919, § 3118.

VII. LIABILITY FOR ERRORS, NEGLIGENCE AND OFFENSES.

Failure to Transmit List of Fines.—Barnes Code, ch. 36, § 17.

Alteration of Records.—Barnes Code, ch. 147, §§ 22-24.

Removal of Papers.—Barnes Code, ch. 117, § 4.

Penalty for False Certificate.—Va. Code 1919, § 6271.

VIII. RESIGNATION AND FORFEITURE.

B. FORFEITURE, REMOVAL, ETC.

Supreme Court of Appeals.—Va. Code 1919, § 3378.

Circuit Courts.—W. Va. Const., art. 8, §§ 18, 26.

County Courts.—Const. of W. Va., art. 8, § 26; Barnes Code, ch. 7, § 7.

IX. DEPUTY CLERKS.

Women.—Pollard's Code 1920, p. 758; Va. Acts 1920, p. 421.

Appointment, etc.—Barnes Code, ch. 7, §§ 11, 12a (1).

"Section 11, c. 163, Code of Virginia 1849 (Va. Code 1919, § 2701), provides for the appointment of a deputy clerk, and authorizes him to 'discharge any of the duties of the clerk.'" Goad v. Walker, 73 W. Va. 431, 80 S. E. 873, 877.

Same—Power to Certify Acknowledgments.—A deputy clerk, being empowered by a statute of Virginia to "discharge any of the duties of the clerk," could, in his own name as such deputy, certify acknowledgments to writings, whether intended for recordation in the office of his principal, or in any other county court clerk's office in Virginia. Goad v. Walker, 73 W. Va. 431, 80 S. E. 873.

Bonds, etc.—Barnes Code, ch. 7, § 14.

Duties.—Barnes Code, ch. 7, § 13.

Constitutionality of Statute—Attestation of Writs.—Section 817 of the Code of Virginia (§ 2701 Va.

Code 1919), empowering deputy clerks to discharge any of the official duties of their principals unless expressly forbidden by law does not contravene § 26 of the constitution of Virginia, and is a valid enactment. Neither the constitution nor the statute expressly forbids a deputy clerk to discharge the official duty imposed upon his principal in the matter of attesting writs that emanate from his office. *Farmers Bank v. McGavock*, 119 Va. 510, 89 S. E. 949.

A summons which concludes "Witness, James Rider, clerk of said court at the court house, the 14th day of January, 1806, in the 20th year of the commonwealth. Jos. C. Cassell, Dep.

Clerk" is sufficiently attested by the clerk, within the meaning of the constitutional requirement that writs shall "be attested by the clerks of the several courts." *Farmers Bank v. McGavock*, 119 Va. 510, 89 S. E. 949.

Ministerial Acts—Judicial Powers.—

"As a general rule a deputy clerk may perform all ministerial acts applying to the office of his principal: but the judicial powers of a principal clerk can not be delegated to his deputy, unless the statute so permits." *Farmers Bank v. McGavock*, 119 Va. 510, 89 S. E. 949.

Removal.—Barnes Code, ch. 7, §§ 12, 12a (2).

CLIENTS.—See ante, ATTORNEY AND CLIENT.

CLOSE CORPORATION.—See *Hogg v. McGuffin*, 67 W. Va. 456, 461, 68 S. E. 41. See, also, post, SPECIFIC PERFORMANCE.

CLOSE OF ARGUMENT.—See post, OPEN AND CLOSE.

CLOSELY BUILT UP.—As to meaning of phrase *closely built up* in statute referring to highways, see *Beck v. Cox*, 77 W. Va. 442, 444, 37 S. E. 492. See also, post, STREETS AND HIGHWAYS.

CLOUD ON TITLE.—See, post, QUIETING TITLE.

CLUBS.—See ante, ASSOCIATION, post, INTOXICATING LIQUORS.

COAL. — See post, MINES AND MINERALS; REAL ESTATE; WEIGHTS AND MEASURES.

COCAINE. -- See post, DRUGS AND DRUGGISTS; POISONS AND POISONING.

CODE.—See post, STATUTES.

CODEFENDANTS.—See post, JUDGMENTS AND DECREES.

CODICIL.—See post, WILLS.

COEMPLOYEES.—See post, FELLOW EMPLOYEES.

COHABITATION. — See ante, ADULTERY, FORNICATION AND LEWDNESS.

COLD STORAGE.—See post, WAREHOUSES AND WAREHOUSEMEN.

COLLATERAL ATTACK.—As to collateral attack, see post, DIVORCE; EMINENT DOMAIN; HOMESTEAD EXEMPTION; JUDGMENTS AND DECREES; WILLS. As to collateral facts, see post, EVIDENCE. As to

collateral agreements, see post, **FRAUDS, STATUTE OF; PAROL EVIDENCE.** As to collateral security, see post, **PLEDGE AND COLLATERAL SECURITY.** As to collateral inheritance tax, see post, **SUCCESSION TAXES.**

COLLECTED—COLLECTION.—See *Dudley v. Barrett*, 66 W. Va. 363, 370, 66 S. E. 507. As to validity of stipulation in note for collection fees, etc., see ante, **BILLS, NOTES AND CHECKS.**

COLLECTOR.—See post, **TAXATION.**

COLLEGES AND UNIVERSITIES.

I½. Constitutional and Statutory Provisions.

A. Virginia.

B. West Virginia.

CROSS REFERENCES.

See the title **COLLEGES AND UNIVERSITIES**, vol. 2, p. 848, and references there given. In addition, see post, **SCHOOLS.**

I½. CONSTITUTIONAL AND STATUTORY PROVISIONS.

A. VIRGINIA.

General Provisions as to Colleges.—

Va. Code 1919 §§ 354, 596, 986-999.

Boards of Directors and Visitors of State Institutions.—Va. Code 1919, §§ 1096-1098, 4706.

Creation of Non-Stock Corporations.—Va. Code 1919, §§ 3872-3880.

Donations to Universities and Colleges Having Law Schools.—Va. Code 1919, §§ 356.

State Appropriations Prohibited to Schools Not Owned or Controlled by State.—Const. of Va. § 141.

Student's Residence for Purpose of Voting.—Va. Const., § 24.

Property Exempt from Taxation.—Va. Const., § 183; Va. Code 1919, §§ 2272, 2301.

When Incorporated Educational Institution May Convey Real Estate in Excess of One Thousand Acres.—Va. Code 1919, § 3877.

Unauthorized Credit to Minor.—Va. Code 1919, § 4707.

College Receiving Acts of Assembly.—Va. Code 1919, § 388.

Placing Certain Colleges on Year-Round Basis of Instruction.—Acts

1919 p. 73; Pollard's Code Biennial, 1920, p. 719.

University of Virginia.—Va. Code 1919, §§ 806-833. See also §§ 291, 523, 537, 581, 1729, 1732-1734, 1963, 1975, 4804, 4805, 4384, 4385.

Scholarship in University.—Acts 1918 p. 538; Pollard's Code Biennial, p. 511.

William and Mary College.—Va. Const., § 141; Va. Code 1919, §§ 934-938.

Admission of Women to William and Mary.—Acts 1918, p. 424; Pollard's Code Biennial, 1920, p. 433.

Virginia Military Institute.—Va. Const., § 130; Va. Code 1919, §§ 834-852. See also §§ 291, 523, 1963, 1975, 4385.

Virginia Polytechnic Institute.—Va. Const., §§ 130, 143, 146; Va. Code 1919, §§ 853-869, 921-925, 929-933. See also §§ 523, 717, 828, 1099, 1963, 1975.

Hampton Normal and Agricultural Institute.—Va. Code 1919, §§ 853, 926-933.

Medical College of Virginia.—Va. Code 1919, § 1003.

Dead Bodies for Use in Medical Schools.—Va. Code 1919, §§ 1729-1736.

Normal Schools for Women.—Va. Code 1919, §§ 939-946.

Normal Schools to Give Courses in Preventive Medicine.—Acts 1918, p. 411; Pollard's Code Biennial, 1920, p. 430.

Virginia Normal and Industrial Institute.—Va. Code 1919, §§ 947-969.

Miller Manual Labor School.—Va Code 1919, §§ 100-1002.

Institution for Deaf, Dumb and Blind.—Va. Const., § 130; Va. Code 1919, §§ 970-978, 4385, 4414; Acts 1918, p. 484; Pollard's Code Biennial, 1920, p. 472.

School for Colored Deaf, Dumb and Blind Children.—Va. Code 1919, §§ 979-985, 4385, 4414.

B. WEST VIRGINIA.

General Statutory Provisions Relating to University.—Barnes W. Va. Code, pp. 599, 600, ch. 45, §§ 166-176, as amended by Acts 1919, pp. 101-104, ch. 2, §§ 134-143.

Board of Contract — Regents. — Barnes W. Va. Code, pp. 205-214, ch. 15M, §§ 1-30.

Laws and Reports Furnished to College of Law.—Barnes W. Va. Code, p. 132, ch. 13, § 1; p. 143, ch. 15A, § 2; ch. 10.

Law License to Graduate of College of Law.—Barnes W. Va. Code, p. 1098, ch. 119, § 1.

Military Department of University.—Barnes W. Va. Code, p. 289, ch. 18, § 100; W. Va. Code, Suppl. 1918, § 2248.

Teachers Certificates to Graduates.—Barnes W. Va. Code, pp. 581, 582 ch. 45, §§ 88-91, as amended by Acts 1919, pp. 88-89, §§ 105-107.

Endowment for Agricultural College.—Barnes Code, ch. 45, § 175.

Agricultural Department of Preparatory Branch of State University at Keyser.—W. Va. Acts 1917, Reg. Sess., ch. 70; W. Va. Code Suppl. 1918, §§ 2288-2288c.

Department of Agricultural Extension of State University.—Acts 1919, Reg. Sess., ch. 2, § 139, amending Barnes Code, ch. 45, § 172.

Agricultural Experiment Station — See ante, AGRICULTURE.

Mining Experiment Station. — Barnes W. Va. Code, p. 189, ch. 15H, § 38c (3).

Vocational Education — Federal Act.—W. Va. Code Supp. §§ 2288d-2288h.

Anatomical Board—Use of Dead Bodies.—Barnes Code, ch. 45, § 176b, as amended by Acts 1919, p. 105, ch. 2, § 145.

Chief Engineer of Bureau — Headquarters at University.—Barnes Code, ch. 43A, § 5.

Same — Assistants Selected from University Students. — Barnes Code ch. 43A, § 11.

Instruction in Road Building.—Barnes Code, ch. 43A, § 10.

Printing.—Barnes Code, ch. 16, § 27.

Financial Support.—Acts 1919, p. 105, ch. 2, § 146.

Normal Schools.—Barnes W. Va. Code, pp. 602, 603, ch. 45, §§ 177-188, as amended by Acts 1919, pp. 105, 106, ch. 2, § 147.

Same — Appropriations. — W. Va. Const., Art. XII, § 11.

Preparatory Schools.—Barnes Code pp. 603, 604, ch. 45, §§ 189, 196, as amended by Acts 1919, p. 107, ch. 2, §§ 148, 149.

West Virginia Collegiate Institute.—Barnes W. Va. Code, pp. 604-606; ch. 45, §§ 204-210, as amended by Acts 1919, p. 108, ch. 2, § 150.

Bluefield Colored Institute.—Barnes W. Va. Code, p. 606, ch. 45, § 211, as amended by Acts 1919, p. 109, ch. 2, § 151.

Industrial School for Colored Boys and Girls.—Acts 1921, pp. 593, 594.

School for Deaf, Dumb and Blind.—Barnes W. Va. Code, pp. 606-607, ch. 45, §§ 219-235, as amended by Acts 1919, pp. 110-112, ch. 2, §§ 152-158.

Incorporation of Educational Institution.—Barnes Code, ch. 54, § 2, cl. 4; W. Va. Acts 919, p. 188.

Property of Educational Institution.—Barnes Code, ch. 57, §§ 1-11.

COLLISION.—See ante, AUTOMOBILES; post, CROSSINGS; RAILROADS; STREET RAILROADS; STREETS AND HIGHWAYS.

COLLUSION.—See post, DIVORCE.

COLORED PERSONS.—See ante, CARRIERS; COLLEGES AND UNIVERSITIES; post, CONSTITUTIONAL LAW; HOSPITALS AND ASYLUMS; MISCEGENATION; PERSON; RESTRAINT ON ALIENATION. As to separation of white and colored children, see post, SCHOOLS.

Colored Person Defined.—Va. Code 1919, § 67.

Segregation Districts.—Va. Code 1919, secs. 3043-3053.

COLORE OFFICII.—See *State v. Mankin*, 68 W. Va. 772, 70 S. E. 764. See, also, post, OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PUBLIC OFFICERS.

COLOR OF TITLE.—See ante, ADVERSE POSSESSION.

Color of title is that which in appearance is title, but which in reality is no title at all. It is that which is apparently good title, but which, by reason of some defect not appearing on its face, does not in fact amount to title. *Knight v. Grim*, 110 Va. 400, 66 S. E. 42.

COLUMNS.—See *Hatcher v. Richmond, etc., R. Co.*, 109 Va. 357, 360, 63 S. E. 999.

COMBINATION. — See post, LABOR; MONOPOLIES AND CORPORATE TRUSTS.

COMBINATION PROCEEDINGS.—See post, EMINENT DOMAIN.

COMITY.—See post, CONFLICT OF LAWS; EXTRADITION.

COMMENCEMENT OF A SUIT OR ACTION.—See ante, ACTIONS.

COMMENSURATE—COMPENSATORY.—As to **commensurate** as equivalent to **compensatory**, see *Yates v. Crozer Coal, etc., Co.*, 76 W. Va. 50, 84 S. E. 626. See also post, DAMAGES.

COMMERCE.—See post, INTERSTATE COMMERCE.

“Commerce undoubtedly is traffic, but it is something more. It is intercourse. It describes the **commercial** intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.” *Western Union Tel. Co. v. Hughes*, 104 Va. 240, 244, 51 S. E. 225.

COMMERCIAL.—As to commercial paper, see ante, BILLS, NOTES AND CHECKS. As to commercial travelers and drummers, see post, DRUMMERS. As to commercial fertilizers, see post, FERTILIZERS.

COMMISSION.—As to state corporation commission, see post, PUBLIC SERVICE AND CORPORATION COMMISSIONS. As to commission merchants, see post, FACTORS AND COMMISSION MERCHANTS. As to commission form of government, see post, MUNICIPAL CORPORATIONS.

COMMISSIONERS.—See ante, ACCOUNTS AND ACCOUNTING; post, COUNTIES; ELECTIONS; EMINENT DOMAIN; PARTITION; REFERENCE AND COMMISSIONERS. As to commissioner's report, see ante, AP-

PEAL AND ERROR; post, EMINENT DOMAIN; REFERENCE AND COMMISSIONERS. As to commissioners of banking, see ante, BANKS AND BANKING. As to county commissioners, see post, COUNTIES. As to commissioners of accounts, accounts and accounting, see post, EXECUTORS AND ADMINISTRATORS; REFERENCE AND COMMISSIONERS. As to jury commissioners, see post, JURY. As to commissioners of insurance, see post, INSURANCE. As to commissioner's deed, see post, JUDICIAL SALES. As to commissioner of labor, see post, LABOR. As to commissioner of revenue, see post, LICENSES; TAXATION.

COMMISSIONERS IN CHANCERY.—See ante, ACCOUNTS AND ACCOUNTING; APPEAL AND ERROR; post, REFERENCE AND COMMISSIONERS.

Commissioners in chancery are conservators of the peace, and as such may carry concealed weapons, although not at the time acting in the discharge of official duty. *Withers v. Com.*, 109 Va. 837, 65 S. E. 16. See post, WEAPONS.

COMMISSIONS.—See ante, AGENCY; BROKERS; post, CONTRACTS; CORPORATIONS; SALES.

COMMITMENT FOR CONTEMPT.—See post, CONTEMPT.

COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED.

I. Commitments.

- A. Nature and Grounds.
- B. Authority to Commit.
 - 1. Justice of Peace.
- C. Warrant or Order of Commitment.
 - 1. Requisites.
 - a. In General.
 - 4. Variance between Commitment and Indictment.

II. Preliminary Examination of Accused.

- A. Necessity for Examination.
 - 1. In General.
 - 2. Statutory Provisions.
 - a. Virginia Statute.
- C. Tribunal for Examination.
 - 3. Justice of the Peace.
- D. Proceedings upon Examination.
 - 1. In General.
 - 3. Adjournment or Continuance.

CROSS REFERENCES.

See the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1, and references there given. In addition, see post, CRIMINAL LAW; HOMICIDE.

I. COMMITMENTS.

A. NATURE AND GROUNDS.

Felony Case—Commitment to Jail

—Va. Code 1919, §§ 4839, 4845; Barnes Code, ch. 156, § 9.

Failure to Give Recognizance —

When Discharged.—Va. Code 1919, § 4976.

Commitment for Trial.—Va. Code 1919, § 4846; Barnes Code, ch. 156, § 16.

B. AUTHORITY TO COMMIT.

1. Justice of Peace.

Va. Code 1919, § 4839; Barnes Code, ch. 156, § 9.

C. WARRANT OR ORDER OF COMMITMENT.

1. Requisites.

a. In General.

What Order of Justice to Show.—Va. Code 1919, § 4841; Barnes Code, ch. 156, § 11.

Justice to Show. — Va. Code 1919, § 4841; Barnes Code, ch. 156, § 11.

Where an arrest is made on suspicion without a warrant the prisoner should then be taken before the proper officer, who should, without unnecessary delay, formulate a specific complaint in writing against the prisoner, informing him of the offense of which he stands accused; and upon this complaint, he may be lawfully held until the case is disposed of according to law. *Hill v. Smith*, - 107 Va. 848, 59 S. E. 475.

4. Variance between Commitment and Indictment.

Forgery.—A prisoner is committed for examination, is examined, and remanded by the examining court for trial, for felony in forging and uttering a promissory note purporting to be drawn by A. D. (no intention to defraud A. D. or any other person being charged). Held, the examination is sufficient, and well warrants an indictment for forging and uttering the note with intention to defraud. *A. D. Bogart v. Com.*, 10 Leigh (37 Va.) 693.

II. PRELIMINARY EXAMINATION OF ACCUSED.

A. NECESSITY FOR EXAMINATION.

1. In General.

Where an officer arrests a prisoner for felony without warrant, it is his duty, equally as if the arrest had been made by warrant, to take the arrested party without any unnecessary delay before some officer who can take such proofs as may be offered, or, if the circumstances will justify it, hold him for further examination. *Hill v. Smith*, 107 Va. 848, 59 S. E. 475, 476.

2 Statutory Provisions.

a. Virginia Statute.

Examination by Justice.—Va. Code 1919, § 4842; Barnes Code, ch. 156, § 12.

C. TRIBUNAL FOR EXAMINATION.

3. Justice of the Peace.

Va. Code 1919, § 4842; Barnes Code, ch. 156, § 12.

D. PROCEEDINGS UPON EXAMINATION.

1. In General.

Witness — Testimony. — Va. Code 1919, §§ 4843-4844; Barnes Code, ch. 156, §§ 13, 14.

When Justice to Discharge or Not to Discharge Accused.—Va. Code, 1919, § 4845; Barnes Code, ch. 156, § 15.

Commitment for Trial — Recognizance—Certificate to Clerk of Court—Notice to Commonwealth's Attorney.—Va. Code 1919, § 4846; Barnes Code, ch. 156, § 16.

Certifying Examination and Recognizance.—Va. Code 1919, § 4847; Barnes Code, ch. 156, § 17.

Hearing by Several Justices.— Va. Code, ch. 156, § 18; Barnes Code, ch. 156, § 18.

Discharge of Misdemeanant or Acknowledgment of Satisfaction by

Party Injured.—Va. Code 1919, § 4849.

Return of Order Discharging Recognizance or Superseding Commitment—Costs.—Va. Code 1919, § 4850; Barnes Code, ch. 156, § 19.

3. Adjournment or Continuance.

Va. Code 1919, § 4839; Barnes Code, ch. 156, § 9.

Where a prisoner has been arrested on suspicion without a warrant and a complaint duly filed against him before a police justice, if cause be shown by the commonwealth the preliminary hearing may be postponed for a reasonable time, not exceeding 10 days at one time, without his consent. *Hill v. Smith*, 107 Va. 848, 59 S. E. 475.

COMMITTEE OF LUNATIC.—See post, INSANITY.

COMMON CARRIERS.—See ante, CARRIERS.

COMMON COUNCIL.—See post, MUNICIPAL CORPORATIONS.

COMMON COUNTS.—See ante, ASSUMPSIT.

COMMON GRANTOR—COMMON SOURCE OF TITLE.—As to common grantor as synonymous with common source of title, see *Jennings v. Marston*, 121 Va. 79, 92 S. E. 821. See also post, EJECTMENT.

COMMON LAW.

I. Definitions and General Consideration.

II. Adoption of Common Law.

A. Adopting Acts.

C. English Statutes.

1. In General.

E. Remains in Force Except When Changed by Statute.

III. Evidence.

B. Presumed to Exist in Sister State.

CROSS REFERENCES.

See the title COMMON LAW, vol. 3, p. 17, and references there given. In addition, see post, PARTITION; STATUTES. As to the common law doctrine of survival of action for personal injuries and charges made therein by statute, see ante, ABATEMENT, REVIVAL AND SURVIVAL. As to the common law award see ante, ARBITRATION AND AWARD. As to common law bond, see ante, BONDS. As to the common law offense of maintaining a gaming house, see post, GAMING. As to common law marriage, see post, MARRIAGE. As to construction of statute in derogation of the common law, see post, STATUTES.

I. DEFINITIONS AND GENERAL CONSIDERATION.

The principles of the common law are elastic, and one of its peculiar merits is that it adapts itself to the rights of parties under changed circumstances; but it is sometimes difficult to

ascertain what these principles are, owing to the fact that the cases and text writers are not in harmony on the subject. *Harris v. Com.*, 113 Va. 746, 73 S. E. 561.

As Part of Federal Jurisprudence.
—Unless the common law be recog-

nized at least to some extent by the State courts as a part of the Federal jurisprudence such courts would be bound hand and foot in administering justice under the Federal Employers' Liability Act. *Baugham v. New York, etc.*, R. Co., 19 Va. Law Reg. 740.

How Common Law Offenses Punished.—A common law offense, for which punishment is prescribed by statute, shall be punished only in the mode so prescribed. Va. Code 1919 § 4760; Barnes Code, ch. 152, § 3.

When Rules of Common Law Applicable to Interpretation of Warehouse Receipts.—Va. Code 1919, § 1345.

II. ADOPTION OF COMMON LAW.

A. ADOPTING ACTS.

Constitutional and Statutory Provisions.—Va. Const. Schedule, § 1; Va. Code 1919, § 2; W. Va. Const. Art. 8, § 21; Barnes Code, ch. 13, § 5. See *State v. Baker*, 69 W. Va. 263, 71 S. E. 186.

C. ENGLISH STATUTES.

1. In General.

Ancient Statutes in Aid of Common Law.—Va. Code 1919, § 3; Barnes Code, ch. 13, § 6.

E. REMAINS IN FORCE EXCEPT WHEN CHANGED BY STATUTE.

The common law is the law of Virginia and remains in force except so far as it is changed by statute or the constitution. *Beavers v. Putnam*, 110 Va. 713, 67 S. E. 353; *Cooley's Const. Lim.* 97; *Swift & Co. v. Newport News*, 105 Va. 108, 112, 52 S. E. 821, citing *Arey v. Lindsey*, 103 Va. 250, 48 S. E. 889; *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288.

"Until altered or repealed by the legislature, such part of the common

law and the laws of this state as were in force when the constitution was adopted, and are not repugnant thereto, continue to operate and bind the courts of this state. Const. Art. 8, § 21; Code, c. 13, § 5 (§ 334)." *Holt v. Otis Elevator Co.*, 78 W. Va. 785, 90 S. E. 333, 335.

"It has been frequently decided by the supreme court, and may be taken as established law with us, that the common law is not to be considered as altered or changed by statute unless the legislative intent be plainly manifested. (*Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760.)" *Norfolk, etc., R. Co. v. Virginian R. Co.*, 110 Va. 631, 646, 66 S. E. 863. See post, STATUTES.

Where a statute does not especially repeal or cover the whole ground occupied by the common law, it repeals it only when and so far as directly and irreconcilably opposed in terms. *Layton v. Brown*, 6 Va. Law Reg., N. S., 179.

III. EVIDENCE.

B. PRESUMED TO EXIST IN SISTER STATE.

In the absence of proof as to the laws of a sister state of the Union, having the common law as the basis of its system, it will be presumed that the common law prevails there, and the rights of the parties will be determined upon common law principles. The courts of this state will not take judicial notice of the laws of sister states at variance with the common law, but, upon common law questions, will presume that the common law of a sister state is similar to that of their own. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751; *Frank & Sons v. Gump*, 104 Va. 306, 51 S. E. 358; *Norfolk, etc., R. Co. v. Denny*, 106 Va. 383, 56 S. E. 321.

COMMON NUISANCE.—See post, NUISANCES.

COMMON SCHOOLS.—See post, SCHOOLS.

COMMON WALL.—See post, PARTY WALLS.

COMMONWEALTH.—See post, STATE.

COMMONWEALTH'S ATTORNEY.

- II. Appointment, Election, etc., 966.
- III. Employment of Counsel to Aid Prosecution, 966.
- IV. Powers, Duties, Rights, Liabilities, etc., 966.
 - ½A. Powers and Duties in General, 966.
- VII. Removal and Offenses, 969.
- VIII. Compensation, Offices, etc., 969.
- XII. Public Defender, 969.

CROSS REFERENCES.

See the title COMMONWEALTH'S ATTORNEY, vol. 3, p. 30, and references there given. In addition, see post, ELECTIONS; FINES AND COSTS IN CRIMINAL CASES; INTOXICATING LIQUORS.

II. APPOINTMENT, ELECTION, ETC.

Election and Appointment.—W. Va. Const., Art. 9, § 2; Barnes Code, ch. 3, §§ 2, 69; Va. Const., §§ 110, 112, 119, 122; Va. Code 1919, §§ 123, 129, 3008.

Same—In Cities.—Va. Const., § 119.

Same — Transition of Towns to Cities of Second Class.—Va. Code 1919, § 2894.

Appointment of Substitute.—Barnes Code, ch. 120, § 7; Va. Code, 1919, § 4970.

Vacancies.—Barnes Code, ch. 4, § 10; ch. 7, § 7; Va. Code 1919, §§ 136, 138, 139.

Assistants.—See post, "Employment of Counsel to Aid Prosecution," III. Barnes Code, ch. 29, § 4; W. Va. Acts 1921, p. 224, amending Barnes Code, ch. 120, § 7, as amended by W. Va. Acts 1917, ch. 107; Barnes Code, ch. 137, § 49; W. Va. Supp. 1918, § 4719, etc.; W. Va. Acts 1921, p. 226; Va. Code 1919, § 2728.

Term of Office.—W. Va. Const., Art. 9, § 2; Barnes Code, ch. 3, § 2, ch. 7, § 1; Va. Const., § 112; Va. Code 1919, § 123.

Residence.—Barnes Code, ch. 7, §§ 1-3; Va. Code 1919, § 2703.

III. EMPLOYMENT OF COUNSEL TO AID PROSECUTION.

Barnes Code, ch. 62, § 11; ch. 120, § 7; Va. Code 1919, § 2728.

To Take Depositions. — Barnes Code, ch. 159, § 1.

IV. POWERS, DUTIES, RIGHTS, LIABILITIES, ETC.

See post, "Removal and Offenses," VII.

½A. POWERS AND DUTIES IN GENERAL.

Abatement of Bridge Nuisance.—Barnes Code, ch. 44, § 23.

Abatement of Dams as Obstructions.—Barnes Code, ch. 44, § 28.

Acts of Legislature—Copy of. — Barnes Code, ch. 13, § 1; Va. Code 1919, § 388.

Advice of Attorney General, etc.—Barnes Code, ch. 120, § 2.

Agriculture — Department of. — Barnes Code, ch. 15 D, § 42.

Same—Plant Diseases and Insects.—Barnes Code, ch. 62A, § 20.

Same—Stallions and Jacks. — W. Va. Code Supp. 1918, § 440p.

Appointment of Trustees for Educational, etc., Institution. — Barnes Code, ch. 57, § 5.

Bastardy Cases.—Barnes Code, ch. 80, § 6.

Children — Dependent and Delinquent.—Barnes Code, ch. 46A, § 33.

Cigarette Law.—Barnes Code, ch. 150, § 20e (3).

Civil Cases.—Barnes Code, ch. 120, § 6.

Claims against State.—Barnes Code ch. 37, 2.

Claims Due State.—Barnes Code, ch. 35, § 33.

Coroner's Inquest. — Barnes Code, ch. 154, § 8.

Criminal Prosecutions in General.—Barnes Code, ch. 120, §§ 2-8; Va. Code 1919, §§ 4846, 4864.

Detection of Crime — Expenditures.—Barnes Code, ch. 32A, 21.

Fertilizers.—Barnes Code, ch. 62 B, § 14.

Fines — Recovery of. — Barnes Code, ch. 36, § 9; Va. Code 1919, § 2554.

Fish and Game Laws.—Barnes Code, ch. 62, § 11.

Food Laws.—W. Va. Code Supp. 1918, § 5342f; Va. Code 1919, § 1223.

Financial Statements of Counties.—Barnes Code, ch. 39, § 35.

Financial Statements of Municipalities.—Barnes Code, ch. 47A, § 2.

Same — Expenditures. — Barnes Code, ch. 137, §§ 39, 51.

Hangings.—Barnes Code, ch. 160, § 10.

Inspection of Hotels.—Barnes Code, ch. 15N, § 23.

Inspection of Records of Anatomical Board.—Barnes Code, ch. 45, § 176b.

Investment of County, etc., Sinking Fund.—Barnes Code, ch. 47A, § 4.

Jailers—Delinquency.—Barnes Code, ch. 41, § 42.

Labor Statutes.—Barnes Code, ch. 15H, § 4.

Licenses.—Barnes Code, ch. 32, §§ 43, 59.

Lunatics — Release of. — Barnes Code, ch. 58, § 13.

Member of Board of Health.—Barnes Code, ch. 150, §§ 6, 22.

Member of Lunacy Commission.—Barnes Code, ch. 58, § 4.

Military Duty — Enrollment. — Barnes Code, ch. 18, p. 3.

Militia Camps—Liquors. — Barnes Code, ch. 18, § 50.

Mines — Oil Used.—Barnes Code, ch. 15H, § 44.

Miners.—Barnes Code, ch. 15H, § 74.

Municipal Corporations.—Va. Code 1919, § 2989.

Officers — Accounts of. — Barnes Code ch. 10A, § 3.

Same—Information from. — Barnes Code, ch. 120, § 8; Va. Code 1919, § 4864.

Process—Failure to Aid in Execution of.—Barnes Code, ch. 41, § 5.

Same — Services against County Court.—Barnes Code, ch. 39, § 5.

Prohibition Acts.—Barnes Code, ch. 32A, §§ 14, 32; Va. Code 1919, §§ 4587, 4596, 4628, 4644, 4648, 4649, 4655, 4657, 4660, 4663.

The provision of § 32, of ch. 32A of the Code, permitting the prosecuting attorney of any county, or the state commissioner of prohibition, to elect whether a justice of the peace before whom a person is arraigned on a charge of having violated a provision of that chapter, the prohibition act, the first time, shall hear and determine the charge, or merely put the accused on his preliminary examination, and, on proof of probable cause, require him to give a recognizance for his appearance to answer an indictment, or commit him to jail in default thereof, is constitutional and valid. *Ex parte Glass*, 81 W. Va. 111, 93 S. E. 1036.

Quo Warranto.—Barnes Code, ch. 109, §§ 6-9; Va. Code 1919, §§ 5842, 5844.

Railroads.—Barnes Code, ch. 54, § 50b (5) (consolidation); § 71a (15) (rates); ch. 120, § 5 (taxation); W. Va. Code Supp. 1918, § 3024f (pay days).

Release from Imprisonment for Nonpayment of Fine.—Barnes Code, ch. 36, § 11.

Release of Road Work Offenders.—W. Va. Code Supp. 1918, § 1940—114; W. Va. Acts, Reg. Sess., ch. 60, § 114.

Reports of Commissioner of Banking.—Barnes Code, 54, § 81a (5).

Rewards.—Barnes Code, ch. 32A, § 21.

Pursuant to the authority conferred by § 21, ch. 32A, Code 1916, upon the prosecuting attorney of a county, with the approval of one of the officers designated by the section, to offer rewards for the apprehension of persons charged with crime, and to expend money for the detection of crime, it is unnecessary for such approval to be given to each individual claim, but it may take the form of an authorization of a maximum sum for a stated period, beyond which the prosecuting attorney may not go, and subject to the limitation that all expenditures therefrom must be for services rendered in aid of the suppression of violations of that chapter. *State v. County Court*, 84 W. Va. 691, 100 S. E. 548.

Pursuant to the authority so conferred, the prosecuting attorney, within his sound discretion, may employ for stated periods, or for a particular service. *State v. County Court*, 84 W. Va. 691, 100 S. E. 548.

When the employment is for a stated period or periods, an account for services rendered sufficiently complies with the provisions of § 1, ch. 14, Acts 1919, if it shows, in addition to the approval of the prosecuting attorney, the kind of service rendered, the dates within which the same was performed, and the name of the person performing the service. *State v. County Court*, 84 W. Va. 691, 100 S. E. 548.

Special Court Terms. — Barnes Code, ch. 112, § 5, ch. 165, § 6.

Speculative Securities Act. — Barnes Code, ch. 55B, §§ 9, 15.

Street Car Platforms—Enclosure. — Barnes Code, ch. 15H, § 69.

Transition of Towns to Cities of Second Class.—Va. Code 1919, § 2894.

Taxation — Duties Relating to. — See post, TAXATION.

Weapons — Offense of Carrying.—Barnes Code, ch. 148, § 7.

Witnesses — Summons. — Barnes Code, ch. 120, §§ 6, 8; ch. 130, § 25; ch. 162, § 25; ch. 162, § 1; Va. Code 1919, §§ 4969, 6211.

Are Statutory.—The office of the prosecuting attorney is of modern creation, it seems, and its powers and duties are given, imposed and prescribed by statutory law. *State v. Ehrlick*, 65 W. Va. 700, 702, 64 S. E. 935.

Criminal and Civil Proceedings. — The prosecuting attorney of a county has authority, independent of the attorney general, to institute and prosecute all criminal actions and proceedings, cognizable in the courts of his county; but has no such power or authority, respecting the prosecution of civil proceedings on the part of the state, beyond that expressly conferred by statute. *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935.

Discretion.—"As to the duty of the prosecuting attorney, Mr. Bishop in the 1st volume of his *Criminal Law*, § 815 (a), says: 'In all our states, the prosecuting officer acts under a discretion committed to him for the public good. He is not, as of course, to pursue to conviction every offender against whom he can obtain adequate evidence. Nor is it his duty to convict every prosecuted person of the highest offense which can be carved out from the mass of his entire evil doings. It is among the most important functions of a state's attorney to select, out of what the law permits, the charges which he will bring against offenders. They have no power to elect, and above all they can not object if he overlooks their heavier offenses and pursues them simply for the lighter.'" *State v. Doyle*, 64 W. Va. 366, 368, 62 S. E. 453.

Authority of Attorney General.—"We may say the office of prosecuting attorney has been carved out of that of attorney general and made an independent office, having exclusive con-

trol, to some extent, of business of the state, arising within the county. No doubt the attorney general may assist the prosecuting attorney in the prosecution of such business, or perform it himself, in case of the nonaction of the prosecuting attorney, but he can not displace that officer. He has neither power of removal nor control over him within his own province, so far as it is defined by statute, for, if the division of powers, made by the statute, were not respected nor observed, nor susceptible of enforcement, the object and purpose of the division would be defeated." *State v. Ehrlick*, 65 W. Va. 700, 703, 64 S. E. 935.

Assistants of Attorney General.

"Prosecuting attorneys" are generally described as deputies or assistants of the attorney general, 4 Am. & Eng. Ency. Law 1026; but they are not dependent upon him for their powers in all cases nor in all respects subject to his control. 23 Am. & Eng. Ency. Law 275." *State v. Ehrlick*, 65 W. Va. 700, 702, 64 S. E. 935.

Serving Independent District Boards of Education.—It is the duty of the prosecuting attorney, imposed by § 49, ch. 39, Code 1913 (§ 1602), to serve independent district boards of education as well as other district boards, as thereby prescribed. But said section does not deprive such independent district boards of the implied power, to employ other counsel, or additional counsel to assist the prosecuting attorney, where, in their judgment and reasonable discretion on account of the character of the business, or the absence of the prosecuting attorney, or his incapacity, sickness, or other disability, or his refusal to act, there is necessity therefor. *Mollohan v. Cavender*, 75 W. Va. 36, 83 S. E. 78.

VII. REMOVAL AND OFFENSES.

Removal.—Barnes Code, ch. 9, § 4;

ch. 29, § 19; Va. Code 1919, §§ 2702, 2706.

Subject to Indictment, etc.—Barnes Code, ch. 9, § 4.

Compromising Proceedings. — Barnes Code, ch. 36, § 17.

Prevention of Prosecutions. — Barnes Code, ch. 36, § 17.

Failure to Recover Fines. — Va. Code 1919, § 2554.

VIII. COMPENSATION, OFFICES, ETC.

Salary and Compensation in General.—Barnes Code, ch. 39, § 49; ch. 69; § 23; ch. 120, § 6; W. Va. Acts 1919, p. 278, ch. 74, amending Barnes Code, ch. 137, § 44; Barnes Code, ch. 137, §§ 46, 52; W. Va. Supp. 1918, § 15241; W. Va. Acts 1917, ch. 103; Va. Code 1919, §§ 119, 1223, 2726, 2904, 2989, 3504.

Expenses.—Barnes Code, ch. 137, § 49.

Offices and Office Supplies.—Barnes Code, ch. 137, § 46; Va. Code 1919, § 2854.

Stenographers.—W. Va. Acts 1921, p. 224, amending Barnes Code, ch. 120, § 7, as amended by W. Va. Acts 1917, ch. 107.

Fees.—Va. Code 1919, §§ 513, 591, 1118, 2328, 2378, 2396, 2894, 3504, 3505, 4077, 4630, 4655, 4705, 4961, 4962, 4966, 4971; Pollard's Code 1920, p. 539; Va. Acts 1918, p. 572; Pollard's Code 1920, p. 602; Va. Acts 1918, p. 627; Barnes Code, ch. 29, § 73; ch. 32A, § 32; ch. 36, § 9; ch. 37, § 2; ch. 50, § 230; ch. 62, § 29; ch. 80, § 6; ch. 137, §§ 34-39; ch. 138, § 16; ch. 139, § 16; ch. 150, § 20b (8); ch. 162, § 13; W. Va. Code Supp. 1918, § 7222; W. Va. Acts 1921, p. 294, § 15, cl. 11.

XII. PUBLIC DEFENDER.

Va. Acts 1920, p. 544; Pollard's Code 1920, p. 771.

COMMUNICATION.—The word *communication* is the Masonic equivalent of the word *meeting*. *State v. Goodwyn*, 83 W. Va. 255, 98 S. E. 577.

COMMUNITY.—As to reputation in **community**, see *Brotherhood v. Vickers*, 121 Va. 311, 93 S. E. 577, see also post, **WITNESSES**.

COMMUNITY OF INTEREST.—See post, **PARTNERSHIP**.

COMMUNITY PROPERTY.—"In some of the American states the property acquired by husband and wife after the marriage is known as their **community property**. The husband controls such property during his lifetime, but can only dispose of one-half of it by will at his death." *Tolley v. Poteet*, 62 W. Va. 231, 245, 57 S. E. 811.

COMPANY.—In *Lowther v. Bridgeman*, 57 W. Va. 306, 309, 50 S. E. 410, the court said: "**Company** in its primary sense means an association of a number of individuals for the purpose of carrying on a legitimate business, a number of persons united for the same purpose, or in a joint concern, as a **company** of merchants. The word is applicable to private partnerships or incorporated bodies of men. Cyc. of Law and Procedure, vol. 8, p. 399. The word **company** as used in the statute has been judicially construed many times in this country. Individuals may be included within the meaning of the term. * * * The word **companies** as used in the statute under construction includes individuals as well as corporations. If it includes individuals there is no reason for saying that it does not include a single individual."

COMPARATIVE NEGLIGENCE.—See post, **NEGLIGENCE**.

COMPARATIVE VALUE.—See *Fowler v. Norfolk, etc., R. Co.*, 68 W. Va. 274, 284, 69 S. E. 811.

COMPENSATORY.—See ante, **COMMENSURATE—COMPENSATORY**. As to compensatory damages, see *Yates v. Crozer Coal, etc., Co.*, 76 W. Va. 50, 84 S. E. 626. See also post, **DAMAGES**.

COMPETENCY OF WITNESS.—See post, **WITNESSES**.

COMPETITION.—See post, **RESTRAINT OF TRADE**.

COMPLETED.—As to meaning of **completed**, as applied to oil well being drilled, see *Chambers v. Simmons*, 76 W. Va. 174, 85 S. E. 182. See, also, post, **MINES AND MINERALS**.

COMPLETE RELIEF.—See post, **JURISDICTION**.

COMPLETION.—See *Carnegie Natural Gas Co. v. South Penn Oil Co.*, 56 W. Va. 402, 49 S. E. 548. See, also, post, **MINES AND MINERALS**.

COMPOSITION WITH CREDITORS.—See post, **COMPROMISE**.

COMPOS MENTIS.—See post, **INSANITY; WILLS**.

COMPOUNDING OFFENCES.

CROSS REFERENCES.

See the title COMPOUNDING OFFENSES, vol. 3, p. 36, and references there given. In addition, see post, ILLEGAL CONTRACTS.

Agreement Not to Prosecute.—When the instructions given in the case at bar are read together and in connection with the pleadings, it appears that the jury was fairly instructed that an agreement that a third person should not be indicted for a felony would be an illegal consideration for a note as well as an agreement that he should not be prosecuted and tried, and that the

court and counsel treated the words “indicted” and “prosecuted” as synonymous. *Saunders v. Bank*, 112 Va. 443, 71 S. E. 714.

Validity of Private Settlements.—See ante, COMPROMISE.

Punishment for Concealing or Compounding.—Va. Code 1919, § 4513; Barnes Code, ch. 147, § 19.

COMPOUND INTEREST.—See post, INTEREST; USURY.

COMPROMISE.

I. Nature and What Constitutes—General Consideration, 972.

II. Who May Compromise, 973.

A. In General, 973.

G. Municipal Corporation, 973.

III. Compromise Favored in Law, 973.

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XI. Enforcement, 975.

XII. Compromise of Criminal Prosecutions, 975.

CROSS REFERENCES.

See the title COMPROMISE, vol. 3, p. 37, and references there given. In addition, see ante, ACCORD AND SATISFACTION; ARBITRATION AND

AWARD; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS; ATTORNEY AND CLIENT; BOUNDARIES; post, CONTRACTS; DEATH BY WRONGFUL ACT; MISTAKE AND ACCIDENT; PARTNERSHIP; RELEASE; TRUSTS AND TRUSTEES. As to compromise of claim of mother of bastard child against reputed father, see ante, BASTARDY. As to compromise made under duress, see post, DURESS. As to compromise by guardian, see post, GUARDIAN AND WARD. As to right of defendant sued for excessive distress to show compromise and settlement under general issue, see post, LANDLORD AND TENANT. As to compromise with subscriber to stock for corporation's benefit, see post, STOCK AND STOCKHOLDERS. As to compromise of taxes, see post, SUCCESSION TAXES; TAXATION.

I. NATURE AND WHAT CONSTITUTES—GENERAL CONSIDERATION.

A mere proposal by plaintiff amounting to a proposition of compromise of a claim for damages for breach of a contract, unaccepted by defendant will not stop or bar him of his right of action against defendant. *Smith v. Atlas-Pocahontas Coal Co.*, 66 W. Va. 599, 66 S. E. 746.

Necessity for Acceptance. — "The plaintiffs in error having refused to accept the offer of compromise made in the petition of the defendant in error, they had no right to claim any benefit from such offer." *Hamman v. Miller*, 116 Va. 873, 879, 83 S. E. 382.

Error to Enforce Compromise Not Accepted by Other Party.—In the matter of a disputed claim between R. and G., R., the claimant, proposed in writing on April 7th, as a compromise, that if G. would pay \$100, R. would accept it in full of the claim, and release his mortgage lien on property securing the debt. On the 12th of May following, not receiving a response from G., R. sold the debt to S. U. & N. Ins. Co., assigned the same and subrogated the assignee to the rights of the mortgagee. In a proceeding by the assignee to enforce the mortgage, it is error for the court to enforce the compromise offered by R., but which was never accepted by G. *Gillespie v. Scottish Union, etc., Ins. Co.*, 61 W. Va. 169, 170, 56 S. E. 213.

Not Bound by Admission in Offer

to Compromise When Not Accepted.—

A person is not bound by an admission in an offer to compromise not accepted by the party. *Wade v. McDougale*, 59 W. Va. 113, 114, 52 S. E. 1026.

Silence Not Acceptance. — Mere silence and failure to reply to a written proposition, when there is no legal duty to reply, does not amount to acquiescence therein, so as to constitute an agreement between parties. *Carr v. Coffman*, 70 W. Va. 190, 73 S. E. 275.

Validity of Compromise of Fraudulent Transaction.—If a party makes a deliberate settlement of an alleged fraud, with his eyes wide open, such settlement will not be disturbed. Parties may settle frauds as well as anything else, if they act with knowledge of the facts; and such a settlement is as effectual when made by the parties, as when made by a court. *Cary v. Harris*, 120 Va. 252, 91 S. E. 166.

Construction of Agreement—Suit for Share of Royalty.—Although the parties may agree in writing compromising their claims to real estate that, should it thereafter be ascertained that any well producing oil has theretofore been drilled on a certain parcel of land, part of the royalty reserved in the lease and paid to one of them shall be refunded to the other, the stipulation does not, in the absence of terms expressly indicating or necessarily implying an intention to create a condition precedent to the maintenance of a suit or action to recover such share of the oil royalty or to require an accounting therefor.

inhibit such proceeding until the well is located definitely, either by the joint action of the parties or by judicial inquiry instituted solely for that purpose. *Warren v. Boggs*, 83 W. Va. 89, 97 S. E. 589.

Abandonment of Compromise. — The fact that an agreement to compromise a suit was entered into on behalf of some of the parties by counsel who had no authority to make it, and was subsequently abandoned by all the parties thereto, is a sufficient reason for not entering it up as the judgment of the court, although it had been agreed that it should be so entered when it was made. *Carter v. Cooper*, 111 Va. 602, 69 S. E. 944.

II. WHO MAY COMPROMISE.

A. IN GENERAL.

Fiduciaries.—Va. Code 1919, § 5440.

Auditor—Old Claim Due State.—Va. Code 1919, § 2532.

G. MUNICIPAL CORPORATION.

"The power to prosecute suits on behalf of a corporation includes the power to settle the same. So, the power to defend suits brought against a corporation gives them the same power of adjustment. They may compromise doubtful controversies to which the corporation is a party, either as plaintiff or defendant. The law vests them with discretion in such matters, which they are to exercise for the best interests of the corporation. The settlement of an existing controversy, if made in good faith, binds the corporation, but if collusively made, it is not obligatory." *McKennie v. Charlottesville, etc., R. Co.*, 110 Va. 70, 79, 65 S. E. 503. See post, MUNICIPAL CORPORATIONS.

III. COMPROMISE FAVORED IN LAW.

Compromise Agreements Are Favored.—*Cary v. Harris*, 120 Va. 252, 91 S. E. 166.

IV. CONSIDERATION.

A. NECESSITY.

At common law nothing less than the payment of the whole sum due would satisfy the demand. A party never could be held to surrender his rights under contract, unless it appeared that he made the surrender understandingly and intentionally, and freely, nor could such surrender or release be implied by his act. It never could be implied by the act of a party accepting a part of what he had a right to demand, that he released the security for the balance without consideration. *Thomas v. Brown*, 116 Va. 233, 81 S. E. 56.

C. AS AFFECTED BY VIRGINIA STATUTE AS TO PART PAYMENT.

The Virginia statute allowing part payment to extinguish a money demand is coupled with the condition or qualification "when expressly accepted by the creditor in satisfaction, and rendered in pursuance of an agreement for that purpose." And the burden is on the debtor to bring himself within the statute. The statute was never intended to enable a debtor to perpetrate a wrong and injustice upon his creditor as is attempted in the case at bar. Here the creditors were in a desperate strait for money, the correctness of their bill was not denied, and although they signed a receipt stating the sum received to be "payment in full," the settlement was not made as a compromise of differences, but only because the sum received was deliberately held out to them as the only relief they could get outside of the law. Under these circumstances, it is held that the creditors are not bound by their acceptance and may recover the balance of their debt. *Thomas v. Brown*, 116 Va. 233, 81 S. E. 56.

V. EFFECT OF COMPROMISE.

A. CONCLUSIVENESS.

1. In General.

Where a compromise of a doubtful

right is fairly made between parties, it is binding and can not be affected by any subsequent investigation or result; and this is so, whether it is a compromise of a doubtful question of law or fact. *Producers Coal Co. v. Mifflin Coal Min. Co.*, 82 W. Va. 311, 318, 95 S. E. 948.

Where at the close of operations the parties had a settlement in which the defendant paid in full the plaintiffs' demand for their services, the plaintiffs could not subsequently bring a suit for an alleged breach of contract. *Sutherland v. Wampler*, 119 Va. 800, 804, 89 S. E. 875.

2. Matters Affecting Conclusiveness.

d. Fraud.

Compromise agreements are favored and where their rescission is sought on the ground of fraud or duress such fraud must be clearly and convincingly shown. *Cary v. Harris*, 120 Va. 252, 91 S. E. 166. See post, FRAUD AND DECEIT.

e. Mistake.

The rule that whenever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact, has no application to cases of compromise, where doubts have arisen as to the rights of parties, and they intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or of fact, are governed by special consideration. *Burton v. Haden*, 108 Va. 51, 58, 60 S. E. 736. See post, MISTAKE AND ACCIDENT.

5. As to Persons Not Parties to Compromise.

Where a person employed an independent contractor to perform work which was intrinsically dangerous in itself and the contractor agreed to indemnify his employer for injury done to third persons for which the employer would be liable, and such injuries were done the employer had a right to settle the matter without suit with the party injured and to recoup the amount thus paid in an action by the contractor against the employer for services. But the amount paid in settlement of the alleged damage is not conclusive against the contractor. He has a right to controvert this by proof of the actual damage done. *Walton v. Cherokee Colliery Co.*, 70 W. Va. 48, 73 S. E. 63.

VI. COMPROMISE WITH JOINT OBLIGORS.

Va. Code 1919, §§ 5763, 5764, 5766.

VII. COMPOSITIONS WITH CREDITORS.

See ante, ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

A purchaser of the assets of an insolvent firm, under a proposal to pay, in consideration therefor, one-third of each of the several debts of the firm, assented to by practically all of the creditors, can not retract or withdraw his proposal so as to bar acceptance thereof by one of the creditors to whom payment has not been made, without having first restored the status quo. If, in such case, a creditor whose claim has not been provided for in the decree confirming the purchase, files a cross-bill or an answer in the nature of a cross-bill, seeking the benefit of the contract of purchase, assented to by the order creditors, but not formally accepted by him, such claim so made amounts to an acceptance of the unretracted offer of the purchaser, and relief on the cross-bill is limited to a decree against the latter for payment of one-third of the claim. Such relief may

be granted by an accidental decree upon the cross-bill, without reversal or disturbance of the previous one. *Bank v. Williamson*, 73 W. Va. 190, 80 S. E. 836.

IX. EVIDENCE.

A. IN SETTING ASIDE COMPROMISE.

Burden of Proof.—Where the plaintiff entered into a written compromise with the defendant and was represented in the matter by astute attorneys and sought to have the contract cancelled by an imputation of bad faith and fraud, it was held, that in such case, "it is well settled that the burden rests upon the plaintiff to establish the charges by the clearest and most satisfactory evidence." *Curry v. Landes*, 116 Va. 843, 83 S. E. 396.

Settlement of Default—Presumptions.

A settlement of a default is not inferable from mere payments on account thereof and representation by the defaulting officer that he had fully made up the shortage. *Wait v. Homestead Bldg. Ass'n*, 76 W. Va. 431, 85 S. E. 637.

B. COMPROMISE OR ADMISSIONS IN OFFER TO COMPROMISE.

Admissions not made "without prejudice," or when not plainly shown to have been made as a concession or sacrifice in an effort to buy peace, may be given in evidence. *Chesapeake, etc., R. Co. v. Stock & Sons*, 104 Va. 97, 51 S. E. 161.

"It is to be observed that confidential overtures of pacification, and any other offers or propositions between litigating parties, expressly stated to be made without prejudice, are excluded on grounds of public policy. * * * But if it is an independent admission of a fact merely because it is a fact, it will be received; and even the offer of a sum by way of compromise of a claim tacitly admitted is receivable, unless accompanied with a caution that the offer is confidential." *Chesapeake,*

etc., R. Co. v. Stock & Sons, 104 Va. 97, 103, 51 S. E. 161.

Where, in an offer of compromise, a plain concession is in fact made, and not stated merely hypothetically for the purpose of buying peace, it is allowable in evidence as an admission. *Lovett v. West Virginia Cent. Gas Co.*, 73 W. Va. 40, 79 S. E. 1007.

Testimony to show an unaccepted offer of compromise is incompetent and inadmissible in evidence. *Howell v. McCarty*, 77 W. Va. 695, 88 S. E. 181.

XI. ENFORCEMENT.

Where a bill in equity seeks the specific enforcement of a compromise made nearly a century ago, but fails to state facts and circumstances sufficient to constitute a good excuse for the reasonable delay in seeking the relief asked, and facts and circumstances are stated which show on their face that a court of equity would encounter a great risk of doing injustice to the defendants and others if it enforced the compromise, relief in such a case is properly refused. *Clinchfield Coal Co. v. Clintwood Coal, etc., Co.*, 108 Va. 433, 62 S. E. 329.

XII. COMPROMISE OF CRIMINAL PROSECUTIONS.

See post, CRIMINAL LAW.

Validity of Private Settlements. —

Private adjustment of criminal prosecutions are not unusual and are frequently recognized as proper. In Virginia settlements of this character are expressly provided for by statute as to misdemeanors (Code of 1904, § 3973, Code of 1919, § 4849), and this is in accord with the general policy of the law. Of course, compounding or concealing crimes, or stifling prosecutions to defeat the ends of justice, will not be countenanced or permitted, but in prosecutions for offenses and cheats not involving any great offense against the public, the courts will encourage settlements between the parties as less injurious to the public than

litigation. *Glidewell v. Murray-Lacy & Co.*, 124 Va. 563, 98 S. E. 665.

Such code provision authorizes a private adjustment between the parties immediately concerned, "when a person is in jail or under recognizance to answer a charge of assault and battery, or other misdemeanor, for which there is a remedy by civil action." The general words, "or other misdemeanor," following the specific words, "assault and battery," are not limited to other misdemeanors of the same kind as assault and battery. *Glidewell v. Murray-Lacy & Co.*, 124 Va. 563, 98 S. E. 665.

Violation of Fishery Laws. — *Va. Code* 1919, §§ 3156, 3264, 3288.

COMPUTATION OF TIME.—See post, LIMITATION OF ACTIONS; TIME.

CONCEALED WEAPONS.—See post, WEAPONS.

CONCEALMENT.—See ante, COMPOUNDING OFFENSES.

In *Talley v. Metropolitan Life Ins. Co.*, 111 Va. 778, 784, 69 S. E. 936, it is said: "The law applicable to these facts is stated by May on Insurance as follows: 'Representations should not only be true, but they should be full. The insurer has a right to know the whole truth. And a lack of fullness, if designed, in a respect material to the risk, is tantamount to a false representation, and is attended by like consequences. This lack of fullness is termed a **concealment**, which is the designed and intentional withholding of some fact material to the risk which the insured in honesty and good faith ought to communicate to the insurer. It is not mere unintentional silence or inadvertence. It is a positive intentional omission to state what the applicant knows, or must be presumed to know, ought to be stated. It is a suppression of the truth, whereby the insurer is induced to enter into a contract which he would not have entered into had the truth been known to him. It is a deception whereby the insurer is led to infer that to be true, as to a material matter, which is not true. Hence strictly speaking, under the general law of insurance, there can be no **concealment** of a fact which is not known to the applicant.' 1 May on Ins. (4th Ed.), § 200." See post, INSURANCE; LIFE INSURANCE.

CONCENTRATED FEEDING STUFFS.—See post, FOOD.

CONCESSI.—See *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744.

CONCLUSIONS OF LAW.—See post, LEGAL CONCLUSIONS.

CONCLUSIVE PRESUMPTIONS. — See post, PRESUMPTIONS AND BURDEN OF PROOF.

CONCURRENT.—As to concurrent jurisdiction, see post, COURTS; JURISDICTION. As to concurrent covenants, see post, COVENANTS. As to concurrent negligence, see post, CROSSINGS; NEGLIGENCE.

In *State v. Harden*, 62 W. Va. 313, 355, 58 S. E. 715, 60 S. E. 394, the court, quoting Chief Justice Marshall as to the construction of the act "that the district court shall have cognizance **concurrent with** the courts and magistrates of the several states, and the circuit courts of the United States, of all suits," etc., says: "What is the meaning and purport of the words **concurrent with** the circuit courts of the United States? For one body to do a thing **concurrently with** another, is to act in conjunction with that other. The phrase may imply that power was previously given to that other; but if, in fact, it had

not been given, the words are capable, of imparting it. If they are susceptible of this construction, they ought to receive it."

CONDEMNATION PROCEEDINGS.—See post, EMINENT DOMAIN.

CONDITIONAL LIMITATIONS.—See post, REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

CONDITIONAL SALES. — See post, MORTGAGES AND DEEDS OF TRUST; SALES.

CONDITIONS.

I. Conditions Precedent and Subsequent Defined and Distinguished.

II. Construction of Conditions Subsequent.

III^{1/2}. Performance of Conditions.

CROSS REFERENCES.

See the title CONDITIONS, vol. 3, p. 50, and references there given. In addition, see post, CONTRACTS; DEEDS; FIRE INSURANCE; RESCISSION, CANCELLATION AND REFORMATION; VENDOR AND PURCHASER; WILLS. As to conditions in contracts, see post, CONTRACTS. As to conditions in deeds, see post, DEEDS. As to conditional grant of oil and gas, see post, MINES AND MINERALS. As to conditional extension of time within which timber might be cut and removed, see post, TREES AND TIMBER.

I. CONDITIONS PRECEDENT AND SUBSEQUENT DEFINED AND DISTINGUISHED.

A condition subsequent is one which is to be performed or fulfilled after the vesting of the estate, and the intent of which is to defeat it. *Potomac Power Co. v. Burchell*, 109 Va. 676, 683, 64 S. E. 982.

Where title to land has vested any provision by which it is to be divested, it is regarded as a condition subsequent. *Potomac Power Co. v. Burchell*, 109 Va. 676, 64 S. E. 982.

Conditions precedent and subsequent differ in this: The former is one by the performance of which a right, estate or thing is obtained or gained; the latter, one by the performance of which a right, estate or thing already obtained is kept and continued. *Adams v. Guyandotte Valley R. Co.*, 64 W. Va. 181, 61 S. E. 341.

In granting real estate upon condition, if the act upon which the estate depends must be performed before the

estate can vest, it is a condition precedent; but where the performance of the act does not necessarily precede the vesting of the title, but may accompany or follow it, it is a condition subsequent. *Spies v. Arvondale, etc., R. Co.*, 60 W. Va. 389, 55 S. E. 464.

If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is precedent, and, unless it be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, and this can be collected from the whole will, the condition is subsequent. *Wenner v. George*, 129 Va. 615, 106 S. E. 365.

There are no technical words to distinguish between conditions precedent and conditions subsequent. The distinction is matter of construction. The same words may indifferently make either, according to the intent of the

person who creates the condition. *Wenner v. George*, 129 Va. 615, 106 S. E. 365.

Intention of Parties.—Whether a thing stipulated to be done is a condition precedent, depends upon the intention of the parties, to be gathered from the form of the stipulation, the general and immediate contexts, the nature of the subject matter, the purposes the parties had in view as disclosed by the whole instrument, and such extraneous evidence as is admissible under the rules of construction, when the parties have not in terms agreed that it shall be such. *Adams v. Guyandotte Valley R. Co.*, 64 W. Va. 181, 61 S. E. 341. See *Shreve v. Norfolk, etc., R. Co.*, 109 Va. 706, 64 S. E. 972.

II. CONSTRUCTION OF CONDITIONS SUBSEQUENT.

See post, **DEEDS; INTERPRETATION AND CONSTRUCTION; MINES AND MINERALS.**

Conditions subsequent are not favored in law, because they tend to destroy estates, and a party who insists upon a forfeiture for a breach of such a condition must bring himself clearly within the condition. Conditions subsequent are always strictly construed. *Peoples Pleasure Park Co. v. Rohleder*, 109 Va. 439, 61 S. E. 794, 63 S. E. 981; *Deepwater R. Co. v. Honaker*, 66 W. Va. 136, 148, 66 S. E. 104; *Potomac Power Co. v. Burchell*, 109 Va. 676, 64 S. E. 982; *Epperson v. Epperson*, 108 Va. 471, 62 S. E. 471; *Killgore v. County Court*, 80 W. Va. 283, 92 S. E. 562;

Shreve v. Norfolk, etc., R. Co., 109 Va. 706, 64 S. E. 972; *Pence v. Tidewater Townsite Corp.*, 127 Va. 447, 103 S. E. 694.

Conditions subsequent when effective to work a forfeiture of title must have been created by express terms or clear implication. *Pence v. Tidewater Townsite Corp.*, 127 Va. 447, 103 S. E. 694.

III½. PERFORMANCE OF CONDITIONS.

Lease Contract.—An agreement by a lessor with the lessee to procure a release of the lien of a deed of trust upon the premises by an assignee of the note representing the debt so secured, as a condition precedent to payment of part of the purchase money of the lease, is not discharged or performed by the procurement of a release of the lien by the original creditor. Nor is the effect of the agreement destroyed or performance of the condition excused by proof, in an action for recovery of the deferred purchase money, of payment of the debt secured by the deed of trust to the original creditor, before assignment, or its extinction by merger in the hands of an assignee. *Bogges v. Bartlett*, 72 W. Va. 377, 78 S. E. 241, 243, wherein the court said: "By her contract she precluded herself from absolute payment, and bound herself to the performance of the condition precedent. In such cases, recovery can not be had without previous performance of the condition. Indeed, no right of action accrues until after such performance."

CONDONATION.—See post, **DIVORCE**.

CONDUCTOR.—See ante, **CARRIERS**. As to right of conductor to make arrest, see ante, **ARREST**.

CONFEDERATE HOME.—Reduced Rate of Transportation to Inmates.—Va. Code 1919, sec. 3918.

CONFEDERATE MEMORIAL ASSOCIATION.—Road Through Land.—Va. Code, 1919, sec. 3041.

CONFEDERATE MEMORIAL DAY.—Public Holiday.—Va. Code 1919, sec. 5758.

CONFEDERATE MEMORIAL LITERARY SOCIETY.—Property Exempt from Taxation.—Va. Const. sec. 183; Va. Code, 1919, secs. 2272, 2301:

CONFEDERATE MONUMENT.—Erection of by County.—Va. Code 1919, sec. 2742.

Confederate States.

See the title **CONFEDERATE STATES**, vol. 3, p. 53, and references there given. In addition, see post, **PENSIONS**. As to statutory provision declaring laws of confederate government void, see Barnes Code, ch. 13, sec. 7.

CONFEDERATE VETERANS.—See Va. Code 1919, secs. 60, 2648, 2664, 5214. As to enumeration of confederate veterans, see Pollard's Code 1920, pp. 787, 848, 849. As to appropriation by local authorities to defray expenses of veterans attending reunion of U. C. V., see Acts 1919, p. 127; Pollard's Code, 1920, p. 712. As to pensions, see post, **PENSIONS**.

CONFESSION OF JUDGMENTS.

I. General Consideration.

II. Time and Place of Making Confession.

B. In Clerk's Office.

1. In General.

2. Must Be in Vacation.

IV. Power of Attorney to Confess Judgment.

A. In General.

VII. Entry.

A. Duty to Enter.

VIII. Effect of Confession.

A. As Release of Errors.

IX. Lien.

CROSS REFERENCES.

See the title CONFESSION OF JUDGMENTS, vol. 3, p. 64, and references there given. In addition, see ante, APPEAL AND ERROR; ATTORNEY AND CLIENT; CLERKS OF COURT; post, FOREIGN JUDGMENTS; FORMER ADJUDICATION OR RES ADJUDICATA; JUDGMENTS AND DECREES; JUSTICES OF THE PEACE; PLEADING. As to the necessity of a confession of judgment as prerequisite to granting an injunction, see post, INJUNCTIONS. As to judgments pro confesso, see post, JUDGMENTS AND DECREES.

I. GENERAL CONSIDERATION.

Judgment Tainted with Usury.—Confession of judgment by an accommodation indorser upon an usurious note, where there was no new consideration moving to him, nor was it intended or considered by him or the lender at the time as a novation of the debt, merged the contract evidenced by the note on which it was entered, and the judgment became a subsequent and different security; but the judgment, nevertheless, was wholly based on an obligation tainted with usury, and therefore the judgment itself was tainted with such usury. *Ruckdeschall v. Seibel*, 126 Va. 359, 101 S. E. 425.

II. TIME AND PLACE OF MAKING CONFESSION.

B. IN CLERK'S OFFICE.

1. In General.

Va. Code 1919, § 6130; Barnes Code, ch. 125, § 43.

The statutory provision with reference to judgments confessed in the clerks' office are, for the most part, merely declaratory of the common law, and such judgments will be declared valid where there has been substantial compliance with the statute. *Manson v. Rawlings*, 112 Va. 384, 71 S. E. 564.

Statutory Authority Necessary.—"A confession of judgment in the clerk's office was never contemplated by the common law, and can only take place in pursuance of the authority of some statute." *Farquhar & Co. v. Dehaven*, 70 W. Va. 738, 75 S. E. 65, 67, quoting 4 Minor's Inst. 726.

2. Must Be in Vacation.

Va. Code 1919, § 6130; Barnes Code, ch. 125, § 43.

IV. POWER OF ATTORNEY TO CONFESS JUDGMENT.

A. IN GENERAL.

Judgments by confession, by attorneys

in general, are not contrary to the policy of this state. *Insurance Co. v. Barley*, 16 Gratt. (57 Va.) 363, nor to the terms of the negotiable instruments law (Va. Code 1904, § 2841-a, sub-sec. 5). *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979, 983.

A warrant of attorney contained in a note did not designate the person in whose favor the judgment was to be confessed. Held: A confession of judgment by an attorney under his warrant in favor of a bank, the holder of the note in due course, was valid, it appearing from the record and otherwise that before the judgment was taken the appellants all knew that the bank had the note, was looking to them for payment and had been notified by one of the indorsers to sue on the note. *Colona v. Parksley Nat. Bank*, 120 Va. 812, 92 S. E. 979.

Power Must State Amount.—A power of attorney purporting to give authority to confess judgment must state the amount for which such judgment is to be confessed, or at least contain facts from which such amount can be definitely ascertained. *Gerber Co. v. Thompson*, 84 W. Va. 721, 100 S. E. 733.

Power to Confess Judgment for Amount Due.—A paper purporting to confer authority to confess judgment for such amount as may be found due from one party to another, upon their dealings in the future, is invalid because of the uncertainty and indefiniteness of the amount for which such confession of judgment is attempted to be authorized. *Gerber Co. v. Thompson*, 84 W. Va. 721, 100 S. E. 733.

Judgment Held Invalid.—A judgment, purporting to be by confession of

attorneys in fact, on a note, commonly called a judgment note, on warrant of attorney therein, purporting to empower and authorize the payees, or agent, or any prothonotary, or attorney of record, to appear for the makers and in their names, and confess judgment against them in favor of the payees, for the amount, with costs, and release of errors, entered by the clerk, in the clerk's office, in vacation, without process executed on defendant and declaration filed, is illegal and void on its face; and any execution issued thereon is also without warrant of law, illegal and void, and on motion of defendants should be quashed. *Farquhar & Co. v. Dehaven*, 70 W. Va. 738, 75 S. E. 65.

VII. ENTRY.

A. DUTY TO ENTER.

Va. Code 1919, § 6130; Barnes Code, ch. 125, § 43.

The statutory provision for entry of the judgment on the order or minute book of the clerk is directory only, and, if in fact confessed, the judgment will be upheld, though not entered on that or any other book in his office, but evidenced merely by authenticated memoranda of the clerk taking the confession. *Manson v. Rawlings*, 112 Va. 384, 71 S. E. 564.

VIII. EFFECT OF CONFESSION.

A. AS RELEASE OF ERRORS.

A judgment on confession shall be equal to a release of errors. Va. Code 1919, § 6330; Barnes Code, ch. 134, § 2. See ante, APPEAL AND ERROR.

IX. LIEN.

Va. Code 1919, § 6470; Barnes Code, ch. 139, § 5.

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